



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
11-09-2003
(16717- 16713)

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TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 11 September 2003

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JUDICIAL RECORDS ARCHIVES
RECORDED

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON CERTIFICATION OF INTERLOCUTORY APPEAL FROM
DECISIONS ON SEVERANCE AND SCHEDULING OF WITNESSES

The Office of the Prosecutor

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”),

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the “Motion to Dismiss”, etc., filed by the Defence of Ntabakuze on 9 September 2003; and its “Motion for Rule 72 Appellate Certification and for Postponement of Trial Pending Appeal”, filed on the same date;

HEREBY DECIDES the motions.

INTRODUCTION

1. By its Decision of 9 September 2003 (“the Decision”), the Chamber denied two motions of the Defense for Ntabakuze.¹ The Scheduling Motion requested the Chamber to order the Prosecution to refrain from presenting any witnesses against Mr. Ntabakuze until December 2003, based on the lack of time for adequate preparation of recently-appointed Lead Counsel; or in the alternative to order a postponement of the joint trial, or separation of the trial of Mr. Ntabakuze from the other Accused for recommencement after a reasonable delay.² The Severance Motion, sought a separate trial of Mr. Ntabakuze under Rule 82(B) of the Rules of Procedure and Evidence (“the Rules”), claiming various types of prejudice to the rights of the Accused that would be occasioned by a joint trial.³

SUBMISSIONS

2. The Defence for Ntabakuze has submitted two motions in relation to the Decision that largely correspond to the grounds for the original motions. The Motion to Dismiss relates to the claims that Lead Counsel’s appointment was untimely; that the Accused has thereby been deprived of his rights; and that Prosecution witnesses should be postponed. The Chamber is asked to declare, as a result of its Decision, “that the subject matter jurisdiction, or competency to render a judgment, no longer exists in the Ntabakuze trial and that the case against him be dismissed, so that appeal may be taken as a matter of right under Rule 72(B)(i).”⁴ In the alternative, certification of an interlocutory appeal from the Decision as it relates to the Scheduling Motion is sought under Rule 72(B)(ii). The Motion for Rule 72 Appellate Certification requests the Chamber to certify an interlocutory appeal from the Decision on the Severance Motion, and refers to the test in Rule 72(B)(i) as applicable. A postponement of the trial pending appeal is requested in both motions.

DELIBERATIONS

3. The Rules governing interlocutory appeals from decisions on motions have recently been amended and now read as follows:

¹ *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses, 9 September 2003.

² *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Emergency Defence Motion to Establish a Reasonable Schedule for the Presentation of Certain Prosecution Witnesses, to Ensure Effective Representation of Defendant Aloys Ntabakuze, 18 July 2003.

³ *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Motion for Severance of Defendant Aloys Ntabakuze, 29 August 2003.

⁴ *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Motion to Dismiss, etc., 9 September 2003, p. 6.

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Rule 72: Preliminary Motions

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- (A) Preliminary motions, being motions which:
- (i) challenge jurisdiction;
 - (ii) allege defects in the form of the indictment;
 - (iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82(B); or
 - (iv) raise objections based on the refusal of a request for assignment of counsel made under Rule 45(C)
- shall be made in writing....

- (B) Decisions on preliminary motions are without interlocutory appeal, save:
- (i) in the case of motion challenging jurisdiction, where an appeal by either party lies as of right;
 - (ii) in other cases where certification has been granted by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

- ...
- (D) For purposes of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:
- (i) any of the persons indicate in Articles 1, 5, 6, and 8 of the Statute;
 - (ii) any of 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.

...

