



ICTR-99-50-T
23-04-2004
(13351 - 13346)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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Or: ENG

TRIAL CHAMBER II

Before: Judge Khalida Rachid Khan

Registrar: Mr. Adama Dieng

Date: 23 April 2004

The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jerôme BICAMUMPAKA
Prosper MUGIRANEZA
Case No. ICTR-99-50-T

JUDICIAL RECORDS
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**DECISION ON MOTION OF ACCUSED BICAMUMPAKA FOR DISCLOSURE
OF EXCULPATORY EVIDENCE**

Office of the Prosecutor:

Paul Ng'arua
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Counsel for the Defence:

Michelyne C. St. Laurent and Alexandra Marcil for Casimir Bizimungu
Howard Morrison and Ben Gumpert for Justin Mugenzi
Pierre Gaudreau and Michel Croteau for Jérôme Bicamumpaka
Tom Moran and Christian Gauthier for Prosper Mugiraneza

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, assigned to decide this Motion pursuant to Rule 73(A) of the Rules of Procedure and Evidence, (the “Trial Chamber”);

BEING SEIZED of the “Motion of Defendant Bicomumpaka for Disclosure of Exculpatory Evidence” filed on 10 December 2003, (the “said Motion”);

NOTING the “Prosecutor’s Response to Bicomumpaka’s Motion for Disclosure of Exculpatory Evidence” filed on 16 December 2003, (the “Response”);

RECALLING the “Decision on the Prosecutor’s Motion for Protective Measures for Witnesses”, filed on 12 July 2000 (the “Chamber’s Order on Protective Measures”) and the “Clarification Order in Respect of Disclosure of Identifying Information of Protected Witnesses” filed on 15 October 2003, (the “Clarification Order”);

CONSIDERING the Statute of the Tribunal and the Rules of Procedure and Evidence (the “Rules”) particularly Rule 68 of the Rules which reads:

The Prosecutor shall, as soon as practicable, 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.

INTRODUCTION

1. Judge Asoka de Zoysa Gunawardana, Presiding Judge in this case, is temporarily absent from the seat of the Tribunal, for medical reasons. As a consequence, the Motion has been assigned to Judge Khan to decide pursuant to Rule 73(A).

SUBMISSIONS OF THE PARTIES

Relief Sought by the Defence

2. The Defence requests the Trial Chamber to order the Prosecution to disclose the unredacted information sheets of witnesses GLK, GLN and GLO, which have previously been made available in a redacted format for the purposes of this case. In relation to the same witnesses, the Defence also requests the Trial Chamber to order the Prosecution to obtain and disclose all previous and subsequent statements of these witnesses, and in addition to allow a variation to the Chamber’s Order on Protective Measures, in order to be allowed to meet and interview these witnesses. In relation to Witness GAP, the Defence requests the Trial Chamber to order disclosure of the previous testimony before this Tribunal of Witness GAP, and also to order the Prosecution to obtain and disclose other written statements or confessions of Witness GAP.



Disclosure of unredacted information sheets of witnesses GLK, GLN and GLO

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3. The Defence submits that the unredacted witness information sheets are in the control and custody of the Prosecutor's Office.¹ The Defence maintains that, considering the importance and exculpatory nature of the information contained in the statements of witnesses GLK, GLN and GLO, the Defence is entitled to receive the unredacted witness information sheets of these witnesses, in order to meet them and evaluate the status of their evidence.

4. The Defence submits that since witnesses GLK, GLN and GLO will not be called by the Prosecution as witnesses in this case, they do not fall under the Chamber's Order on Protective Measures, and thus do not qualify as protected witnesses. Thus, according to the Defence, it is entitled to receive the information sought, and also meet the witnesses without the presence a representative of the Office of the Prosecutor.

5. The Prosecution submits that it has already fulfilled its disclosure obligations by disclosing to the Defence the unredacted witness statements and the accompanying cover sheet in accordance with the Clarification Order.

Variation of Witness Protection Order

6. The Defence requests that the Trial Chamber allows the Defence to meet and interview Witnesses GLK, GLN and GLO, without the presence of a representative of the Office of the Prosecutor. It also requests however that the Trial Chamber directs the Prosecution to undertake to make all necessary arrangements to facilitate such interview.

7. The Prosecution raises no objection to the Defence requesting to interview Witnesses GLK, GLN and GLO, however, it does stipulate that such an interview should only be allowed after the Registry establishes that the witness is willing to be interviewed by the Defence, and that any such interview should be conducted in the presence of a representative of the Office of the Prosecutor.

Measures requested in relation to Witness GAP

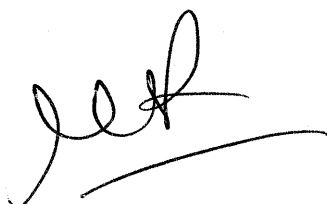
8. The Defence seeks to obtain the transcripts of Witness GAP's testimony before this Tribunal (specifically, testimony given "from July 2001 to April 2002 before the International Criminal Tribunal for Rwanda"), his guilty plea of 12 August 2002 made before the Rwandan Authorities,³ and also "several statements" that witness GAP admitted during his cross-examination of 3 December 2001 of having made before the Rwandan Authorities.⁴

¹ The Defence attach copies of the redacted witness information sheets as "Annex A" to the Motion.

² *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68 (TC), 10 December 2003.

³ The Defence attach the statement of Witness GAP dated 12 August 2002 as "Annex B" to the Motion.

