1369
Mwanja

-0693

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

ICTR-97-21-T
02-02-2005
(1369-1361)

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

Registrar: Mr Adama Dieng

Date: 2 February 2005

The PROSECUTOR

v.

Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T
Joint Case No. ICTR-98-42-T

DECISION ON NTAHOBALI'S MOTION FOR SEPARATE TRIAL

Office of the Prosecutor
Ms. Silvana Arbia
Ms Adelaide Whest
Ms Holo Makwaia
Ms Adesola Adeboyejo
Mr Cheikh T. Mara
Ms Althea Alexis
Mr Michael Adenuga
Ms Astou Mbow, Case Manager

Defence Counsel
Mr Duncan Mwanyumba
Mr Normand Marquis

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

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

BEING SEISED of Ntahobali's Motion for Separate Trial, filed on 18 January 2005 (the "Motion"),[1]

CONSIDERING:

i. The Prosecutor's Response to Arsène Shalom Ntahobali's Request for a Separate Trial, filed on 24 January 2005 (the "Prosecutor's Response");
ii. Kanyabashi's Response to Arsène Shalom Ntahobali's Motion for Separate Trial, filed on 24 January 2005 ("Kanyabashi's Response");[2]
iii. Nsabimana's Response to Arsène Shalom Ntahobali's Motion for Separate Trial, filed on 26 January 2005 ("Nsabimana's Response");[3]
iv. Ntahobali's Reply to the Prosecutor's Response to Arsène Shalom Ntahobali's Request for a Separate Trial, filed on 31 January 2005 ("Ntahobali's Reply to the Prosecution");[4]
v. Ntahobali's Reply to Kanyabashi's and Nsabimana's Responses to Arsène Shalom Ntahobali's Motion for Separate Trial, filed on 31 January 2005 ("Ntahobali's Reply to Kanyabashi's and Nsabimana's Responses");[5]

NOTING the "Decision on Prosecutor's Motion for Joinder of Trials" rendered on 5 October 1999 in the present case (the "Joinder Decision");

NOTING FURTHER the Oral Ruling of 18 October 2004 on the order of presentation of the Defence cases (the "Oral Ruling of 18 October 2004");[6]

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

Ntahobali's Motion

1. The Defence for Ntahobali reminds the Chamber that the order of presentation of the Defence case was decided on 18 October 2004 and that it was ruled that the Defence for

[1] The Motion was filed in French and entitled "Requête de Arsène Shalom Ntahobali en Séparation de Procès".
[2] Kanyabashi's Response was filed in French and entitled "Réponse de Joseph Kanyabashi à la 'Requête de Arsène Shalom Ntahobali en séparation de procès'".
[3] Nsabimana's Response was filed in French and entitled "Réponse de Sylvain Nsabimana à la Requête d'Arsène Shalom Ntahobali en séparation de procès".
[4] Ntahobali's Response to the Prosecution was filed in French and entitled "Réplique à la 'Prosecutor's Response to Arsène Shalom Ntahobali's Request for a Separate Trial'".
[5] Ntahobali's Reply to Kanyabashi's and Nsabimana's Responses was filed in French and entitled "Réplique aux Réponses de Joseph Kanyabashi et Sylvain Nsabimana à la Requête de Arsène Shalom Ntahobali en separation de procès".
[6] T. 18 October 2004, p.16 (ICS).

Ntahobali should present its case in the second place, after the presentation of Nyiramasuhuko's Defence.

2. The Defence submits that the Pre-Defence Briefs filed by the various Defence teams reveal a conflict of interests which is a new fact that substantially prejudices the Accused Ntahobali's right.

3. The Defence submits that pursuant to Rule 82(A), in joint trials, each accused shall be accorded the same rights as if he were being tried separately and that, in accordance with Rule 82(B), the Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

4. The Defence submits that the Motion is not grounded on the risk of contamination of evidence, because the bench is composed of professional judges who can deal with such a risk. The Defence further submits that motions for severance of trial may be filed at any time, when one of the criteria for severance has been met.

5. The Defence relies on the jurisprudence to submit that the advantages of a joint trial must be balanced against the rights of the accused to a trial without undue delay and any other prejudice to the accused that may be caused by joinder.

