ICTR-98-41-A
2 MAY 2002
(86/H - 80/H)

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

BEFORE A BENCH OF THE APPEALS CHAMBER

Before : **Judge Mehmet GÜNEY, Presiding**
Judge David HUNT
Judge Theodor MERON

Registrar : **Mr Adama DIENG**

Decision of: **2 May 2002**

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA
(Appellants)

v

THE PROSECUTOR
(Respondent)

Case ICTR-98-41-A

DECISION

INTERLOCUTORY APPEAL FROM REFUSAL TO RECONSIDER DECISIONS RELATING TO PROTECTIVE MEASURES AND APPLICATION FOR A DECLARATION OF "LACK OF JURISDICTION"

Counsel for the Appellants

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1. This interlocutory appeal arises out of a joint trial in which the four appellants, who had been indicted separately in three different indictments, were joined in accordance with Rule 48 of the Tribunal's Rules of Procedure and Evidence ("Rules").[1] Prior to the Joinder Decision, orders had been made in each of the three separate trials for protective measures which differed in detail one from the other as to the time at which the prosecution was obliged to disclose to the accused the identity of its protected witnesses (the "Extant Orders"). The appellants' appeal proceeds upon the basis that each of the Extant Orders had been made by a Trial Chamber which was differently constituted from the Trial Chamber to which the joint trial was assigned,[2] a basis which has not been challenged by the prosecution.

2. Following the Joinder Decision, the prosecution sought to have the different times for disclosure harmonised so that all four accused would obtain disclosure of the identity of the prosecution witnesses at the same time. Counsel for the accused indicated that they would be agreeable to a harmonised order in conformity with the Rules which required the prosecution to disclose unredacted statements of the protected witnesses at least sixty days before the trial.[3] The Trial Chamber concluded that each of the Extant Orders should be varied to conform with what it described as "the least restrictive or more liberal order" among them, and which it identified as that in the trial of appellant Theoneste Bagosora ("Bagosora"),[4] as interpreted in the reasons which the original Trial Chamber gave for the order it made.

3. The Extant Order made in the Bagosora trial was that all material which identified the protected witnesses be kept under seal and not disclosed to the accused until further order.[5] In its reasons for that Extant Order, the Trial Chamber said:[6]

> The Trial Chamber is of the considered opinion that the Prosecutor should disclose the identity of the witness in sufficient time prior to the trial to allow the defence to rebut any evidence that the prosecution witnesses may raise [...].

The formal order made by the Trial Chamber which was to hear the joint trial was:[7]

> [...] that the names, addresses and other identifying information of the protected victims and witnesses, as well as their locations, shall be kept under seal of the Tribunal and shall not be disclosed to the Defence until further orders [...].

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1 Decision on the Prosecutor's Motion for Joinder, 29 Jun 2000 ("Joinder Decision"), pars 100, 157.
2 Notice of Appeal Against Trial Chamber III's Decision Dated 28 March 2002 on Defence Motion for Reconsideration of the Decisions Rendered on 29 November 2001 and 5 December 2001 and for a Declaration of Lack of Jurisdiction, 1 Apr 2002 ("Interlocutory Appeal"), Brief in Support of Notice of Appeal, par (C)(i)(c).
3 Decision on the Prosecutor's Motion for Harmonisation and Modification of Protective Measures for Witnesses, 29 Nov 2001 ("First Decision"), par 13.
4 *Ibid*, par 22.
5 *Ibid*, par 23.
6 *Ibid*, par 24.
7 *Ibid*, par 43(f).

There was no appeal brought against this Decision.

4. Further orders were subsequently made by the Trial Chamber by which the prosecution was required to disclose the identity of its protected witnesses no later than thirty-five days before the protected witness is expected to testify at the trial, or until such time as the protected victims or witnesses are brought under the protection of the Tribunal, whichever is earlier.[8] Judge Dolenc dissented from this Order, upon the basis that Rule 69(C) requires the disclosure to be made "prior to the trial",[9] that it was inconsistent with Rule 82(A) and that it ran contrary to the assertion made in the First Decision that the accused would not be prejudiced by harmonisation.[10] There was no appeal brought against the Second Decision. The trial was fixed to commence on 2 April 2002.

5. On 7 March 2002, the accused filed an application to the Trial Chamber to reconsider both the First and Second Decisions, upon the basis, *inter alia*, that:

(i) the Trial Chamber did not have the power to alter the decisions previously made by the other Trial Chambers in relation to protective measures;[11]

(ii) it had disregarded the requirements of Rule 69(C);[12] and

(iii) its decisions were *ultra vires* by misconstruing Rule 69(C).[13]

Despite the reference in the title of the application to a Declaration of "Lack of Jurisdiction", no such relief was sought in the prayers pleaded, although the Trial Chamber was requested to "find" that the First and Second Decisions were made "in excess of jurisdiction".[14]

6. The application was unanimously rejected by the Trial Chamber. It held that it possessed an inherent discretionary power to reconsider its decision, but it did not consider it to be an appropriate case in which to do so.[15]

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[8] Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 5 Dec 2001 ("Second Decision"), par 27.