⁴ The Defence attach an extract of the cross-examination as "Annex C" to the Motion.



DELIBERATIONS

Previous Statements of Witnesses before Rwandan Authorities

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9. The Prosecution is duty bound 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 the Prosecution evidence, pursuant to Rule 68 of the Rules. This does not mean that the Prosecution should be forced to hunt for materials that it has no knowledge of. It does mean however that where the Defence has specific knowledge of a document covered by the Rule not currently within the possession or control of the Prosecution, and requests that document in specific terms, the Prosecution should attempt to bring such documents within its control or possession where the circumstances suggest that the Prosecution is in a better position than the Defence to do so, and, once this is successfully done, should be disclosed to the Defence; provided it is shown that the Defence had made prior efforts to obtain such document by its own means. This obligation stems from the Prosecution's inherent duty to fully investigate a case before this court, and applies particularly in relation to obtaining previous statements made by Prosecution witnesses before the Rwandan Authorities,⁵ where, as a practical reality, the Prosecution enjoys greater leverage than the Defence.

10. In relation to the specificity required in such a request, the Trial Chamber is of the view that a blanket request for all "previous and subsequent statements" of certain witnesses amounts to fishing for information, and does not meet the requisite standard.

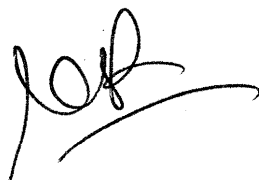
11. The Trial Chamber finds that the Defence has identified with sufficient specificity:

[GAP's] guilty plea of August 12th 2002, made before the Rwandan authorities, which are mentioned in witness' GAP statement of July 14th and 15th 2003, the whole as appear from such statement, filed herewith as Annex 'B'.⁶

The Trial Chamber finds that such information may be relevant to the Defence in relation to the alibi of the Accused. However, with regard to the Defence request for the "several statements made before the Rwandan Authorities", supposedly identified in Annex C to the Defence Motion, the Chamber finds the materials sought have not been sufficiently specified.

⁵ See *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO (TC), 2 November 2001; Followed by *Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-96-8-T, Decision on the Defence Motions Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses (TC), 15 November 2001; and *Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on Ndayambaje's Motion to *inter alia* Order the Prosecutor and the Rwandan Government to Obtain Statements and to Suspend Hearing of Detained Witnesses (TC), 6 March 2002.

⁶ Motion para.15 (mistake in original)



Request for Transcripts

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12. The Defence makes a request for the previous testimonies of witnesses GLK, GLN and GLO "before this Tribunal or any other jurisdiction". The Trial Chamber finds this request cannot be considered as it lacks specificity.

13. The Defence requests the transcripts of the previous testimony of Witness GAP before this Tribunal, between July 2001 and April 2002. The Defence is reminded that, in accordance with Article 19(4) of the Statute, trials are held in public unless otherwise directed by the Trial Chamber. Therefore, there is no need to request from the Trial Chamber open-session testimony of previous trial proceedings before any Chamber of this Tribunal, considering that such records are already in the public domain. In relation to previous closed-session testimony for Witness GAP, the Trial Chamber finds that such a request should if possible be made before the Chamber that initially sealed the record. Furthermore, the Trial Chamber finds that this request lacks the required specificity.

Request for Modification of Witness Protection Order

14. In relation to the Defence request to interview witnesses GLK, GLN and GLO, the Trial Chamber notes that the Prosecution no longer intends to call these persons as witnesses for the Prosecution.⁷ The Trial Chamber is therefore of the view that these particular persons can no longer be classified as potential Prosecution Witnesses, and the Defence is free to conduct its own enquiries and interviews as it deems fit, without further reference to the Prosecution or the Trial Chamber. Correspondingly, the Prosecution is under no obligation to facilitate such interview. However, should it not already have done so, the Trial Chamber requires the Prosecution to immediately inform the former potential Prosecution witnesses that it no longer intends to call them to give testimony in this trial.

15. The Trial Chamber finds that information previously obtained by the Prosecution from these witnesses, which was given under the assurance of the Chamber's Order on Protective Measures, should remain protected by this Order. However, the Trial Chamber finds that the Prosecution should assist the Defence to the extent of disclosing to the Defence of Jérôme Bicamumpaka, if it is so aware, the current address of these persons so as to facilitate their location.

⁷ Confirmation by email from the Office of the Prosecutor to Court Management Section, 19 December 2003.



FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion in the following terms:

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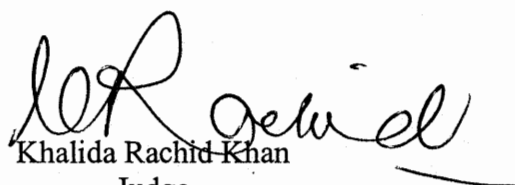
MODIFIES the Chamber's Order on Protective Measures as directed in paragraphs 13 and 14 of this Decision.

ORDERS the Prosecution to inform Witnesses GLK, GLN and GLO that it no longer intends to call them to give testimony in this trial, and also to disclose to the Defence of Jérôme Bicomumpaka, if it is so aware, the current addresses of the said witnesses.

ORDERS the Prosecution to request the previous statement of Witness GAP made before the Rwandan Authorities as identified in paragraph 11 of this Decision, and upon receipt of the same, to disclose to the Defence.

DENIES the Motion in all other respects

Arusha, 23 April 2004


Khalida Rachid Khan
Judge

