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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
03-10-2003
(16877-16872)

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S. Mussa

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 3 October 2003

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

2003 OCT -31 P 1:07
ICTR
SECRETARIAT

DECISION ON DEFENCE REQUEST FOR AN INVESTIGATION INTO ALLEGED
FALSE TESTIMONY OF WITNESS DO

The Office of the Prosecutor

Barbara Mulvaney
Drew White
Segun Jegede
Alex Obote-Odora
Christine Graham
Rashid Rashid

Counsel for the Defence

Raphaël Constant
Paul Skolnik
Jean Yaovi Degli
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

Signature

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

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

BEING SEIZED OF an oral request on 2 July 2003 by the Defence for Ntabakuze that the Chamber direct the Prosecutor to investigate alleged false testimony of Witness DO in respect of whether he had met with staff of the Office of the Prosecutor before testifying; and an oral request of the same date by the Defence for Nsengiyumva, in which the Defence for Bagosora and Kabiligi joined, for an investigation into alleged false testimony of Witness DO that he had been threatened by members of the family of one of the Accused;

CONSIDERING the oral submissions of the Prosecution in response;

HEREBY DECIDES the motion.

INTRODUCTION

I. Witness DO testified before the Chamber for three days, from 30 June 2003 until 2 July 2003. On 1 July, the following question was asked by Counsel for Bagosora, followed by a question from the Presiding Judge:

Q. I didn't interview you. You agree it was Mr. Rashid or Ms. Mulvaney or some of these other people from the Prosecutor's office. Were you interviewed by them, that is my question.

A. They didn't put questions to me.

...

Mr. President:

Mr. Witness, in front you have the Judges. On that side you have the Defence, and on that side you have the Prosecution. You started your testimony yesterday. Before you got into the courtroom, were you interviewed by any member of the Prosecution side sitting on that side of the courtroom? That is what counsel for the Defence wants to know. Did you have any conversation with the Prosecution, any of those or the rest of the team?

A. No.¹

2. The next day, Counsel for Ntabakuze asked further questions on the same subject, referring specifically to the Prosecution Counsel, Mr. Rashid, who had conducted the examination-in-chief:

Q. Witness, are you able to recognize in this hall, Mr. Rashid, the person who examined you; are you able to identify him?

A. Yes, yes. That's him.

Q. I have a very specific question to put to you: Did you meet Mr. Rashid before testifying, before giving evidence? So, it is a clear question.

A. I did not meet him.²

During re-direct examination by the Prosecution, Mr. Rashid asked:

Q. Witness DO, you and I met this last weekend and we went over your statements with the assistance of an interpreter; isn't that true?

¹ T. 1 July 2003 p. 70.

² T. 2 July 2003 p. 44.

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A. You know, I cannot tell the difference between you because I can't make the distinction between you and your colleagues because I don't know you well. What I told you, that there was someone who came to see me where I'm staying. That is something which I've not denied.

Q. Witness, I'm telling you that I was with you this weekend, and we prepared your testimony with the help of some Kinyarwanda interpreters. Do you agree with that?

A. I don't know whether it was you or someone else who looks like you, but the only person I could identify was the one who was speaking in Kinyarwanda.

...

Mr. President:

I think the question in brief is the following, Mr. Witness: When you were asked, why didn't you simply say that you had met with Mr. Rashid?

The Witness:

I did not know Rashid prior to this time. I was shown Rashid here in the courtroom, and that's when I was able to identify him.

Mr. President:

For how long did the preparatory interview last on – during the weekend when the people came to see you?

The Witness:

If I'm not wrong, maybe two days.³

3. At the close of his testimony on 2 July, 2003, Witness DO asked permission to address the Chamber concerning his safety. He stated:

The witness:

...

Furthermore, Mr. President, we witnesses coming from Rwanda, in order to testify here, face security problems in our own country, Rwanda. We are faced with serious problems. I could give you the example of the problem related to persecution, particularly from members of the family – family members of people against whom we are testifying here....