[9] Separate Dessenting [*sic*] Opinion of Judge Pavel Dolenc on the Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Mofication [*sic*] of Protective Measures for Witnesses, 7 Dec 2001, par 3.

[10] *Ibid*, par 5.

[11] Defence Motion for Reconsideration of the Trial Chamber's Decisions Rendered on 29 November 2001, *"Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses"* and 5 December 2001, *"Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses,"* and for a Declaration of Lack of Jurisdiction, 7 Mar 2002, par 52.

[12] *Ibid*, pars 60, 70.

[13] *Ibid*, par 102-106.

[14] *Ibid*, p 28 (Second Prayer).

[15] Decision on Defence Motion for Reconsideration of the Decisions Rendered on 29 November 2001 and 5 December 2001 and for a Declaration of Lack of Jurisdiction, 28 Mar 2002 ("Reconsideration Decision"), pars 21-22.

7. The interlocutory appeal, filed on the day before the trial was fixed to commence, is brought against the Reconsideration Decision only. The grounds of appeal are expressed repetitively, and they are all to the effect that the Trial Chamber had erred by failing to find that it had exceeded its jurisdiction in making the First and Second Decisions.[16]

8. The only appeals available from decisions on interlocutory motions are from decisions upon a preliminary motion dismissing an "objection based upon lack of jurisdiction".[17] A preliminary motion constituting such an objection must be brought within thirty days of the prosecution's compliance with its obligations under Rule 66(A)(i) to disclose the supporting material which accompanied the indictment when confirmation was sought.[18] The phrase an "objection based upon lack of jurisdiction" is exclusively defined as a motion which challenges an indictment on the ground that it does not relate to (i) any of the persons indicated in Articles 1, 5, 6 and 8 of the Statute; (ii) the territories indicated in Articles 1, 7 and 8 of the Statute; (iii) the period indicated in Articles 1, 7, and 8 of the Statute; or (iv) any of the violations indicated in Articles 2, 3, 4 and 6 of the Statute.[19] If a Bench of three Judges of the Appeals Chamber decides that an interlocutory appeal is not capable of satisfying the definition of an "objection based upon lack of jurisdiction", that appeal may not be proceeded with, and it shall be dismissed.[20]

9. This interlocutory appeal fails to comply with these requirements at every stage:

(a) The motion which led to the impugned Reconsideration Decision did not challenge the indictments in any way – and, in particular, it raised no issue as to the jurisdiction of the Tribunal as defined for the purposes of an interlocutory appeal. Nor was it brought within thirty days of the prosecution's compliance with its obligations under Rule 66(A)(i).

(b) The interlocutory appeal, so far as it impermissibly seeks to challenge the First and Second Decisions, was not filed within seven days of those decisions, as required by Rule 75(E), and the failure to comply with that time limit constitutes a waiver of the appellant's rights unless good cause is shown.[21] No attempt has been made to explain why no appeal was filed within the time limit. Indeed, the timing of the motion to reconsider and of this appeal suggests strongly that the appellants were merely endeavouring to avoid the trial which was fixed to commence within days.

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[16] Interlocutory Appeal, Brief in Support of Notice of Appeal, par (A).
[17] Rule 72(D).
[18] Rule 72(A).
[19] Rule 72(H).
[20] Rule 72(I).
[21] Rule 75(F).

(c) In any event, neither of the First and Second Decisions was one challenging the indictment in any way, and they concerned no issue as to the jurisdiction of the Tribunal as defined for the purposes of an interlocutory appeal.

10. An appellant cannot seek to challenge a decision of a Trial Chamber after the time for filing an appeal from that decision has expired by the simple expedient of seeking to have that decision reconsidered. Whether or not a Trial Chamber reconsiders a prior decision is itself a discretionary decision. The issue in an appeal from such a decision is not whether the prior decision sought to be reconsidered was correct, or whether the decision not to review it was correct, in the sense that the Appeals Chamber agrees with either decision, but rather whether the Trial Chamber had correctly exercised its discretion in refusing to reconsider the prior decision.[22]

11. Following the response filed by the prosecution to the Appellant's Brief, in which it was submitted that no appeal lay from the Reconsideration Decision,[23] the appellants filed a further document which, although it purports to be a "Further Brief", is in effect a reply to the prosecution's submission.[24] They submit that, insofar as Rule 72(H) limits the meaning of jurisdiction for the purposes of the availability of an interlocutory appeal, it is inconsistent with the Tribunal's Statute and it ignores "established legal norms and available jurisprudence"; it is therefore invalid.[25] The prosecution objected, correctly, that this document was an unauthorised filing, that it was filed outside the period allowed for a reply and that its length exceeded the page-limit for a reply; it has requested that the document be rejected.[26] The prosecution made no submissions as to the merits of the challenge to the validity of the Rule upon which it relies.