6. According to that jurisprudence, the Defence submits that it is sufficient to demonstrate either the existence of a conflict of interests that might cause a serious prejudice to the Accused, or that the interest of justice requires a separate trial. The Defence submits that during the presentation of the Prosecution Case, it became obvious that the Defence strategy of some Accused was contradictory to that of Ntahobali: their Defence strategy was reproving the *Interahamwe* and, consequently, Ntahobali. The Pre-Defence Briefs filed by Kanyabashi and Nsabimana confirmed this orientation:

   - Kanyabashi lists Defence Witness SW, who was formerly on the Prosecution list of Witnesses, before the Prosecution dropped him from their list. It appears from the statement of SW of 15—17 November 1995 that his testimony incriminates Ntahobali.

   - Kanyabashi is also planning to call agents of African Rights to testify on words they heard about some Prosecution Witnesses. According to publications by African Rights, the appearance of those agents may be the occasion of new allegations against Ntahobali. This would cause a serious prejudice to Ntahobali who will have ended the presentation of his case by the time Kanyabashi presents his case. That means that Ntahobali will be obliged to request leave to call additional Defence witnesses in rebuttal.

   - Kanyabashi intends to call several witnesses implicating the *Interahamwe* in massacres in Butare.

   - There is a high probability that Kanyabashi and Nsabimana will call previous Prosecution Witnesses who were withdrawn from its list. The Defence for Ntahobali will only be informed that they were previously on the Prosecution list when they testify.

- Nsabimana Defence Witnesses IBO, LALA and BUBU will also testify on the responsibility of the *Interahamwe*.

- Accused Nsabimana himself will testify on his relationship with the *Interahamwe*.

- Defence for Nsabimana have also indicated their intention to rely on documentary evidence that would incriminate Ntahobali: those documents were known previously but were not filed as evidence.

7. The Defence for Ntahobali submits that, as opposed to the Defence for the other accused, it will neither be aware of the totality of the acts he is charged with, nor have the facilities to prepare its case and to conduct investigations in order to rebut the allegations against the Accused. Therefore, the Defence submits that a conflict of interests has arisen in the strategy of the various Defence teams, which may cause a serious prejudice to the Accused. This situation is similar to the situation where Ntahobali would have been obliged to present his case in the middle of the Prosecution Case and compromises the right of the Accused to have a full defence, his right to equality before the Tribunal, his right to be informed of the charges against him and his right to have sufficient time and facilities for the presentation of his case.

8. The Defence submits that, even if Ntahobali is allowed to rebut new evidence against him, this would not cure the prejudice: Ntahobali would have prepared his Defence Case and designed his strategy without being informed of the totality of the charges against him. This situation would also lengthen the duration of the trial.

9. The Defence submits that this situation would also violate the equality between co-accused enshrined in Rule 82(A). If the Accused was tried alone, he would be completely informed of the evidence against him. Additional evidence, such as the evidence brought by Kanyabashi and Nsabimana, would not be brought against Ntahobali if he was tried alone.

10. The Defence also submits that the requested severance would be in the interests of justice. The conflict of interests jeopardizes the right of Ntahobali to have a fair trial. Moreover, the joinder has considerably lengthened the duration of the Trial and aggravated the complexity of the case. In the current situation, Ntahobali will have to present his case twice, once after the Prosecution Case and a second time after the Kanyabashi and Nsabimana Defence cases.

11. The Defence submits that, if the severance is granted, Ntahobali accepts to have his trial continued at the current stage. He also accepts that his separate trial be resumed at any time the judges will find appropriate.

12. The Defence concludes that two solutions are possible to avoid the prejudice that is described:

- To put off the presentation of Ntahobali's case to follow the presentation of Nsabimana's and Kanyabashi's cases. However, this solution would not solve the problems of the duration of trial and it would still cause prejudice to the Defence. But this prejudice would be less serious. Ntahobali's Defence does not lay

accusations at Kanyabashi and Nsabimana: therefore, those co-accused would suffer no prejudice.

- To order the severance and the continuation of Ntahobali's trial as soon as possible.