Mr. President:

...

Is there anything in particular you would like to draw our attention to, such as a situation which is specific to you, consequently slightly different from what may generally be the situation for witnesses?

The witness:

For me, Mr. President, in regard to Colonel Anatole, he has a huge family in the Gisenyi area, so much so that members of Anatole's family say to us that we are going to pay for what we are doing.⁴

4. The Chamber subsequently asked for further details regarding this allegation, and the witness gave the names of two individuals whom he said had threatened him.

Mr. President:

These two persons, are they family members of Anatole Nsengiyumva?

The witness:

I can't confirm that because I don't know Anatole Nsengiyumva's entire family. However, when they talked to me, I noticed that they are very interested in regard to the testimony – or the statement I made with regard to Anatole Nsengiyumva.

The President:

Thank you, Mr. Witness. So you cannot confirm that these persons are family members of the Accused. Are you aware of any other link with the Accused at present?

³ *Id.* pp. 50-51.

⁴ *Id.* p. 61.

The witness:
I do not know.

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...
The President:

Now if this is so, what then is your basis for saying that threats have been made by members of his family to the effect that if you testify, measures may be taken against you? What is then your basis for that assertion?

The witness:

I say so on the basis of what was said to me. These are frightening pronouncements.

Mr. President:

But so far I have not heard anything in your explanations which implies that members of Anatole Nsengiyumva's family are threatening you.

The witness:

Well, even if his family is not in Gisenyi, he has friends who are still on the spot in Gisenyi.⁵

SUBMISSIONS OF THE PARTIES

5. The Defence for Ntabakuze requested orally that the Chamber direct, pursuant to Rule 91, that the Prosecution open an investigation into whether Witness DO had deliberately and consciously provided false testimony in stating that he had not met with Prosecution lawyers before his testimony.⁶ The Defence's opinion was that this had occurred, and insisted that the Prosecutor herself, Ms. Del Ponte, pursue the matter.

6. The Defence for Nsengiyumva also requested an investigation to determine whether Witness DO had committed perjury in alleging that he had been threatened by members of Nsengiyumva's family.⁷ In its view, perjury had almost certainly been committed, the witness had been compromised, and the results of any investigation by the Prosecution should be disclosed to the Defence in advance of any decision by the Chamber. The Defence for Kabiligi and Bagosora joined in this request.⁸ Defence for Bagosora, in response to arguments of the Prosecution, denied that the witness's testimony could be attributed to cultural factors, observing that Witness DO was not a traumatized witness, and that the denial of having met Mr. Rashid was a blatant lie. The witness's detention in Rwanda for other crimes does not relieve the need for prosecution and, at the least, a nominal fine, to send a message to other witnesses and to maintain the dignity of the Tribunal.

7. The Prosecution argued that the denial of the meeting with the Prosecution arose from cultural factors, the witness's fear that the meeting was improper, and the witness's feeling of intimidation in the courtroom. Further, the pursuit of a perjury charge would be a waste of time given that the witness was already serving a life sentence. Finally, the Prosecution suggested that it would have a conflict of interest as one of its counsel, Mr. Rashid, would have to be a witness against Witness DO in any false testimony proceeding. In respect of the testimony of threats from the family of Nsengiyumva, the Prosecution commented only that there was "no rational relationship between that and a 91 proceeding".⁹

⁵ *Id.* p. 64.

⁶ *Id.* pp. 52, 66.

⁷ *Id.* p. 67.

⁸ *Id.* p. 68.

⁹ *Id.*

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DELIBERATIONS

8. Rule 91(B) provides:

If a Chamber has strong grounds for believing that a witness may have knowingly and willfully given false testimony, the Chamber may direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony.

