ICTR-97-21-T
19-03-04
(1609 - 1602)

1609
mwp

-0518

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 19 March 2004

2004 MAR 19 P 1:57

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO

Case No. ICTR-97-21-T

DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE "DECISION ON DEFENCE MOTION FOR A STAY OF PROCEEDINGS AND ABUSE OF PROCESS"

Office of the Prosecutor
Silvana Arbia
Adelaide Whest
Jonathan Moses
Adesola Adeboyejo
Manuel Bouwknecht, Case Manager

Defence Counsel
Nicole Bergevin
Guy Poupart

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

RECALLING the "Decision on Defence Motion For a Stay of Proceedings and Abuse of Process", issued by the Trial Chamber on 20 February 2004 (the "Impugned Decision");

BEING SEISED of the "Defence Motion for Certification to Appeal the Decision on Defence Motion for a stay of proceedings and abuse of process" (the "Motion"), filed on 27 February 2004;[1]

CONSIDERING the "Prosecutor's Combined Reply to Nyiramasuhuko's Requête aux Fins de Certification d'Appel de la 'Decision on Defence Motion For a Stay of Proceedings and Abuse of Process' and Kanyabashi's 'Requête demandant l'autorisation d'interjeter appel' (the "Response"), filed on 8 March 2004;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter, pursuant to Rule 73 (B), on the basis of the written submissions of the Parties.

SUBMISSIONS OF THE PARTIES

Defence

1. The Defence submits that the Trial Chamber erred in law and in fact in the Impugned Decision:

- By considering that the delays which have occurred since the Accused's arrest do not constitute unreasonable delays equivalent to an abuse of process;
- By deciding that the delays of proceedings are to be distinguished from the delays of detention on remand, since the last are an unavoidable consequence of the first;
- By deciding that the Accused did not suffer any prejudice as a consequence to these undue delays of proceedings and that her right to a fair trial was not violated in any manner;
- By deciding that the Accused should have raised the objections relating to the violations of her right to be immediately informed of the charges against her and of the motives of her arrest and to appear without delay before a judge at the initial appearance;
- By deciding that the Defence was raising the objections relating to the violations of the rights of the Accused for the first time in the Motion.

[1] The Motion was filed in French and originally entitled: «*Requête de Pauline Nyiramasuhuko aux fins de certification d'appel de la 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process'*»

2. The Defence recalls that the issue of the violation of the rights of the Accused had previously been raised in a Motion filed on 1 March 2000, a decision on which was rendered by Judge Laïty Kama on 12 October 2000, but without elaborate reasoning.

3. The Defence also submits that:

- The requested stay of proceedings is an issue that would directly lead to the outcome of the Trial and, therefore, significantly affect the expeditious conduct of the proceedings;
- The delays that have already occurred in the proceedings violate the Accused's rights to have a fair Trial; and
- The immediate resolution by the Appeals Chamber may materially advance the proceedings by clarifying the criteria of undue delays of proceedings.

4. The Defence prays the Chamber to grant the certification of appeal.

Prosecution

5. The Prosecution submits that, pursuant to Rule 73(B) the requested certification should be granted only where (i) the decision involves an issue that would significantly affect the fair and expeditious conduct of proceedings or outcome of the trial and (ii) an immediate resolution by the Appeals Chamber may significantly or materially advance the proceedings.

6. With regard to these criteria, the Prosecution submits that Defence for Nyiramasuhuko failed to advance any compelling reason why the certification should be granted.

7. Relying on the jurisprudence, the Prosecution submits that the certification shall not be granted automatically but only on the basis of each particular motion's merits.

8. The Prosecution further submits that in the Impugned Decision, the Trial Chamber clearly set out the reasons why the application of the Accused was rejected.

9. Similarly, the Prosecution stresses that the remedy proposed by the Defence fall under the purview of Rule 65, which governs provisional release, and that the conditions enunciated in Rule 65 have to be satisfied for such an order to be granted.