Prosecutor's Response

13. The Prosecution submits that the Defence does not provide sufficient legal basis for severance. The Pre-Defence Briefs of the co-accused do not contain substantially new information or evidence that should not have been anticipated by the Defence of Ntahobali prior to the close of the Prosecution case.

14. The Prosecution submits that the alleged criminal acts, including the Conspiracy to commit genocide, were undertaken in furtherance of a single and common enterprise. It is still in the public interest for the six accused to be tried jointly. The Prosecution reiterates the submissions it made in its initial application for joinder of the accused on 17 August 1998 which was granted by the Trial Chamber on 5 October 1999.

15. The Prosecution submits that a severance at this stage of the proceedings is likely to result in delay. The issue of the right to be tried without undue delay, as mentioned by the Defence, is inapplicable here since the Prosecution has closed its case and the time table for the presentation of the Defence case has been set. The Prosecution submits that the *Kovacevic* Decision on which the Defence relies[7] was rendered before the end of the Prosecution case and that this distinction is fundamental.

16. The Prosecution relies on several decisions rendered by the ICTY and domestic courts to sustain that the arguments advanced by the Defence for Ntahobali do not render the severance necessary. The Prosecution submits that Counsel for Ntahobali will be given full opportunity to cross-examine the witnesses called by his co-accused.

17. As regards the option to reorder the sequence of the Defence so that Ntahobali presents his Defence after the Defence for Kanyabashi and Nsabimana, the Prosecution admits that it is at the Chamber's discretion, but submits that there is no compelling reason to alter the established sequence.

18. The Prosecution therefore prays the Chamber to dismiss the Motion.

Kanyabashi's Response

19. The Defence for Kanyabashi leaves the issue of severance at the Chamber's discretion but submits that the Motion itself recognises that this issue is not new and that the Chamber was therefore aware of that problem when ruling on 18 October 2004 on the order of presentation of the Defence cases. The Defence for Kanyabashi submits that this Motion is an attempt to relitigate the Oral ruling of 18 October 2004.

[7] ICTY, *Prosecutor v. Kovacevic and Drljaca*, Case Nu. IT-97-24-I, Decision on Motion for Joinder of Accused and Concurrent Presentation of Evidence, 14 May 1998.

20. Therefore, the Defence for Kanyabashi prays the Chamber to dismiss the request that Kanyabashi present his case before Ntahobali.

Nsabimana's Response

21. The Defence for Nsabimana leaves the issue of severance at the Chamber's discretion.

22. As regards the order of presentation of the Defence cases, the Defence for Nsabimana submits that the Motion is an attempt to relitigate the Oral ruling of 18 October 2004. The Defence for Nsabimana submits that the allegation that its witnesses may reprove Ntahobali is not founded. Defence for Ntahobali cannot make presumptions about Nsabimana's Defence strategy solely on the basis of his Pre-Defence Brief. Nsabimana's case has not started yet and it is too early to say that Ntahobali will be prejudiced as a result of how Nsabimana conducts his case. The Defence for Nsabimana submits that the Motion is therefore premature.

23. Consequently, the Defence for Nsabimana prays the Chamber to dismiss the request to alter the order of presentation of the Defence cases.

Ntahobali's Reply to the Prosecution

24. The Defence reiterates the prejudices caused to Ntahobali by the joinder and submits that, pursuant to Rule 82(B), the onus is limited to the demonstration that he may be prejudiced.

25. The Defence repeats that the recall of witnesses after the presentation of Nsabimana's and Kanyabashi's cases will automatically cause new delays that could be avoided by a severance. On the other hand, the Defence does not understand how the severance of the case could cause additional delays, the time of presentation of the Defence case remaining the same.

26. The Defence submits that the stage at which the Motion for severance is made does not change the applicable law. Rule 82(B) does not specify when such a motion can be made.

27. The Defence submits that the severance will minimize hardship caused to the witnesses and is in the interest of judicial economy, by avoiding the recall of Ntahobali Defence witnesses in rebuttal after the close of the Nsabimana's and Kanyabashi's cases.

28. The Defence submits that the opportunity to cross-examine the witnesses called by its co-accused does not counterbalance the prejudice resulting to Ntahobali's right to have a full defence. Ntahobali must be given the opportunity to be informed in advance of the evidence against him and to call witnesses to challenge the allegations of Nsabimana and Kanyabashi witnesses.

