



ICTR-98-41-T
01-03-2004
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
(18770-18766)

18770
Ivan

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

2004 MAR -1 P 5 30
[Handwritten signature]

WRITTEN REASONS FOR ORAL DECISION OF 18 FEBRUARY 2004 ON MOTIONS FOR FURTHER POSTPONEMENT OF TESTIMONY OF WITNESS DBQ

The Office of the Prosecutor

Barbara Mulvaney
Drew White
Segun Jegede
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

[Handwritten signature]

18769

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 the Further Postponement of Portions of the Anticipated Testimony of Witness DBN or for the Exclusion of this Evidence and for Further Postponement of the Continued Testimony of Witness DBQ”, filed by the Defence for Ntabakuze (“the Defence”) on 19 January 2004; the “Supplementary...Motion”, filed on 13 February 2004; and the “Second Supplementary...Motion”, filed on 17 February 2004;

CONSIDERING the Prosecution “Response”, filed on 26 January 2004; and the Defence “Reply” thereto, filed on 13 February 2004;

HEREBY DECIDES the motions.

INTRODUCTION

1. The present motions concern the timing of testimony of Witness DBQ in respect of witness statements disclosed after the start of trial. These “will-say” statements of Witness DBQ were filed on 6 August; 12 September (in Kinyarwanda, followed by a translation into English and French on 19 September); 15 September; and 22 September 2003.¹ The witness was presented for testimony on 23 September 2003. The Defence raised written and oral objections to the recently-disclosed testimony, seeking either that the testimony be excluded, or that testimony on those matters be postponed to give the Defence an adequate opportunity to prepare for its cross-examination. A status conference was held on 25 September 2003 to determine whether the positions of the parties could be reconciled. The Prosecution agreed to postpone the testimony of the witness on the contested issues until the session beginning 3 November 2003. Witness DBQ testified on 23, 26, 29 and 30 September 2003 on matters not mentioned in the will-say statement. He was not called by the Prosecution during the trial session commencing on 3 November 2003.

2. On 18 November 2003, the Chamber issued its decision on the admissibility and the timing of Witness DBQ’s will-say testimony.² Though the testimony was not excluded, the Chamber made clear that a postponement was necessary in the face of “an avalanche of new evidence, disclosed in will-say statements forty-eight days, eight days, four days and one day prior” to the witness’s appearance.³ The Chamber decided that the testimony arising from the three later will-say statements could be heard no earlier than the trial session commencing 3 November 2003. As that date had already passed, the Prosecution was authorized to recall Witness DBQ to testify on the matters in the will-say statements. The testimony in the first will-say statement, disclosed forty-eight days prior to the appearance of the witness, had been disclosed with sufficient notice to permit testimony during the initial appearance of the witness.

¹ The translation into English and French was not filed until 22 September 2003, although it was disclosed to the Defence on 19 September 2003. For the purposes of this motion, the Chamber will treat the 19 September communication as the effective date of disclosure.

² *Bagosora et al.*, Decision on the Admissibility of Evidence of Witness DBQ (TC), 18 November 2003 (“the DBQ Decision”).

³ *Id.* para. 27.

h

18768

3. The Prosecution placed Witness DBQ on its list of witnesses for the trial session commencing on 19 January 2004. The Defence objected that the remaining testimony of Witness DBQ should be further postponed, as it had been unable to conduct the investigations required to be adequately prepared to conduct its cross-examination. On 18 February 2004, after considering the oral and written submissions of the parties, the Chamber announced orally that it would permit the Prosecution to call Witness DBQ, and denied the request for a further postponement of that testimony for at least sixty days. The present decision sets forth the reasons for that oral ruling.

4. Witness DBQ subsequently testified on 25 February 2004. The Defence raised a further objection to the witness's testimony when it emerged that the Prosecution had failed to disclose a witness statement. On 26 February 2004, with two Defence teams still to cross-examine the witness, the Registry advised the Chamber that the witness was ill and unable to continue with his testimony until after the close of the trial session on 27 February 2004. The Chamber ruled orally on the Defence objection, finding that the evidence should not be excluded, but that the Defence required further time to prepare. Accordingly, the cross-examination was delayed until at least the start of the next trial session on 29 March 2004. Although the remainder of Witness DBQ's testimony has now been postponed for other reasons, it is still necessary for the Chamber to give reasons for its oral decision of 18 February 2004.

SUBMISSIONS

5. The Defence argues that it has been unable to adequately prepare for Witness DBQ's remaining testimony because the Registry has not authorized sufficient further investigations. Authorization of fourteen additional days of investigations was requested on 18 December 2003, of which the Registry approved five days of work by a legal assistant in Rwanda.⁴ Those five days of investigations were conducted in January 2004 and were "mainly" directed towards another witness whose testimony had also been postponed.⁵ On 27 January 2004, the Defence sought authorization for an additional sixteen days of investigative work and, "within a week or so", was given approval for nine days.⁶ The Defence then sought to convince the Registry to increase the authorization to sixteen days because "the approval was so short that it really wasn't possible to undertake the investigation in a meaningful way".⁷ Lead Defence Counsel submits that the Registry's approval of sixteen days of investigations was not communicated earlier than 16 February 2004.⁸ In these circumstances, hearing the remaining testimony of the witness would violate the right of the Accused to a fair trial.

6. The Prosecution argues that the Defence already has extensive information from past investigations that is relevant to the new allegations, particularly those concerning events on 7 April 1994. Elaborate new investigations are not required for the Defence to be adequately prepared to cross-examine the witness.

⁴ T. 18 February p. 11.

⁵ *Id.* p. 4. The other witness, whose testimony was also postponed on the basis of disclosure of will-say statements, is Witness DBN. Information about a third Prosecution witness, KJ, was also obtained during this trip.

