International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
11-09-2006
(29312-29306)

29312
S. Nwosa

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 11 September 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON SEVERANCE OR EXCLUSION OF EVIDENCE BASED ON PREJUDICE ARISING FROM TESTIMONY OF JEAN KAMBANDA

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence
Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 29311

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 Severance on the Grounds of Serious Prejudice Caused By the Testimony of Bagosora Witness Jean Kambanda", filed jointly by Kabiligi, Nsengiyumva and Ntabakuze on 14 July 2006;

CONSIDERING the Prosecution Response, filed on 2 August 2006; the joint Reply, filed on 15 August 2006; and the submissions of the Bagosora Defence, filed on 21 August 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 11, 12 and 13 July 2006, Jean Kambanda, testified before this Chamber as a witness for Colonel Bagosora. Mr. Kambanda, who was the Prime Minister of Rwanda during the period from April to July 1994, is currently serving a life sentence of this Tribunal, having been convicted of genocide and other crimes.[1] In the course of his cross-examination by the Prosecution, Mr. Kambanda offered testimony to which the Kabiligi, Nsengiyumva and Ntabakuze Defences objected on the ground that it improperly re-opened the Prosecution case and, therefore, went beyond the proper scope of cross-examination as prescribed by the Rules and a previous decision of the Chamber concerning Mr. Kambanda's testimony. After several oral rulings allowing the testimony, the Kabiligi, Nsengiyumva and Ntabakuze Defence teams made an oral motion for severance from the joint trial, arguing that they had been irremediably prejudiced. Exclusion of the testimony was requested as an alternative remedy. After hearing the parties' oral arguments, the Chamber adjourned the remainder of Mr. Kambanda's testimony, and requested further submissions in writing on all of the areas of disputed evidence.

DELIBERATIONS

(i) General Principles

2. The parameters of the Prosecution cross-examination of Mr. Kambanda have already been addressed by the Chamber in its decision of 27 March 2006, in response to a previous motion for severance on the basis of his appearance ("the Kambanda Severance Decision"):

> The suggestion that the Prosecution case can be re-opened through cross-examination is unfounded. Rule 90 (G)(i) [of the Rules of Procedure and Evidence ("the Rules")] constrains the scope of cross-examination to three areas: the subject-matter of the examination-in-chief; matters affecting credibility; and, "where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case". This last category must [be] read in light of Rule 85 (A)(i), which prescribes that "the trial shall be presented in the following sequence: (i) Evidence of

[1] *The Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence (TC), 4 September 1998. Mr. Kambanda contests the validity of the plea agreement on which the judgement was based; nevertheless, the judgement was confirmed on appeal. *Kambanda v. The Prosecutor*, Case No. ICTR 97-23-A, Judgement (AC), 19 October 2000.

> the prosecution; (ii) Evidence for the defence; (iii) Prosecution evidence in rebuttal; (iv) Defence evidence in rejoinder ...." This sequence implies that ... matters on which no evidence was led during the Prosecution case do not form part of that case. Accordingly, the "case for the cross-examining party" must now be understood as defined and limited by the evidence presented during the Prosecution case. The Prosecution may adduce evidence during its cross-examination which corroborates or reinforces evidence presented during the presentation of its case, but may not, at this stage, venture into new areas.[2]

The parties do not contest this standard, but disagree as to its application in respect of the specific questions asked, or proposed, by the Prosecution. The Defence argues that the questions enter into new areas on which no evidence was led during the Prosecution case; the Prosecution responds that the questions merely corroborate or reinforce evidence heard during the case-in-chief. Furthermore, the Prosecution contends that its questions are proper to test the witness's credibility.

