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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

ICTR-96-8-A
10 January 2003
(182/h - 177/h)

BEFORE A BENCH OF THE APPEALS CHAMBER

Before: **Judge Fausto POCAR, Presiding**
Judge Mohamed SHAHABUDDEEN
Judge Theodor MERON

Registrar: **Mr. Adama DIENG**

Decision of: **10 January 2003**

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Elie NDAYAMBAJE
(Applicant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-96-8-A

DECISION ON MOTION TO APPEAL AGAINST THE PROVISIONAL RELEASE DECISION OF TRIAL CHAMBER II OF 21 OCTOBER 2002

Counsel for the Appellant

Mr. Pierre Boule
Mr. Frédérick Palardy

Counsel for the Prosecution

Ms. Silvana Arbia
Mr. Jonathan Moses

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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181/h

THIS BENCH OF 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 ("Tribunal"),

BEING SEISED OF the "*Demande d'autorisation au Collège de la Chambre d'appel, d'interjeter appel de la décision de la Chambre de Première Instance II, ayant rejetée la requête en extrême urgence aux fins de remise en liberté provisoire et sous conditions de l'Accusé (Article 65(D) du Règlement)*", filed on 28 October 2002 ("Application") by Elie Ndayambaje ("Applicant");

NOTING the *Decision on the Defence Motion for the Provisional Release of the Accused* ("Impugned Decision"), rendered on 21 October 2002 by Trial Chamber II ("Trial Chamber"), which dismissed the *"Requête en extrême urgence aux fins de remise en liberté provisoire et sous conditions de l'Accusé (Article 65(D) du Règlement)"*, filed by the Applicant on 21 August 2002 ("Motion");

NOTING that the Motion was dismissed by the Trial Chamber, on the grounds that:

1. this Tribunal, including the Appeals Chamber, has consistently recognised that Rule 65 (B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), with its "exceptional circumstances" provision, is an appropriate rule governing provisional release, and that exceptional circumstances had to be proved;

2. because the Tribunal is a sovereign body, with a competence *rationae materiae* and *ratione temporis* distinct from that of the International Criminal Tribunal for the former Yugoslavia, the Judges of the Tribunal are bound to apply the ICTR Rules;

3. a lengthy detention does not constitute in itself good cause for release,[1] and that, having regard to the general complexity of the proceedings and the gravity of the offences, the Applicant's detention remains within acceptable limits;

4. since the trial of the Applicant, who is jointly tried with five others, began in June 2001, and the testimony of 14 witnesses has already been heard, provisional release would not be justified;

[1] *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Appeals Chamber, Decision (On Application for Leave to Appeal Filed Under Rule 65 (D) of the Rules of Procedure and Evidence), 13 June 2001, p. 3 ("*Kanyabashi* Decision") (citing *Prosecutor v. Barayagwiza*, Case No. ICTR-97-20-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para.74).

180/h

5. the Applicant's detention in Arusha, at a distance from his family, does not constitute exceptional circumstances; and

6. a decision to provisionally release an accused charged with serious violations of international law, including genocide, must weigh the request of the accused against community interests and the need to complete trial proceedings in an orderly manner[2], and, consequently no exceptional circumstances existed in the case to justify provisional release;

NOTING that the Applicant argues in his Application that:

1. the Trial Chamber erred when it stated in its decision that "a lengthy detention does not constitute in itself good cause for release", and it did not take into account the exceptional nature of the Applicant's case;
2. the Trial Chamber erred when it failed to take into consideration the period of seven years that he has already spent in detention, and it further failed to take into consideration the fact that unlike the situation in *Nahimana*, his trial has not yet reached a terminal stage;
3. the Trial Chamber erred when it stated that as the trial had begun in June 2001 and fourteen witnesses had been heard since then, the circumstances of the case did not justify the Applicant's release;
4. the Trial Chamber erred by failing to formally take note of the fact that the length of his trial will require an abnormally lengthy preventive detention, and that this should have been considered as an exceptional circumstance;
5. the Trial Chamber erred when it considered, separately, the factors put forward by the Applicant in his Motion; if those grounds had been analysed together rather than separately, their effect would have led the Trial Chamber to quite a different finding with regard to the "exceptional circumstances" test, and this failure amounts to the good cause referred to in Rule 65 of the Rules;
6. the Trial Chamber erred when it failed to take into consideration the factors put forward by the Applicant cumulatively, which may have prevented it from giving these factors all the weight that such an analysis would have allowed;[3] and

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[2] *Prosecutor v. Nahimana*, Trial Chamber Decision, 5 Sept. 2002, para. 10.