10. Therefore, the Prosecution prays the Chamber to dismiss the Motion.

DELIBERATION

11. In order to determine the Motion, the Chamber first recalls that it is Rule 73(B) that controls interlocutory appeals of Decisions rendered by the Trial Chamber on motions brought under Rule 73(A). Rule 73(B) provides as follows:

> Decisions rendered on such motions are without interlocutory appeal save with certification 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.

12. As a general observation, it must be noted that the general rule in Rule 73(B) remains this: 'Decisions rendered on such motions are without interlocutory appeal.' This general rule is consistent with some important national jurisdictions around the world in which interlocutory appeals are not allowed in criminal cases,[2] or allowed only in very limited circumstances.[3] Rule 73(B) provides, however, that in exceptional circumstances, the Trial Chamber may—not must—allow interlocutory appeals of such decisions.

13. It should be emphasized that the situations which may warrant interlocutory appeals under Rule 73(B) must be exceptional indeed. This point is made clear by the conditions which must be satisfied before the Trial Chamber may consider granting certification. These conditions are reviewed next.

14. The first condition is that the decision against which the appeal is being sought must be one that involves an issue which 'would significantly affect the fair and expeditious conduct of the proceedings', or '[the decision involves an issue that would significantly affect] the outcome of the trial'. The tests engaged by the emphasized words and phrases must be passed by every application for certification. In particular, the adjective 'significantly' has a value that must be considered in each case. In each of these tests, the applicant must show how significantly the decision in question affects (a) a fair and expeditious conduct of the proceedings, or (b) how significantly the decision would affect the outcome of the trial. Furthermore, it results from the Rule that this demonstration shall turn on the substance of the appealed decision and not on the eventual consequences of the Appeals Chamber decision to come.

15. The second condition is that, 'in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings'. This condition naturally recommends that counsel seeking certification should do their *bona fide* best to sway the opinion of the Trial Chamber on how it is that an immediate resolution by the Appeals Chamber may materially advance the proceedings. Such submissions should ordinarily assist the Trial Chamber in forming its opinion on the matter. Ultimately, however, such a judgement remains that of the Trial Chamber who is conducting the trial.

16. It is the view of the Trial Chamber that the demonstrations of the matters involved in the above tests must be clearly made in the Motion for certification itself and cannot result from a general reference to the motion on which the Impugned Decision was rendered.

17. Before determining the merits of the Motion, the Trial Chamber first stresses that the submission of the grounds of appeal in the Motion is irrelevant and premature. The only matter before the Trial Chamber at this stage of the proceedings is to determine whether the conditions for certification as provided in Rules 73(B) are met or not. Therefore, the Trial

[2] See *R. v. Mills* 1986 Carswell Ont 11652 CR (3d) 1, [1986] 1 SCR 863, 26 CCC (3d) 481 [Supreme Court of Canada]; *Cobbledick v. US*, 60 S Ct 540 (1940) [US Supreme Court]; *Firestone Tire & Rubber Co v. Risjord* 101 S Ct 669(1981) [US Supreme Court].

[3] See, in England and Wales, ss 9(11), 9(3) and 7 of the Criminal Justice Act 1987; ss 35, 31 and 29 of the Criminal Procedure and Investigations Act 1996. See also *R. v. Gunawardena*, [1990] 91 Cr App R 55 [Court of Appeal of England and Wales].

Chamber will determine the Motion on the sole basis of the arguments related to the criteria of certification, without considering the other submissions.

18. The first argument of the Defence, that, if the Appeals Chamber granted the requested stay of proceedings, the Trial would come to its end, relies on the prospective consequences of an eventual reconsideration of the Decision by the Appeals Chamber. As stated above, such an argument is of no relevance for the matter of certification, insofar as it does not turn on the substance of the Decision.

19. The second and third arguments for certification shall be considered together since they turn on the same issue of undue delays of proceedings.

20. However, the Motion only contains the allegation that the Trial Chamber erred in law on the issue of undue delays, without any argument in support, apart from general references to the motion on which the Impugned Decision was rendered. Moreover, the issue of whether the Chamber erred in law is something that may be taken up as part of any final appeal on the merit pursuant to article 24 of the Statute. It does not address the tests for certification for purposes of interlocutory appeal, as set out in Rule 73(B).