⁶ *Id.*

⁷ *Id.* p. 2.

⁸ *Id.* p. 10 ("The Monday of this week is when I heard it").

8/1w

18767

7. The Registry, represented by Mr. Didier Preira, made oral submissions at the hearing on 18 February 2004. A request for further investigations had been received from the Defence on 18 December 2003, but had not explained the grounds or nature of the proposed investigation sufficiently. Five days of investigations were subsequently approved by the Registry and carried out by the Defence in January 2004. Approval of nine days of investigations in response to the 27 January request was communicated on 3 February; approval of the full sixteen days was communicated orally on 11 February, not 16 February as claimed by the Defence.⁹ Mr. Preira indicated that the Registry was open to modifying work programs already under way, and that the Defence could have immediately undertaken the nine days of investigations approved on 3 February without undermining its petition for a more generous work program.¹⁰

DELIBERATIONS

8. The legal claim of the Defence is that the right of the Accused to a fair trial, guaranteed by Article 19 of the Statute, will be violated if Witness DBQ's remaining testimony is heard without giving the Defence further time and resources to conduct investigations. Though not mentioned by the Defence, the right of the Accused in Article 20(b) to "have adequate time and facilities for the preparation of his or her defence" is also relevant to the present motion. The onus of showing that there has been a violation of these rights rests with the Defence, in particular because the Chamber is not well-positioned to minutely assess its needs.

9. The DBQ Decision recognized that the evidence disclosed in the September 2003 will-say statements is substantial and that the rights of the Accused in Article 20 required a postponement of approximately six weeks.¹¹ It has now been more than twenty-two weeks since disclosure of the evidence, and more than fourteen weeks since the DBQ Decision definitively declared that the witness could be recalled by the Prosecution. The Defence has not shown what efforts, if any, it made between 22 September 2003 and 18 November 2003 to prepare for the new testimony, or that those efforts were frustrated by refusal of adequate resources.¹² Following the DBQ Decision on 18 November 2003, when the witness's recall was definitively authorized, and at a time when the new allegations were well-known, the Defence waited for another four weeks before making any application to the Registry to conduct further investigations. It was then given an additional five days of investigation, but chose instead to focus "mainly" on issues arising from the testimony of other witnesses. Authorization for further investigations was sought on 27 January 2004, and there is no

⁹ *Id.* p. 9 ("...we replied on the 3rd of February to the request of Professor Erlinder"); ("And so on the 11th we had some discussions in the course of which I confirmed to him that in actual fact, this 16 days had been approved, instead of nine, that he could consider that that approval was granted").

¹⁰ *Id.* p. 12 ("Now even if Professor Erlinder's team considered that we had approved nine days, we still stand by our position that the nine days, which was partial approval, that team should have started the investigations, and subsequently, see to what extent any misunderstanding might have been cleared. Our section is very open to any such type of discussions, and if necessary, corrections would be made").

¹¹ DBQ Decision, para. 27. The period of postponement was between 23 September and 3 November 2003.

¹² While it was not certain that the testimony of the will-say statements would be admitted, the Chamber gave strong indications that its admission was very likely. T. 25 September 2003, p. 1 ("We can see that the evidence the Prosecution wants to bring appears relevant and, for that reason, should be admitted. And that's a legitimate interest from that side. On the other hand, we are equally concerned that the Defence should not be prejudiced by late notice. And the difficult task for this Trial Chamber, of course, is to balance these conflicting interests, and that can be done in terms of a decision, and it may well be handed down; but we thought it useful to discuss with you informally how, in a practical way, to reconcile these two conflicting, legitimate interests without jeopardising the steady progress of the trial").

18766

dispute that nine days of investigation were authorized on 3 February 2004. The Defence did not establish, and it is implausible, that the nine-day period was too short to immediately undertake meaningful investigations. Rather than seizing the opportunity to embark upon those investigations and making a request for extension while the mission was underway, the Defence made further submissions to the Registry to convince it to approve the full sixteen days requested. In these circumstances, the Chamber is of the view that the Defence has not shown that it has been deprived of adequate time or facilities to prepare its defence.

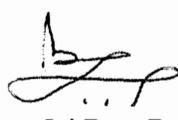
10. Furthermore, the Defence did not show with particularity what investigations were required or why, and seemed to presume that the Chamber's postponement of testimony implied recognition that new investigations were required.¹³ In its prior decisions, however, the Chamber has indicated that new evidence does not necessarily require new investigations prior to cross-examination. In relation to Witness DCB, for example, the Chamber recognized that there was new evidence and that a notice period was required; it also held, however, that "we cannot see that this new evidence or new element would need much investigation, if any. The incrimination requested for cross-examination would seem to fall squarely within the knowledge of the Accused...".¹⁴ This is not to say that the new allegations in Witness DBQ's will-say statements did not require further investigation before cross-examination, but simply that the Defence has not shown that need with particularity, much less that the need was of such a nature as to infringe the right of the Accused to adequate time and facilities for the preparation of his Defence.

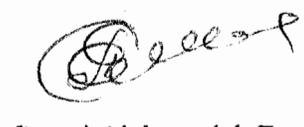
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motions.

Arusha, 1 March 2004


Erik Møse
Presiding Judge


Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



¹³ Supplementary Motion, para. 12 ("There is a clear dichotomy between what the Chamber has ordered, in giving us 60 days to investigate, and what the DCMS does with regard to processing and approving investigative work programs").

¹⁴ T. 6 February 2004. See also *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DP (TC), 18 November 2003, para. 8 (two days was sufficient notice for the admission of testimony because "the possible investigations to be carried out by the Defence to test this testimony are rather narrow").