UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
11-01-2005
(23442-23439)

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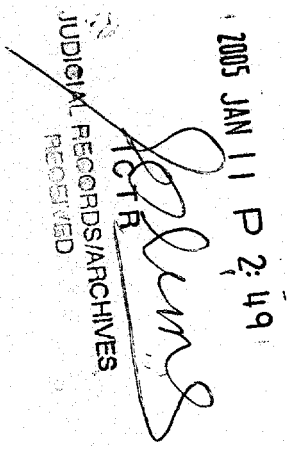
S. Musa

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 11 January 2005



THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON MOTION TO COMPEL ACCUSED TO TESTIFY PRIOR TO OTHER DEFENCE WITNESSES

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence
Raphaël Constant
Paul Skolnik
René Saint-Léger
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

23441

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 Prosecution "Motion to Compel Accused to Testify Prior to Other Defence Witnesses Pursuant to Rules 73, 90 (D) and 90 (F) (i) of the Rules of Procedure and Evidence", filed on 21 October 2004;

CONSIDERING the Responses of the Bagosora and Ntabakuze Defence, filed on 2 and 8 November 2004, respectively;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 14 October 2004, the Prosecution closed its case, subject to a motion for admission of evidence by written procedure. The Defence case is scheduled to commence on 30 March 2005, having been postponed from 12 January 2005. Between 11 and 17 November 2004, three of the Defence teams filed provisional lists of witnesses to be called during the first trial session, none of which indicated the appearance of the Accused.

SUBMISSIONS

2. The Prosecution argues that Rule 90 (D) of the Rules of Procedure and Evidence ("the Rules") prohibits an Accused from testifying after having heard the testimony of other Defence witnesses. Rule 90 (D) is said to apply to all witnesses, including a witness who is also a party to the proceedings. No substantive purpose is served by permitting an accused to testify after other Defence witnesses, with whom an accused might then consciously or unconsciously align his or her testimony. Statements from the law of the United States are cited in support of requiring an accused to testify before other Defence witnesses. If the Accused in this case wish to testify, the appropriate procedure is either that they testify before other Defence witnesses, or that they be excluded from the courtroom and deprived of any information about the substance of the testimony of Defence witnesses until they have themselves testified.

3. The Defence argues that the Accused have an unfettered discretion to choose when to testify, or not at all. The Accused are parties, not witnesses. Even assuming that Rule 90 (D) applies, it provides that witnesses shall not be disqualified merely for having heard the testimony of other witnesses. The Chamber is perfectly capable of weighing the credibility of testimony given after that of other Defence witnesses, including the possibility of alignment of testimony. The proposed remedy of sequestering the Accused prior to their testimony would violate their rights in Article 20 of the Statute. The Ntabakuze Defence suggests in the alternative that the Accused should all be declared to be expert witnesses who are expressly exempted from Rule 90 (D).

DELIBERATIONS

4. Neither the Statute nor the Rules expressly govern the issue presently before the Chamber. No mention of the timing of the appearance of the accused is to be found in Articles 19 or 20 of the Statute, which enumerate the rights of the accused. Under Rule 90 (F), the Chamber has the obligation and authority to "exercise control over the mode and order of interrogating witnesses…". Chambers have considered the interests of justice and

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questions of judicial economy in ordering a particular sequence of witnesses.[1] The present motion, in effect, requests the Chamber to exercise its discretion under Rule 90 (D) to prescribe the timing of the appearance of the Accused as witnesses.

5. The Prosecution has not cited any case before the Tribunal in which such an order has been made. The Chamber observes that the consistent practice is that accused have chosen the timing of their testimony which, in most cases, has been given at or near the end of the Defence case. A Trial Chamber of the ICTY, applying the same rules as are relevant to the present application, has expressly held that an accused may determine the timing of his or her appearance as a witness.[2] The Chamber sees no reason to depart from this well-established practice and jurisprudence.

6. The Prosecution has argued that the practice of national jurisdictions supports such an order. However, national practices diverge widely. Some jurisdictions, both civil law and common law, do appear to favour the appearance of an accused as the first Defence witness.[3] Others require an accused to testify before any witness is heard, whether for the Prosecution or the Defence.[4] In a third group of countries, the Accused has an unfettered discretion to choose the timing of his or her testimony during the presentation of the Defence case.[5] Accordingly, it cannot be said that there is any uniform practice amongst national jurisdictions which provides compelling guidance to this international Tribunal.

7. Rule 90 (D) does not compel the appearance of the Accused as the first Defence witness, as urged by the Prosecution. It provides that:

> A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

The interpretation suggested would require not only that an accused testify as the first Defence witness, but before any Prosecution witness as well. Such a procedure would conflict with Rule 85, which prescribes that the presentation of Prosecution evidence shall precede that of the Defence, and with the consistent practice of trials before this Tribunal as discussed above (para. 5). Even assuming that the section were to apply to an accused, the fact that the witness "shall not for that reason alone be disqualified from testifying" contradicts the Prosecution contention that an accused must appear before all other witnesses, or else be excluded from the courtroom and from all access to information regarding Defence witnesses.

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[1] *Ndayambaje et al.*, Decision on the Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on Her Witness List (TC), 27 February 2004.

[2] *Kordic and Cerkez*, Decision on Prosecutor's Motion on Trial Procedure (TC), 19 March 1999.

[3] *Police and Criminal Evidence Act 1984* (England), s. 79; *R. v. Smith (Joan)*, 52 Cr App R 224 (CCA); *Criminal Procedure (Scotland) Act 1995* (Scotland), s. 266(11).

[4] *Code de procédure pénale* (France), s. 442: "Avant de procéder à l'audition des témoins, le président interroge le prévenu et reçoit ses déclarations"; *Act of 22 May 1981 No. 25 Relating to Legal Procedure in Criminal Cases (The Criminal Procedure Act)* (Norway), s. 91: "The person charged shall first be examined by the president of the court. The other members of the court, the prosecuting authority, and defence counsel are then entitled to put questions to the person charged". Such systems may not exclude an accused from testifying at later stages of the trial as well.

[5] *R. v. Angelantoni*, 28 C.C.C. (2d) 179 (Ontario CA 1975); *R. v. Smuk*, [1971] W.W.R. 613 (Alberta CA); *R. v. Sparre*, 37 C.C.C. (2d) 495 (Ontario County Court 1977)). The discretion to choose the timing of testimony has constitutional status in the United States, where it is recognized as a component of the right of an accused not to incriminate himself (*Brooks v. Tennessee*, 406 U.S. 605 (1972)).

8. In the circumstances, the Chamber does not consider it necessary to await further submissions from the Defence teams for Nsengiyumva and Kabiligi, which filed, on 2 and 5 November 2004, respectively, requests for extension of time to file a response.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 11 January 2005

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

[Seal of the Tribunal]