21. It is therefore the view of the Trial Chamber that the Defence Motion for certification of appeal lacks legal basis.

Defence Counsel's Conduct

22. One of the grounds of the Defence submission is that the Chamber had erred in ruling that the Defence had not raised the issue of violation of the rights of the Accused before the motion giving rise to the Impugned Decision. To this end, Defence recalls that the issue of the violation of the rights of the Accused had formerly been submitted in a Motion filed on 1 March 2000 and that, in a Decision issued on 12 October 2000[4], President Laïty Kama had already ruled upon this issue, but without any elaborate reasoning.

23. Indeed, it is correct that the Defence did complain by her motion of 1 March 2000, in which she raised the same issues that she had raised in the motion decided by this Trial Chamber on 20 February 2004. Judge Laïty Kama's Decision of 12 October 2000 disposed of a number of complaints raised then by the Defence, including:

- That the Accused was not informed of her rights and of the reasons for her arrest, while she was under arrest in Kenya at the instance of the Tribunal,
- That following her transfer to Arusha she was not promptly informed of her rights and of the reasons for her arrest, and
- That upon her transfer to the seat of the Tribunal, she was not promptly brought before a Judge of the Tribunal for her initial appearance.

The Defence also complained about the search of her residence and seizure of items in it during her arrest in Nairobi.

[4] The original decision was rendered in French : *Le Procureur c. Pauline Nyiramasuhuko*, Aff. No. ICTR-97-21-T, Décision relative à la requête de la Défense en exclusion de preuve et remise de biens saisis, 12 octobre 2000.

1604

24. In disposing of that Motion, Judge Kama held as follows:

> 18. In regard to this issue [of informations transmitted to the Accused at the time of her arrest], we acknowledge that the Registrar transmitted to said authorities, by letter of 15 July 1997, the warrant of arrest, the transfer order, the confirmed indictment, and the statement of the rights of the accused under the Statute and the Rules, and requested that all of these documents be transmitted to the Accused at the time of her arrest, pursuant to Rule 55(B) of the Rules.
> [...]
> 19. [T]he Registrar, on 26 July 1997, directly transmitted to the Accused the warrant of arrest, the order for transfer, and a document articulating all of her rights under the Statute and the Rules. Furthermore, we take note that in response to another letter from the Accused, dated 1 August 1997, the Registrar transmitted the indictment to her on 9 August 1997. While we deplore this delay, we do not consider that it constitutes a substantial violation of the fundamental rights of the Accused.
> [...]
> 20. Clearly the initial appearance of the Accused on 3 September 1997 was not without delay, as required under Rule 62 of the Rules. However, we consider that this delay has not caused serious and irreparable prejudice to the Accused.

25. In those circumstances then, it was clear that Judge Kama, acting under the designation of the Chamber, had clearly decided on those questions and dismissed all the submissions by the Defence.

26. It is significant to note that, at the time when President Kama, acting under the designation of the Chamber, decided on those questions, Rule 73(B) contained an absolute prohibition of interlocutory appeal. It simply said: 'Decisions rendered on such motions are without interlocutory appeal.' There was no exception to this prohibition. Rule 73(B) was amended on 27 May 2003, now permitting the Trial Chamber to certify interlocutory appeals in the manner discussed above.

27. The Defence motion raising again the issues decided upon by Judge Kama was filed on 25 June 2003 during the current interlocutory appeal dispensation. It worries the Chamber that the same Defence Counsel who brought the Motion decided by the late Judge Kama in March 2000 felt no qualms in bringing back the same issues in June 2003, without saying a word to even hint at the fact that they had raised those issues on a previous occasion and that the decision went against them. This raises grave questions of professional responsibility, as best expressed in the words of Lord Birkenhead (Lord Chancellor), in the House of Lords case of *Glebe Sugar Refining Co. v. Trustees of the Port and Harbours of Greenock*[5]:

> It is not of course in cases of complication possible for their Lordships to be aware of all the authorities, statutory or otherwise, which may be relevant to the issues which in the particular case require decision. Their Lordships are therefore very much in the hands of counsel and those who instruct counsel in these matters, and this House expects, and indeed insists, that authorities which bear one way or the other upon matters under debate shall be brought to the attention of their Lordships by those who are aware of those authorities. [...] A similar matter arose in this House some years ago, and it was pointed out by the then presiding judge that the withholding from their Lordships of any authority which might throw light upon

[5] House of Lords case of *Glebe Sugar Refining Co. v. Trustees of the Port and Harbours of Greenock*, [1921] 2 AC 66, 90 LJPC 162, [1921] WN 85, at p 86.