Rule 73: Motions

- (A) Subject to Rule 72, either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused....
- (B) Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

4. A motion for severance is categorized as a preliminary motion under Rule 72(A)(iii). Rule 72(B) provides that interlocutory appeals from decisions on preliminary motions are not permitted except in accordance with Rule 72(B)(i) and (ii). Subsection (i) grants an appeal as of right where the preliminary motion challenges jurisdiction. Neither the Severance Motion nor the Motion for Rule 72 Appellate Certification, purport to challenge the jurisdiction of the Tribunal, and there is no claim that there is a right to interlocutory appeal. Accordingly, the standard for determining whether to grant an interlocutory appeal on the severance issue is defined by Rule 72(B)(ii), discussed further below.⁵

5. The Motion to Dismiss argues that the appeal of the Decision dealing with the right of the Accused to adequate time for preparation of his defence should be treated as a challenge to jurisdiction, which entitles the Defence to an interlocutory appeal as of right under Rule

⁵ The Motion for Rule 72 Appellate Certification refers to the language of Rule 72(B)(ii), but mentions that the standard is provided for in Rule 72(B)(i). The Chamber assumes that this is a typographical error and that certification is being sought under Rule 72(B)(ii).

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72(B)(i). It is claimed that the Chamber has lost jurisdiction over the trial of Mr. Ntabakuze by denying the Scheduling Motion, which sought an order prohibiting the Prosecution from presenting any witnesses against the Accused for three months, to allow newly-appointed Lead Counsel to prepare for the case. Various decisions from American law concerning the writ of *habeas corpus* are quoted for the proposition that a violation of the right to assistance by counsel deprives a court of jurisdiction and that any judgment arising from such a proceeding is void. The Defence requests that the Chamber dismiss the case against Mr. Ntabakuze; or, in the alternative, that the "jurisdiction/competence question" be certified for interlocutory appeal.

6. In order to have a right to interlocutory appeal, a motion must be both preliminary, as defined by Rule 72(A), and challenge jurisdiction, as required by Rule 72(B)(i). Neither condition is fulfilled here. A preliminary motion must be brought within thirty days of disclosure of the materials used to request confirmation of an indictment. That is not the case here. Nor can the Defence properly be said to be challenging jurisdiction. Rule 72(D) exhaustively defines "motion challenging jurisdiction". Neither the Scheduling Motion nor the Motion to Dismiss raise any of the matters which "exclusively" define challenges to jurisdiction.⁶ The request for dismissal is nonetheless admissible under Rule 73, although it cannot properly be said to be a "motion challenging jurisdiction" for the purposes of Rule 72.

7. The Chamber believes that the Decision is correct for the reasons stated therein, and does not render it incompetent to proceed with the trial of Mr. Ntabakuze. Dismissal on this basis is denied.

8. The standard for granting certification of interlocutory appeals from decisions on motions that do not challenge jurisdiction is the same whether the motion is categorized as preliminary, under Rule 72, or not, under Rule 73. Rule 72(B)(ii) and Rule 73(B) both prescribe that an appeal "may" be certified by the Trial Chamber "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

9. The Chamber finds that appeals from its Decision in respect of both the Severance Motion and the Scheduling Motion meet the standard for certification. The Defendant's motions have questioned the fairness of the proceedings against the Accused, and have suggested that the outcome of the trial may be at stake, either on the basis of the prejudice arising from joint trial, or lack of adequate preparation of the Defence. A decision by the Appeal Chamber at the interlocutory stage would spare the Accused the possibility of a lengthy and unnecessary joint trial, and permit the Prosecution to narrow its case.

10. A postponement of ongoing trial proceedings is not warranted. Adjournment is within the Chamber's discretion, based on all the circumstances. Several circumstances disfavour adjournment: the attendance of witnesses in Arusha waiting to testify; the presence of co-Counsel who knows the case very well, as described in paragraph 15 of the Decision; the right of the three other co-Accused to be tried without undue delay, who have already endured many adjournments; the ongoing trial hearings; and the fact that if successful on appeal, the likely remedy would be a separate trial *de novo*, thus eradicating any prejudice that might have been caused by continuing with proceedings in the context of this trial.

⁶ See *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-AR72, Decision on Notice of Appeal.

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FOR THE ABOVE REASONS, THE CHAMBER

GRANTS certification to appeal its Decision on Motions Filed By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses;

DENIES the request for an adjournment of the trial pending a decision on appeal;

DENIES the request to dismiss the case.

Arusha, 11 September 2003



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