Ntahobali's Reply to Nsabimana and Kanyabashi

29. The Defence for Ntahobali submits that the issue of conflict of interests was raised prior to the 18 October 2004 Oral ruling, by Counsel for Nyiramasuhuko only and did not concern Ntahobali. This Motion was therefore never ruled upon by the Chamber. The Defence for Ntahobali further recalls that the Chamber decided that in the event of any

difficulties in the course of the proceedings, appropriate measures would be taken to deal with such difficulties.

30. The Defence for Ntahobali submits that the right to cross-examine Nsabimana and Kanyabashi witnesses can in no way remedy the prejudice caused to him if he is not given the opportunity to call witnesses in rebuttal.

DELIBERATIONS

On the Issue of Severance

31. In accordance with Rule 82(B), a "Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice".

32. The Chamber recalls that the jurisprudence on Rule 82(B) shows that the Chamber has a discretionary power to order a separate trial. The Appeals Chamber of the International Tribunal for the Former Yugoslavia (ICTY) ruled in its Decision on Request to Appeal rendered in *Prosecutor v. Brdanin and Talic*, on 16 May 2000 that:[8]

> [S]ub-Rule 82 (B) is permissive rather than obligatory, thus leaving to the relevant Trial Chamber the power to determine the matter of separate trials in the circumstances of the case before it.

33. It results from Rule 82(B) that the moving Party requesting the severance has to demonstrate the existence of a conflict of interests of such a nature as might cause serious prejudice to an accused or that the interests of justice are compromised.

34. The Chamber notes the Defence submission that it appears from the Pre-Defence Briefs filed by co-accused Joseph Kanyabashi and Sylvain Nsabimana that their defence strategies would implicate Arsène Shalom Ntahobali, as member of the *Interahamwe*. Consequently, the Defence submits that there is a conflict of interests between Arsène Shalom Ntahobali and his co-accused, which may cause a serious prejudice to its defence. According to the order of presentation of the Defence cases as decided in the Oral Ruling of 18 October 2004, Arsène Shalom Ntahobali is to present his case before Joseph Kanyabashi and Sylvain Nsabimana and will not be aware of the incriminating evidence that Kanyabashi and Nsabimana may bring against him. According to the Defence, this situation prejudices Ntahobali's right to a fair trial and to be informed of the evidence against him before the presentation of his case.

35. The Chamber notes the ICTY Trial Chamber's ruling in *Prosecutor v. Brdanin and Talic* in the "Decision on Motions by Momir Talic for Separate Trial and for Leave to File a Reply" of 9 March 2000:[9]

---

[8] ICTY, *Prosecutor v. Brdanin and Talic*, Case Nu. IT-99-36-I, Decision on Request to Appeal (AC), 16 May 2000.

[9] ICTY, *Prosecutor v. Brdanin and Talic*, Case Nu. IT-99-36-I, Decision on Motions by Momir Talic for Separate Trial and for Leave to File a Reply (TC), 9 March 2000, para. 29.

> Nor does the Trial Chamber see any possibility of serious prejudice resulting from the prospect that Brdanin may give evidence which incriminates Talic or that Talic will be unable, without fear of contradiction, to blame Brdanin and others for the orders which the prosecution may establish that he followed. A joint trial does not require a joint defence, and necessarily envisages the case where each accused may seek to blame the other. The Trial Chamber will be very alive to the "personal interest" which each accused has in such a case. Any prejudice which may flow to either accused from the loss of the "right" asserted by Talic here to be tried without incriminating evidence being given against him by his co-accused is not ordinarily the type of serious prejudice to which Rule 82(C) is directed. The Trial Chamber recognises that there could possibly exist a case in which the circumstances of the conflict between the two accused are such as to render unfair a joint trial against one of them, but the circumstances would have to be extraordinary.