12. A challenge to the validity of the Rule upon which the prosecution relies should not be rejected merely because of procedural irregularities. It is too significant a submission to be ignored, as the prosecution has suggested, and it deserves a proper consideration of its merits despite those procedural irregularities. It would have been more helpful to the Appeals Chamber if the prosecution had responded to the merits of the submission, at least in the alternative.

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[22] *Prosecutor v Milošević*, ICTY-99-37-AR73, ICTY-01-50-AR73, ICTY-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 18 Apr 2002, par 4.

[23] Prosecutor's Response in the Defence "Notice of Appeal Against Trial Chamber III's Decision Dated 28 March 2002 on Defence Motion for Reconsideration of the Trial Chamber's Decisions Rendered on 29 November 2001 and 5 December 2001 and for a Declaration of Lack of Jurisdiction" (Filed on 2 April 2002), 11 Apr 2002, par 9.

[24] Defence Further Brief to the Notice of Appeal and Brief Filed on 2nd April 2002, Against Trial Chamber III's Decision Dated 28 March 2002 on Defence Motion for Reconsideration of the Decisions Rendered on 29 November 2001 and 5 December 2001 and for a Declaration of Lack of Jurisdiction, 17 Apr 2002 (Filed 19 Apr 2002).

[25] *Ibid*, par C.

[26] Prosecutor's Response to the "Defence Further Brief to the Notice of Appeal and Brief Filed on 2nd April 2002, Against Trial Chamber III's Decision Dated 28 March 2002 on Defence Motion for Reconsideration of the Decisions Rendered on 29 November 2001 and 5 December 2001 and for a Declaration of Lack of Jurisdiction" (Filed on 19 April 2002), 23 Apr 2002.

13. Article 24 of the Tribunal's Statute ("Appellate Proceedings") provides:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
>
> (a) An error on a question of law invalidating the decision; or
> (b) An error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

It is in the same terms as Article 25 of the Statute of the International Criminal Tribunal for the Former Yugoslavia. In neither Tribunal has it ever been contemplated that the Article gave the parties a right to appeal against every interlocutory decision, or even a right to seek leave to appeal against every interlocutory decision.[27] Both Tribunals have recognised a right to argue in an appeal against a final judgment the correctness of interlocutory decisions which were not otherwise susceptible to interlocutory appeal in accordance with the Rules.

14. Nor is a right to an interlocutory appeal against every decision dictated by the international human rights norms. Article 14.5 of the International Covenant on Civil and Political Rights provides:

> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Article 2.1 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

> Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

Recent jurisprudence in the European Court of Human Rights recognises that even appeals against conviction or sentence (for which the International Covenant and the European Convention provide) may be the subject of limitations such as a requirement of leave.[28] There is no provision in any of the accepted international human rights norms giving a party the right to an interlocutory appeal or to seek leave to appeal against an interlocutory decision. Moreover, interlocutory appeals are rarely permitted in national criminal proceedings, except in the most stringent circumstances.[29]

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[27] The references in the Article to appeals by "persons convicted" and the prosecutor mean only that appeals may be taken by either of the parties in the proceedings; it does not mean that an appeal may be brought only after a conviction: *Barayagwiza v Prosecutor*, ICTR-97-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 Mar 2000, pars 47-48; *Prosecutor v Delić*, ICTY-96-21-R-R119, Decision on Motion for Review, 25 Apr 2002, par 7, footnote 19.

[28] *Affair Krombach c/ France*, Requête n° 229731/96, Arrêt, 13 février 2001, at par 96; *Eliazer v The Netherlands*, Application 38055/97, Judgment, 16 Oct 2001, at par 30.

[29] "The final judgment rule reflects a determination that, on balance, postponing an appeal until a final judgment is reached best protects the interests of the litigants in a fair and accessible process while conserving judicial resources.": *Criminal Procedure*, La Fave et al (2000), par 27.2. In Germany, for example, interlocutory

15. Rules 72 and 73 postpone but do not deny to the parties the right to appeal interlocutory decisions. The parties are entitled to argue in an appeal against a final judgment the correctness of interlocutory decisions which were not otherwise susceptible to interlocutory appeal in accordance with the Rules. The Appeals Chamber therefore rejects the appellants' challenge to the validity of Rule 72 insofar as it restricts the right to an interlocutory appeal. There is no interlocutory appeal against a decision of a Trial Chamber either to vary protective measures or to refuse to reconsider such a decision. The Appeals Chamber is satisfied that the interlocutory appeal filed by the appellants is incapable of satisfying the definition in Rule 72(H) of an "objection based upon lack of jurisdiction".

16. Accordingly, the appeal is dismissed.

Done in English and French, the English text being authoritative.

Dated this 2nd day of May 2002,
At The Hague,
The Netherlands.

Judge Mehmet Güney
Presiding Judge

[Seal of the Tribunal]

appeals are permitted only concerning issues related to the liberty of the accused: German Code of Criminal Procedure, par 305 (StrafProcess Ordnung).