[3] The Applicant cites the 11 November 1999 decision rendered in *Prosecutor v. Kunarac and Kovac* ("Decision on the Motion for the Provisional Release of Dragoljub Kunarac"), in which, with regard to the aforementioned aspect, the Trial Chamber stated (at para. 10): "In conclusion, the Trial Chamber is of the view that, in the circumstances of the present case, none of the factors put forward by the accused, either alone or in combination, amounts to exceptional circumstances within the ambit of Rule 65 of the rules." (emphasis added)
The Applicant also submits that this principle was further clearly reaffirmed in *Prosecutor v. Kupreskic et al*, Case No. 95-16-T, Decision of 30 July 1999, p. 2: "Considering that each of these grounds, by themselves, do not amount to the "exceptional circumstances" mentioned in Rule 65(B), and Considering, however, by a majority of the Trial Chamber (Judge Richard May dissenting) that the combination of the aforementioned grounds and their cumulative effect might

7. the Trial Chamber took no account of the Appellant's submission with regard to the inherent problems in the Prosecution case, namely the absence of witnesses who were held back in Rwanda, and as a result, the cumulative effect of the grounds put forward was not fully considered;

NOTING that the Prosecution filed the "*Prosecutor's Application for Summary Rejection of the Defence's Notice of Appeal Relating to a Request to Appeal Against the Trial Chamber of First Instance's Decision Denying Provisional Release* on 29 November 2002 ("Prosecution Response"), and on 2 December 2002 filed the *Prosecutor's Corrigendum to Application for Summary Rejection of the Defence's Notice of Appeal Relating to a Request to Appeal Against the Trial Chamber of First Instance's Decision Denying Provisional Release* ("Corrigendum"), twenty-two days and twenty-five days, respectively, after the time limit for the filing of its response had expired;[4]

NOTING that the reason given by the Prosecution for its late filing is that it has yet to receive an official translation of the Application, which was filed in French;

CONSIDERING that the Prosecution did not submit a request for extension of time prior to the expiration of the deadline, and that its request was made not in its Response but only subsequently in its Corrigendum;

CONSIDERING that Rule 116(B) of the Rules provides that "where the ability of the accused to make full answer and defence depends on the availability of a decision in an official language other than that in which it was originally issued, that circumstance shall be taken into account as a good cause...", yet there is no similar provision in the rule which is applicable to the Prosecution;

CONSIDERING that in the opinion of the Appeals Chamber, the Office of the Prosecutor must be able to work equally in English and in French;

FINDING that the Prosecution's reason for the late filing of its Response cannot be considered to constitute good cause within the meaning of Rule 116 of the Rules;

NOTING that the Applicant has not filed a Reply to the Prosecution's Response and Corrigendum;

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be regarded as constituting an exceptional circumstance warranting provisional release for at least a limited period of time..." (emphasis added).

[4] This filing was made after the expiration of the ten-day limit prescribed in paragraph 5 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal.

178/1

CONSIDERING that Rule 65(B) of the Rules provides, *inter alia*, that provisional release may be ordered by a Trial Chamber only "in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person";

CONSIDERING that Rule 65(D) of the Rules also provides that decisions on provisional release "shall be subject to appeal in cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon good cause being shown," and that "...applications for leave to appeal shall be filed within seven days of filing of the impugned decision";

CONSIDERING that the Application was filed within time;

CONSIDERING that "good cause" within the meaning of Rules 65(D) of the Rules requires that a party seeking leave to appeal under that provision satisfies the bench of the Appeals Chamber that the Trial Chamber may have erred in making its decision;

CONSIDERING that the Appeals Chamber has affirmed that the length of pre-trial detention does not constitute *per se* exceptional circumstances for the purposes of provisional release[5];

CONSIDERING that the Applicant has not shown any reason why the Appeals Chamber should depart from its previous jurisprudence;

CONSIDERING that the Trial Chamber rightly took into account the fact that there is an ongoing trial, which commenced in June 2001 and needs to be completed in an orderly manner, and found that in these circumstances, provisional release would not be justified;

CONSIDERING that the Applicant has not shown how the Trial Chamber may have erred in failing to conclude that the anticipated length of the Applicant's ongoing trial is an exceptional circumstance warranting provisional release;

CONSIDERING that the Applicant has failed to establish that the Trial Chamber may have erred in its assessment of the conditions for ordering provisional release of the Applicant in its conclusions reached in paragraphs 19 to 28 of the Impugned Decision;

FINDING that the Applicant therefore has failed to demonstrate good cause such that the Bench should grant leave to appeal;

[5] See *Prosecutor v. Kanyabashi*, Decision, 13 June 2001, p. 3.

177/h

HEREBY REJECTS the Prosecution's request for an extension of time, **DEEMS INADMISSIBLE** the Prosecution Response and Corrigendum, and **DISMISSES** the Application.

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

Fausto Pocar
Presiding Judge

Done this tenth day of January 2003,

The Hague,

The Netherlands.

[Seal of the Tribunal]