International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

BEFORE THE APPEALS CHAMBER

Before:
Judge Mohamed SHAHABUDDEEN, Presiding
Judge Mehmet GÜNEY
Judge Fausto POCAR
Judge Inés Mónica WEINBERG DE ROCA
Judge Wolfgang SCHOMBURG

Registrar : Mr. Adama DIENG

Decision of: 28 October 2003

Aloys NTABAKUZE
(Appellant)
v.
THE PROSECUTOR
(Respondent)

Case No. ICTR-98-41-AR72(C)

DECISION

(Appeal of the Trial Chamber I "Decision on Motions by Ntabakuze for severance and to establish a reasonable schedule for the presentation of prosecution witnesses" of 9 September 2003)

Counsel for the Appellant
Mr Peter Erlinder
Mr André Tremblay

Counsel for the Prosecutor
Ms Barbara Mulvaney
Mr Drew White
Mr Segun Jegede
Ms Christine Graham

Mr Rashid Rashid
Mr Alex Obote-Odova

THE APPEALS CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Genocide or Other Serious Violations of International Humanitarian Law Committed in the territory of Rwanda and Rwandan Citizens Responsible for such Violations in the territory of neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively);

NOTING the "Decision on Certification of Interlocutory Appeal from Decisions on Severance and Scheduling of witnesses" dated 11 September 2003, whereby Trial Chamber I granted certification to the Appellant to appeal against the Trial Chamber's "Decision on Motions by Ntabakuze for Severance and to establish a Reasonable Schedule for the Presentation of Prosecution Witnesses" dated 9 September 2003 ("Impugned Decision");

BEING SEISED of the "Appeal of the Trial Chamber I 'Decision on Motions by Ntabakuze for severance and to establish a reasonable schedule for the presentation of prosecution witnesses' of 9 September 2003" ("Appeal"), filed confidentially on 29 September 2003 in which the Appellant advances two grounds of appeal;

NOTING that the Appellant requests the Appeals Chamber to overturn the Impugned Decision and to order his severance from the so-called Military I trial[1], or, in the alternative, to order the postponement of the Trial, or, in further alternative, to order either the postponement of the appearance of witnesses to testify against him or the return of such witnesses who have testified since 1 September 2003 for further cross-examination as may be necessary;

NOTING the "Prosecutor's Response to the Defence's 'Appeal of the Trial Chamber I 'Decision on Motions by Ntabakuze for severance and to establish a reasonable schedule for the presentation of prosecution witnesses' of 9 September 2003'" filed on 2 October 2003 ("Response"), wherein the Prosecution submits that the Appellant has failed to demonstrate any error on the part of the Trial Chamber and that as a consequence the Appeal should be dismissed;

NOTING the "Defence Reply to the Prosecutor's Response to the Defence's 'Appeal of the Trial Chamber I 'Decision on Motions by Ntabakuze for severance and to establish a reasonable schedule for the presentation of prosecution witnesses' of 9 September 2003'" filed by the Appellant on 3 October 2003 ("Reply"), wherein the Appellant submits *inter alia* that intervention in the sequencing of witnesses by the Trial Chamber was an appropriate remedy given the recent appointment of Lead Counsel, and that, as the Trial Chamber stated the wrong test to be applied under Rule 82 of the Rules of Procedure and Evidence ("the Rules"), it necessarily misapplied the Rule in reaching its decision;

CONSIDERING, as a preliminary matter, that the Appellant submits that the Trial Chamber certified the Appeal under Rule 72(B)(ii) of the Rules in relation to severance,

and also under Rule 73(B) of the Rules with respect to witness scheduling, whereas the Prosecution contends that certification was granted by the Trial Chamber under Rule 73 of the Rules only;

NOTING that, since the trial had already commenced when the Appellant brought the motions before the Trial Chamber, these motions do not constitute preliminary motions in the sense of Rule 72(A) of the Rules;

CONSIDERING therefore that the Appeal will be deemed to have been certified under Rule 73 of the Rules;

CONSIDERING that the Appeal was filed twenty days after the certification, thus outside the time limit of seven days stipulated by Rule 73(C) of the Rules;

NOTING that paragraph 16 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal[2] provides that the Appeals Chamber "may vary any time-limit prescribed under this Practice Direction or recognise as validly done any act done after the expiration of a time-limit so prescribed";

CONSIDERING that the delay in the late filing of the Appeal could prejudice the conduct of the trial and that the Appeal is liable to dismissal on this ground alone, but that in any event it will be dismissed for the following reasons;

(1) As to the Scheduling of Witnesses

NOTING the Appellant's first submission, that the Trial Chamber erred in its interpretation of Article 20(4)(b) of the Statute of the Tribunal ("Statute") and, second, that it should have intervened in the Prosecution's scheduling of witnesses and ordered that witnesses who are to testify directly against the Appellant should be withheld until December 2003;