Though this section does not specifically permit requests from the parties, such motions have been entertained on several occasions.¹⁰ Previous decisions have held that there are four constituent elements of false testimony, as described in Rule 91(B):

- (1) the witness must make a solemn declaration;
- (2) the false statement must be contrary to the solemn declaration;
- (3) the witness must believe at the time the statement was made that it was false; and,
- (4) there must be a relevant relationship between the statement and a material matter within the case.¹¹

The materiality criterion is expressly mentioned as reflected in the practices of representative municipal legal systems.¹²

9. Though Rule 91 does not expressly require a party to prove false testimony as a prerequisite to the Chamber exercising its power to direct an investigation, the party must nevertheless provide "strong grounds" that this has occurred. This has been interpreted to mean that an onus rests on the requesting party "to prove that [the testimony] was given knowingly and willfully".¹³ Previous decisions have expressed a strong preference for considering such matters as part of the evaluation of credibility.¹⁴

(i) Testimony Regarding Meeting With the Prosecution

10. The Chamber agrees with the submissions of the Defence that Witness DO did not give a correct account about whether he had met with members of the Prosecution before commencing his testimony. In his testimony on 1 July, the witness denied having met any of the members of the Prosecution in the courtroom, including the Prosecution counsel who had

¹⁰ *Prosecutor v. Jean-Paul Akayesu*, Decision on the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony By Witness "R", 9 March 1998 (the "Akayesu Decision"); *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Decision on the Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "E", 10 March 1998 (the "Rutaganda Decision"); *Prosecutor v. Ignace Bagilishema*, Decision on the Request of the Defence for the Chamber to Direct the Prosecutor to Investigate a Matter With a View to the Preparation and Submission of an Indictment for False Testimony, 11 July 2000 (the "Bagilishema Decision"); *Prosecutor v. Ferdinand Nahimana*, Decision on the Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony of Witness "AEN" in Terms of Rule 91(B), 27 February 2001 (the "Nahimana Decision").

¹¹ *Akayesu Decision*, p. 3; *Rutaganda Decision*, p. 3.

¹² The requirement that the testimony be material is said to be reflected in the practices of the United States, France, India and Great Britain. *Akayesu Decision*, p. 3; *Rutaganda Decision*, p. 3.

¹³ *Nahimana Decision*, p. 5.

¹⁴ *Rutaganda Decision*, p. 4.

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questioned him in court for several hours. On 2 July, the witness was asked specifically whether he had met with Prosecution counsel, Mr. Rashid, and he again said that he had not met him. On re-direct, Mr. Rashid declared twice that he had met the witness before his testimony commenced, to which the witness responded that he was unable to identify him as the person who had visited him, though he did acknowledge that a meeting had lasted for two days, but that the only person he was able to identify was the Kinyarwandan interpreter.

11. The Chamber has difficulty accepting the witness's explanation for denying the prior meeting with the Prosecution during his testimony on 1 and 2 July. However, the statement does not concern a matter material to the case. A meeting with the Prosecution does not touch in any way on the substance of the evidence against the Accused. One of the elements of false testimony is lacking and, therefore, the requirements of Rule 91(B) are not met. The significance of Witness DO's incorrect account will be considered in connection with the Chamber's assessment of his credibility.

(ii) Testimony Regarding Threats From the Family of Nsengiyumva

13. Witness DO also contradicted his own testimony regarding whether he had been threatened by family members of the Accused Nsengiyumva. However, the witness acknowledged the inaccuracy of his own statement almost immediately after it was made, and without being confronted with irrefutable proof that the statement was wrong. The nearly contemporaneous recognition that his statement was incorrect suggests that the requisite mental element for false testimony was not present. The "strong grounds" required by Rule 91(B) are absent in respect of this testimony.

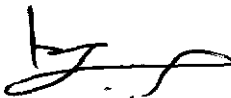
FOR THE ABOVE REASONS, THE CHAMBER

DENIES THE REQUESTS.

Arusha, 3 October 2003



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]