> the matters under debate was really to obtain a decision from their Lordships in the absence of the material and information which a properly informed decision requires; it was in effect to convert this House into a debating assembly upon legal matters, and to obtain a decision founded upon imperfect knowledge. The extreme impropriety of such a course cannot be made too plain.

28. At any rate, it seems clear that, Judge Kama having decided, and dismissed, those issues in October 2000, they were then *res judicata*. They should not have been brought back, in the manner that they were brought back, in 2004. The Rule in place when those issues were decided by Judge Kama, forbade interlocutory appeals of such decisions. It was wrong to have brought them back in 2004, following the change in the Rules, with the aim of being able to attempt an interlocutory appeal on account of them. The Chamber is gravely concerned by this approach to advocacy before the courts which is obstructive to the proceedings and contrary to the interests of justice.

29. The Chamber is further concerned with this conduct's impact on judicial economy, as it may lead to the absurdity of everyone relitigating the same issues in order to raise interlocutory appeals on decisions rendered when all interlocutory appeals were proscribed.

30. The Chamber reaffirms that as counsels to the ICTR, and members of their national bars, all Counsels are expected to maintain the standard of professional responsibility associated with the profession of law. This is also the general meaning of Article 13 of the Code of Professional Conduct For Defence Counsel which calls for "Candour Toward the Tribunal". The omission of relevant information from submissions to the Chamber is a matter of concern, under Rule 46 (A), which stipulates that:

> A Chamber, may, after a warning, impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice.

31. The Chamber recalls that in *Prosecutor v. Kajelijeli*, the Trial Chamber warned the Prosecutor's counsel pursuant to Rule 46 (A) without any motion or submission by the opposing party.[6] Similarly, the Chamber, without submissions by the Prosecutor, takes into considerations Counsel for Nyiramasuhuko's conduct pursuant to Rule 46 (A).

32. The Chamber finds that the same Defence Counsel brought back issues without saying a word to even hint at the fact that they had raised those issues on a previous occasion and that the decision went against them at a time when interlocutory appeal was forbidden. These issues being raised in support of a Motion requesting a stay of proceeding, the Trial Chamber considers this conduct as an attempt by the Defense to obstruct the proceedings against the Accused, which is contrary to the interests of Justice. Such a conduct deserves a sanction pursuant to Rule 46(A).

33. However, the Chamber notes that, pursuant to Rule 46 (A), a warning is a precondition for the imposition of sanctions.[7] The Chamber does not find any former warning on the same topic addressed to the moving party.

---

[6] *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Prosecutor's Motion to Correct the Indictment Dates 22 December 2000 and Motion for Leave to File an Amended Indictment Warning to the Prosecutor's Counsel Pursuant to Rule 46 (A), 25 January 2001, para. 20.

[7] ICTR, *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-T, Decision on the Defence's Motion on Prosecutorial Misconduct, para. 11.

34. Therefore, the Chamber does not, at this stage, impose a sanction against Defence Counsel for Nyiramasuhuko. The Chamber rather warns Defence Counsel for Nyiramasuhuko in the matter that, were Counsel's conduct to remain obstructive to the proceedings or otherwise contrary to the interests of justice, as this is the case in the current case, the Chamber would impose Sanctions pursuant to Rule 46(A) of the Rules.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

DISMISSES the Motion in its entirety;

WARNS the Defence Counsel for Nyiramasuhuko in the matter that, were Counsel's conduct to remain obstructive to the proceedings or otherwise contrary to the interests of justice, the Chamber would impose Sanctions pursuant to Rule 46 of the Rules.

Arusha, 19 March 2004

William H. Sekule
Presiding Judge

Arlette Ramaroson
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]