3. In the Chamber's view, no unfairness arises as long as the evidence adduced through Mr. Kambanda has already been substantially presented during the Prosecution's case. Testimony which broadens the facts imputed to the Accused or the nature of his culpability, are inadmissible as they deviate from the order of proof prescribed by Rule 85. Such evidence would require the Defence to engage in additional investigations and the production of additional evidence which, in the context of this very complex and lengthy trial, would not be in the interests of justice. Whether a question broadens the facts imputed to the Accused or the nature of his culpability is, of necessity, a fact-specific inquiry and requires a close comparison of the evidence which was presented during the Prosecution case with the proposed evidence. The party seeking to cross-examine the witness bears the burden of showing by specific references to the case-in-chief that the proposed questions do not broaden the facts imputed to the Accused or the nature of his culpability.[3]

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[2] *Bagosora et al.*, Decision on Request for Severance of Three Accused (TC), 27 March 2006, para. 7 (citations omitted).

[3] The Chamber's view is supported by principles developed by trial chambers in deciding whether to allow the Prosecution to adduce rebuttal evidence under Rule 85 (A)(iii) of the Rules. Albeit not an identical situation, the general rule is that the Prosecution must present all of its evidence against the Accused by the close of its case. *Ntagerura et al.*, Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rule 54, 73, and 85 (A) (iii) of the Rules of Procedure and Evidence (TC), 21 May 2003, para. 38 ("To permit the Prosecutor to supplement evidence she should have presented in her case-in-chief would be to violate one of the cardinal precepts preventing the prosecutor from splitting her proofs and condone the practice of presenting cases piecemeal for the Defence to answer. In such circumstances, the Chamber should exercise its discretion to exclude such evidence when offered in rebuttal."); *Nahimana et al.*, Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses As Corrected According to the order of 13 may 2003 (TC), para. 50 (referring to the English Court of Appeal holding that if the Prosecution could reasonably have foreseen that a particular piece of evidence was necessary to prove its case it should have put it before the court as part of its case). *See also Delalic et al.*, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case (TC), 19 August 1998, paras. 18-22; *Delalic et al.*, Judgement (AC), para. 275; *Limaj et al.*, Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis (TC), 7 July 2005, para. 6; *Oric*, Decision on the Prosecution Motion With Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 86 (A) (iii) (TC), 9 February 2006. Similar principles follow from the practice of common law jurisdictions. *R. v. Krause*, [1986] 2 S.C.R. 466, para. 15 ("The general rule is that the Crown ... will not be allowed to split its case. The Crown ... must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in ... the indictment and any particulars .... This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence – as much as it deemed necessary at the outset – then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused

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(ii) Application

(a) Command of Troops By Kabiligi

4. The Kabiligi Defence objects to a line of questioning which yielded, in its view, three distinct propositions. The transcripts reflect these three elements to be: that the real command of the Army was in the hands of General Kabiligi, rather than another officer, General Bizimungu;[4] that the powers of the office of G3 entailed commanding troops;[5] and that General Kabiligi, in his capacity as the G3, commanded "all troop movements".[6] The Prosecution argues that the testimony is not new, relying on the testimony of Witness XXJ who testified during the case-in-chief that:

> Yes, the G-3 superiors supervise all military operations on the national territory and, in view of the situation that prevailed, I believe that in his capacity as G-3 he was following even the events that were taking place elsewhere. But he was based in Kigali and he was, more specifically, in charge of the operations that took place in the city of Kigali, but he could also give orders for operations that were taking place elsewhere as he coordinated operations. He coordinated all the operations but, more specifically, he was in charge of operations in the city of Kigali.[7]

Reference is also made to the testimony of Witness XAI that "there was someone in charge of the chief of operations in the war front, and that person's name was Gratien Kabiligi", and that "Gratien Kabiligi was in charge of the entire city of Kigali".[8]

5. The Chamber has carefully considered Mr. Kambanda's testimony in comparison with evidence introduced during the Prosecution case and finds that, in most respects, he merely repeats information which has already been substantially introduced during the case-in-chief. In one respect, the testimony does introduce a new element: that General Kabiligi had more power than General Bizimungu. This element of testimony does broaden the facts imputed to the Accused.