CONSIDERING, as regards the interpretation of Article 20(4)(b) of the Statute, that the Appellant in his Reply clarifies his submission to be that, it is his right, as accused, to have sufficient time for both his Counsel to be fully prepared;

CONSIDERING that, in paragraph 10 of the Impugned Decision, the Trial Chamber noted that the relevant issue is whether the Defence as a whole, not any single counsel, has had adequate time and facilities to provide effective representation;

CONSIDERING therefore that the Appeals Chamber fails to see any error on the part of the Trial Chamber with respect to the interpretation of the Appellant's right under Article 20(4)(b);

NOTING, with respect to the argument that the Trial Chamber erred by failing to intervene in the scheduling of the witnesses, that the central issue for the Appellant is the impossibility and lack of time for Lead Counsel, who was only appointed on 18 July

2003, to adequately prepare for cross-examination of the witnesses scheduled to testify against him before December 2003;

NOTING the Appellant's submission that although the Trial Chamber evaluated a number of criteria in the Impugned Decision it erred by placing undue emphasis on preparedness and competence of Co-Counsel, in determining adequacy of preparation time of Lead Counsel;

CONSIDERING that, subject to Article 19(1) of the Statute, it is within the discretion of the Trial Chamber to determine the progress and schedule of the Trial proceedings and that the Appeals Chamber will intervene in that decision making process in limited circumstances only, for instance where the Trial Chamber has failed to exercise such discretion or to take into account a material consideration;[3]

CONSIDERING that, in the Impugned Decision, the Trial Chamber took into account not only competence and presence of Co-counsel, but also a number of other factors including the suspension of the trial from 3 October to 3 November 2003 to accommodate the Appellant and the other Defendants, the adjournment of the trial daily at 13:00hrs, the disclosure by the Prosecution of redacted witness statements in early 2002, and resources of the Defence team, including legal assistants and investigators;

CONSIDERING that the Appellant has not shown that the Trial Chamber acted outside its discretion in its considerations or that it placed undue emphasis on the competence and preparedness of Co-Counsel;

CONSIDERING, moreover, that the Trial Chamber stated in the Impugned Decision that the Appellant may request "that a witness be recalled, provided that some specific and unexpected prejudice from a justifiable lack of preparation for the testimony can be established", thereby indicating its willingness to intervene where necessary in the scheduling of witnesses if seized by the Appellant;

(2) As to severance from the case

NOTING the Appellant's submission that the Trial Chamber erred by misapplying the standard for severance by requiring proof of prejudice, under Rule 82 of the Rules, which reads,

Rule 82: Joint and Separate Trials

(A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.

(B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

NOTING the Appellant's submissions that, under Rule 82 of the Rules, it need be shown only that there is a conflict of interest that *might* (emphasis added) cause serious prejudice;

NOTING the Appellant's contention that a separate trial is necessary to avoid a conflict of interest that might cause him serious prejudice;

NOTING the Prosecution's submission that the Appellant has failed to demonstrate that the Trial Chamber erred in the exercise of its discretion in relation to the Motion for severance;

CONSIDERING that under Rule 82(B) the Trial Chamber has discretion to determine whether it is necessary to order separate trials to avoid a conflict of interest that might cause serious prejudice, or to protect the interests of justice;

CONSIDERING that paragraph 22 in the Impugned Decision stated, "Severance is only granted if serious prejudice to a specific right of the accused can be shown", but that this did not depart from the test under Rule 82(B) of the Rules since the latter looked into the existence of a potential serious prejudice and since what the Chamber said required a showing that serious prejudice "can" be shown but did not require that serious prejudice "must" be shown;

CONSIDERING that after review of the Impugned Decision and materials presented in support of the Appeal, and having evaluated, *inter alia*, the submissions as to the timeliness of the motion for severance, the availability of exculpatory evidence from other co-accused, the apparent willingness of a co-accused to testify and to the alleged degree of responsibility of the Appellant, the Appeals Chamber finds that the conditions under Rule 82 for the granting of severance were not satisfied;

CONSIDERING therefore, that, in the circumstances of the case, the Trial Chamber acted within its discretion in denying the Appellant's request for severance;

FOR THE FOREGOING REASONS,

DISMISSES the Appeal.

Done in French and English, the English being authoritative.

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Judge Mohamed Shahabuddeen
Presiding

Done on this 28th day of October 2003,
The Hague,
The Netherlands.

[Seal of the Tribunal]

[1] The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No. ICTR-98-41-T

[2] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 16 September 2002.

[3] *Decision in the Matter of Proceedings under Rule 15bis (D)*, The Prosecutor v. Pauline Nyaramasuhuko *et al*., Joint Case No. ICTR-98-42-A15*bis*, 24 September 2003.