UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
05-12-2003
(17820 — 17817)

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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: 5 December 2003

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON CERTIFICATION OF APPEAL CONCERNING WILL-SAY STATEMENTS OF WITNESSES DBQ, DP and DA

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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 the Defence "Application for Certification for Appeal" in respect of the Chamber's two written decisions filed on 18 November 2003 concerning testimony of Witnesses DBQ (the "DBQ Decision") and DP; and an oral decision of 19 November concerning the testimony of Witness DA;

CONSIDERING that there has been no submission by the Prosecution;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 18 November 2003, the Chamber issued written decisions concerning the admissibility of, or the need for an adjournment prior to, the admission of testimony disclosed by the Prosecution shortly before the testimony of Witness DBQ, and Witness DP.[1] The Chamber issued an oral decision on the same issue on 19 November 2003 in respect of Witness DA.[2] Certification of appeal is sought for all three decisions. The Defence argues that the remedy fashioned by the Chamber, requiring a postponement of the witness's testimony to give the Defence further time to prepare, is inadequate and that the new evidence should have been excluded.

2. In the DBQ Decision, the Chamber decided that the will-say statements contained new evidence and that three of the four will-say statements, disclosed eight days, four days, and one day, respectively, prior to the witness's appearance on 23 September 2003, did not provide the Defence with sufficient notice of the new testimony. The issue before the Chamber was whether, as of 18 November 2003, when the decision was rendered, sufficient time had elapsed to permit recall of the witness and admission of the testimony or, rather, whether the testimony should be excluded. The Chamber found that "given the number of new incidents raised in the will-say statements, the seriously incriminating nature of the conduct alleged, and the remoteness of the factual allegations from any incidents of which the Defence had notice", the evidence in the three will-say statements could be introduced no earlier than the subsequent trial session, commencing on 3 November 2003.[3]

3. Relying on the same principles, the Chamber permitted the Prosecution to lead testimony of Witness DP revealed in a will-say statement two days before his appearance. The Chamber distinguished the DBQ Decision, finding that the new evidence concerned but a single event; that it was hearsay evidence, the reliability of which was not likely to be significantly tested by further investigations that the Defence could carry out and which could be put to the witness; and that the hearsay evidence in question had limited probative value standing alone whose reliability would be determined based on other corroborative or contradictory evidence.[4]

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[1] *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ (TC) (the "DBQ Decision"); *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DP (TC) (the "DP Decision").
[2] T. 19 November 2003, p. 37.
[3] DBQ Decision, para. 27.
[4] DP Decision, para. 8.

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4. The same issue arose again in respect of a will-say statement of Witness DA provided some eight days before the witness's appearance, to which the Defence for Bagosora objected. The Chamber required that the witness's cross-examination be delayed for two weeks to give the Defence further time to prepare.[5]

SUBMISSIONS

5. The Defence argues that the remedy of postponement adopted by the Chamber is inadequate, and that the only proper remedy in the circumstances is the total exclusion of the evidence. The two-week period granted in respect of Witness DA is specifically mentioned as not sufficient, and the bifurcation of examination and cross-examination is said to be impractical and unmanageable. The Defence points to an alleged error of law in the DBQ Decision in respect of the meaning of Rule 89(C), in that there is an obligation, not a "power", to exclude evidence that is either not relevant or not probative. The Defence also finds the decisions to be vague, and contends that there is contradictory caselaw which should be resolved by the Appeals Chamber. Further, the admission of this new evidence is highly prejudicial to the Accused and could affect the outcome of the trial.

6. The Defence also recapitulates its argument that the Rules do not permit the introduction of new evidence discovered after the commencement of trial, based on the disclosure obligations set forth in Rules 66, 67(D) and 73*bis* (B).

DELIBERATIONS

7. Rule 73(B) of the Rules of Procedure and Evidence ("the Rules") provides that Decisions on motions are without interlocutory appeal unless certified 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.

8. The Chamber has not been shown in what respect the principles articulated in the various ICTR and ICTY decisions are contradictory or divergent. Different remedies were adopted in different cases, depending on the particular circumstances confronting the Chambers, including the nature of the evidence, when it was disclosed, and its relation to other evidence in the case. Indeed, those decisions show that the appropriate remedy requires a particular factual inquiry into the evidence in question. Nothing in the three decisions issued by the Chamber excludes the possibility of recourse to exclusion of evidence, as was adopted in other cases; nor do those other cases require exclusion where the requirements of Article 20 of the Statute can be met by the remedies of adjournment or postponement of testimony.

9. As to the alleged error of law concerning the interpretation of Rule 89(C), the Chamber notes that the word "power" in the opening sentence of paragraph 24 of the DBQ Decision must be read in relation to the first part of the sentence, and in the context of paragraph 8, where the Chamber says: "The Chamber has a discretion to admit relevant evidence which it deems to have probative value, and conversely, an obligation to refuse evidence which is not relevant, or does not have probative value." To the extent there is any ambiguity, the word "power" in paragraph 24 should be read to conform to the meaning expressed in paragraph 8. The Chamber does not discern that there is any error of law, or

[5] T. 19 November 2003, p. 37.

even that there is any significant possibility that it has erred in law in a manner that affects the outcome of the decision.

10. The remedy fashioned by the Chamber is said to be impractical, unmanageable, and also inadequate to safeguard the rights of the Accused. The Chamber considers that it has a wide latitude, within the constraints on its discretion imposed by the Rules and the rights of the Accused enshrined in the Statute, to prescribe appropriate trial procedures that are not expressly governed by the Rules, as in this case. Certification may be granted where the issue significantly affects the fair and expeditious conduct of the trial or the outcome of the trial; and resolution of which may materially advance the proceedings. The latter condition is not satisfied in this case. The Chamber does not believe that there is serious doubt on a question of law, resolution of which by the Appeals Chamber would materially advance the proceedings, as required by Rule 73(B). The suggestion by the Defence that the remedy does not meet the minimum threshold of rights enshrined in the Statute is not only unsupported by the jurisprudence of this Tribunal and that of the ICTY, but is also contradicted by general principles of law articulated in divergent national legal systems.[6] Nor does the Chamber believe that there is a serious possibility that the Rules could be interpreted to mean, as argued by the Defence, that any new evidence disclosed or discovered after the start of a trial is categorically inadmissible. In the Chamber's view, this decision involves an exercise of discretion based on an assessment of the factual significance of the evidence, within the framework of clear legal guidelines. Resolution of such a question by the Appeals Chamber would not materially advance the proceedings.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 5 December 2003

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[6] See fn. 21 and 22 of the DBQ Decision.