36. It is the Chamber's view that this decision, which was upheld by the ICTY Appeals Chamber,[10] is consistent with the jurisprudence of some domestic courts in relevant respects. In *R. v. Crawford*, for instance, the Supreme Court of Canada held that the use of an antagonistic defence is not sufficient to compel the severance of a joint trial:[11]

> There exist [...] strong policy reasons for accused persons charged with offences arising out of the same event or series of events to be tried jointly. The policy reasons apply with equal or greater force when each accused blames the other or others, a situation which is graphically labelled a "cut-throat defence". Separate trials in these situations create a risk of inconsistent verdicts [...]
>
> Although the trial judge has a discretion to order separate trials, that discretion must be exercised on the basis of principles of law which include the instruction that severance is not to be ordered unless it is established that a joint trial will work an injustice to the accused. The mere fact that a co-accused is waging a "cut-throat" defence is not in itself sufficient.

37. Similarly, in *R. v. Cairns, Zaidi and Chaudhary*, the Court of Appeal of England wrote:[12]

> Of course the trial court has a discretion to be exercised in the interests of justice. But the fact that one defendant is likely to give evidence adverse to a co-defendant, after that co-defendant has given evidence, will not of itself normally require separate trials. It is, after all, a feature of trials where cut-throat defences are being run, a common enough experience of the courts.

38. Furthermore, it has been observed in the decision of the Court of Appeals for the US First Circuit in *United States v. Talavera*, that severance is envisaged only to avoid a situation where the conflict of interests leaves a risk that a jury may confuse the responsibility of one co-accused with that of the other:[13]

> It is well settled that "antagonistic defences do not per se require severance, even if the defendants are hostile or attempt to cast the blame on each other". Severance is required only where the conflict is so prejudicial and the defences are so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.

---

[10] ICTY, *Prosecutor v. Brdanin and Talic*, Case Nu. IT-99-36-I, Decision on Request to Appeal (AC), 16 May 2000, *op. cit.*

[11] Canada, *R. v. Crawford*, 1995 Can. Sup. Ct. LEXIS 8.

[12] United Kingdom, *R. v. Cairns, Zaidi and Chaudhary* [2003] 1 Cr.App.R. 38, CA.

[13] United States of America, Court of Appeals for the First Circuit, *United States v. Talavera*, 668 F.2d 625.

39. In consequence of the observation noted in the preceding paragraph, this Chamber observes as follows: First, the Chamber is composed of professional judges, who are aware that, pursuant to Rule 82(A), each accused in a joint trial shall be accorded the same rights as if he or she were being tried separately. Second, as mentioned in the Oral Ruling of 18 October 2004, the Rules of Procedure and Evidence provide for several remedies, which are always available should any prejudice arise within the course of the trial.[14] In particular, the Defence has a full opportunity to cross-examine the witnesses called by other co-accused. And, where necessary and the legal requirements have been met, it may be open to a party to apply for leave to call additional evidence in rebuttal. Above all, the Chamber will always remain alive to the need for a fair trial with due considerations given to the rights of the accused within a joint trial, in order to ensure that he or she would not lose the rights that he or she would have if he or she was tried alone.

40. In view of all the foregoing, the Chamber is not satisfied that the Defence has demonstrated that there is a conflict of interests of such a nature as may cause serious prejudice to the Accused, or that it is otherwise in the interests of justice to order a severance.

On the Issue of Re-Ordering the Sequence of Presentation of the Defence Case

41. The Chamber reminds the Defence that this issue was previously raised and ruled upon orally during the Status Conference of 18 October 2004. The Chamber recalls that after hearing the submissions made by Counsel for Pauline Nyiramasuhuko on that issue,[15] the Chamber heard additional submissions from Counsel for Arsène Shalom Ntahobali, who expressly mentioned the fear that the order of presentation of the Defence cases may cause a prejudice to the Accused.[16] The decision to maintain the order of presentation of Defence was rendered in this context.

42. The Chamber finds no compelling reason to vary the order of presentation of the cases for the Defence. It is therefore the view of the Chamber that the prayer to re-order the presentation of the defence case has already been ruled upon and may not now be reopened.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 2 February 2005

William H. Sekule
Presiding Judge

Arlette Ramaroson
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

[14] T. 18 October 2004, p. 16 (ICS).
[15] T. 18 October 2004, p. 13-14 (ICS).
[16] T. 18 October 2004, p. 15 (ICS).