



UNITED NATIONS
NATIONS UNIES

ICTR-98-41-T
(18760-18757)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
01-03-2004

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TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 1 March 2004

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

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DECISION ON MOTION FOR DISCLOSURE UNDER RULE 68

The Office of the Prosecutor

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Gershom Otachi Bw'Omanwa

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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 for Disclosure of Evidence”, filed by the Defence for Anatole Nsengiyumva on 3 December 2003;

CONSIDERING the Prosecution “Response” thereto, filed on 8 December 2003; and the Defence “Reply” filed on 15 December 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Nsengiyumva Defence has filed a motion seeking the disclosure of information from the Prosecution under Rule 68 of the Rules of Procedure and Evidence, which requires the Prosecution to “disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence”.

2. The information sought is redacted portions of the statements of three Prosecution witnesses, designated by the pseudonyms OH, OK, and OL. In accordance with the witness protection order then applicable, the statements of these witnesses were disclosed before trial in redacted form so as to conceal their identity. Subsequently, the Prosecution removed these three individuals from its witness list and no further disclosure was made. The Defence now seeks disclosure of the redacted excerpts of the statements on the basis of Rule 68.

SUBMISSIONS

3. The Defence argues that the witness statements as already disclosed are evidently exculpatory as having a direct bearing on the credibility of the testimony of Prosecution Witness OC.¹ It disclaims knowledge of whether the redacted portions themselves contain exculpatory matter, but insists that those excerpts must be disclosed in order to appreciate the “full context” of those statements, and to be “in a form that is useful to the Defence”.² The Defence refrains from more detailed submissions on its intended use of the statements, but offered to submit an *ex parte* brief explaining its reasons more fully in relation to its strategy. The Prosecution objected to an *ex parte* brief, and none was ever filed by the Defence. In the alternative, the Defence requested that the Chamber grant the motion based on its own review of the statements. The Defence at first suggested that the identities of former witnesses OH, OK and OL were no longer subject to the witness protection order and, therefore, that no confidentiality concern was raised by disclosure of their identities. In its Reply, however, the Defence suggested that it would keep the names confidential as with any other Prosecution witness, and that there was no danger of improper disclosure.

4. The Prosecution argues that the redacted portions of the statements contain no exculpatory evidence and that, accordingly, it is under no obligation to disclose them.³ The observations of Witnesses OH, OK, and OL on events also described by Witness OC are

¹ Reply, pp. 2-4; Motion, p. 4.

² Motion, p. 7; Reply, p. 4.

³ Prosecution Response, paras. 3-4.

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already apparent from the statements as disclosed and, therefore, no further disclosure is required. Disclosure would “unnecessarily reveal...their identity to the accused and to the broader public”, and thereby deter prospective witnesses from even speaking with investigators in the future. Unredacted versions of the witness statements were disclosed to the Chamber for its sole review.

DELIBERATIONS

5. There is no doubt in the present case that the evidence sought is defined with the requisite precision, and that the Prosecution has knowledge of, and is in possession, of that evidence, as required by Rule 68.⁴ Further, the Prosecution does not dispute that the portions of the statements which have been disclosed contain evidence which may be characterized as exculpatory within the meaning of Rule 68.⁵ The three statements describe, to a significant extent, the same series of events described by the witness statement of Witness OC and, therefore, could be used to test to accuracy and credibility of Witness OC’s testimony. The only issue for consideration is whether the identities of the authors of the exculpatory statements, which have been redacted from those statements, must be disclosed under Rule 68.

6. In the Chamber’s view, the identity of these three witnesses is inextricably connected with the substance of the statements. The importance of any discrepancies in the statements may depend, for example, on the nature of the relationships between the different witnesses to the events.⁶ A recent decision dealing with the very issue now before the Chamber held that the redacted portions of the statement of a former witness had to be disclosed under Rule 68.⁷

7. The Prosecution seems to assume that an order for disclosure under Rule 68 would lead to dissemination of the identity of these former witnesses to the “broader public”. The Defence, in its reply, protests that it has never revealed protected information to the public, that it would not do so now, and that it is willing to be bound by the witness protection order in respect of these former witnesses. The Chamber observes that nothing in the witness protection order of 29 November 2001 implies that its application ceases upon the witness’s

⁴ *Nzirorera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, paras. 12-14 (requiring evidence requested to be defined with specificity); *Bagilishema*, Decision on the Request of the Defense for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z, and AA (TC), 8 June 2000, para. 7 (equating the term “known” in Rule 68 with “custody and control” or “possession”).

⁵ Response, pp. 2-3 (“...the Prosecution notes that Rule 68 provides that the Prosecution shall disclose to the defence the existence of evidence known to the Prosecution which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. In the respectful opinion of the Prosecution, the redacted aspects of the statements of OH, OK, and OL *do not* contain [such] information....The observations that OH, OK and OL made in relation to the same events that prosecution witness OC will testify to follow clearly from their redacted statements”(underline emphasis added). Based on the Chamber’s own review of the statements, it seems that the accounts do describe the same series of events. Discrepancies in those descriptions, if any, could be used by the Defence to question the credibility of the Prosecution witness.

⁶ See generally *Blaskic*, Decision on the Defence Motion for ‘Sanctions for Prosecutor’s Repeated Violations of Rule 68 of the Rules of Procedure and Evidence’ (TC), 29 April 1998, para. 16 (“an established extraction of the said evidence from its context would not, in principle, be conducive to a full understanding of the text nor permit one to measure its full scope”).

⁷ *Bizimungu et al.*, Decision on Prosper Mugiraneza’s Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68 (TC), 10 December 2003. The moving party in that case argued that the statements would not be admissible unless the names of the witnesses were revealed, and the Defence’s argument here that the statements must be disclosed “in a form that is useful to the Defence” may refer to the same issue. That is not a question that need be resolved here.

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removal from the Prosecution witness list.⁸ Such an interpretation would fundamentally undermine the very purpose of witness protection orders, and is contrary to previous decisions of this Chamber.⁹ Accordingly, the Chamber takes the view that Witnesses OH, OK, and OL are still subject to the witness protection order, and that the Defence and Prosecution are bound thereby.¹⁰

FOR THE ABOVE REASONS, THE CHAMBER

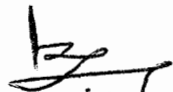
GRANTS THE MOTION by ordering the Prosecution to produce unredacted versions of the statements for Witnesses OH, OK and OL;

DECLARES that the parties are bound to comply in full with the Protective Measures Decision with regard to Witnesses OH, OK and OL.

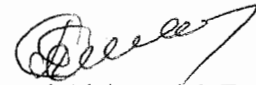
Arusha, 1 March 2004



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

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⁸ *Bagosora at al.*, Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses (TC), 29 November 2001.

⁹ *Nahimana et al.*, Decision on the Prosecutor's Urgent Motion for An Immediate Restraining Order Against the Defence's Further Contact with the Witness RM-10 and for other Relief Based on the Ngeze Defence's Violations of Court Decisions and Rules (TC), 17 January 2003, para. 14.

¹⁰ Nor would disclosure here conflict with the terms of the witness protection order, which required the Prosecution to disclose the identity and unredacted statements of all Prosecution witnesses no later than 28 July 2003. Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003, p. 7.