(b) General Kabiligi Was Informed That Solders Were Committing Massacres

6. The Defence objects to Kambanda's testimony that Kabiligi "was regularly told that soldiers were taking part in the massacres".[9] More accurately, the testimony was that Kambanda had, during some meetings with Generals Kabiligi and Bizimungu, informed them that soldiers or deserters were committing massacres. The Prosecution cites no evidence during its case reflecting this testimony. In the Chamber's view, the fact that the Prime Minister at the time informed the Accused of such actions would broaden the facts imputed to

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is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response.') *Shaw v. The Queen*, 85 C.L.R. 365, 379 (High Court of Australia, 1952); Archbold, *Criminal Pleading, Evidence and Practice* (London: Sweet & Maxwell, 2002), s. 4-335 (England); *Griffith v. State*, 157 N.E.2d 191 (Supreme Court of Indiana, 1959); *State v. Booze*, 334 Md. 64 (Maryland Court of Appeals, 1994).

[4] Motion, p. 10; Reply p. 3; T. 13 July 2006 pp. 10, 15, 16.

[5] Motion, p. 10; Reply p. 3; T. 13 July 2006 pp. 10, 16.

[6] Motion, p. 10; T. 13 July 2006 p. 16.

[7] Response, para. 16; T. 14 April 2004 p. 45.

[8] Response, para. 15, T. 9 September 2003 pp. 1, 2.

[9] Motion, p. 10.

the Accused or the nature of his culpability, even if there was evidence during the Prosecution case that others had provided such information.

(c) General Kabiligi Created a Brigade to Control Renegade Soldiers

7. Mr. Kambanda testified that he was informed that "in Kigali town a special brigade had been set up specifically to control those so-called uncontrolled elements of the army" which were committing massacres of civilians.[10] The Prosecution has failed to refer to any such evidence during its case.

(d) General Kabiligi Exercised Command After Fleeing Into Exile

8. Mr. Kambanda testified that after the flight of the interim government into exile, "practically the same command structure was maintained in exile", implying that General Kabiligi continued to exercise command over troops.[11] The Prosecution relies on the testimony of Witness ZF, who said that after General Kabiligi fled into exile, he lived in south Goma "where a division he was commanding was. It was the southern Division". The testimony of Mr. Kambanda would, in effect, potentially broaden the command responsibility of the Accused beyond the southern Division, mentioned by Witness ZF, to a larger number of troops. Accordingly, the testimony broadens the facts imputed to the Accused or the nature of his culpability.

(e) The Military Had More Power Than Politicians

9. Mr. Kambanda testified that "in any situation of war, it is the people who bear arms who have the real power, that is true".[12] The Defence teams object to this testimony as new evidence. In the Chamber's view, this is not a fact which broadens the facts imputed to the Accused or the nature of their culpability. It constitutes no more than an inference or an opinion based upon unspecified facts or information.

(f) Procurement of Arms in Goma for "Into Gisenyi and Into the Rest of Rwanda", and the Transfer of Weapons From Gisenyi Military Camp To Butare Military Camp, June 1994

10. The Prosecution has indicated that it wishes to elicit testimony from the witness concerning "the procurement of arms and the movement of arms into Rwanda from – from Goma into Gisensyi and the rest of Rwanda" by the Accused Nsengiyumva.[13] It also did lead evidence that weapons were transferred from Gisenyi Military Camp to the Butare Military Camp in June 1994, for subsequent distribution as part of the civil defence program.[14] The Prosecution argues that evidence was led during its case concerning Nsengiyumva's involvement in the distribution of arms in Gisenyi, and his role in bringing weapons from Goma across the border into Rwanda. The Prosecution has failed, however, to point to any evidence during its case that the Accused was involved in the distribution of weapons to civilians or soldiers throughout Rwanda, or that he obtained weapons in Goma for that purpose. The testimony that he was involved in supplying weapons to civilians in Gisenyi

[10] T. 13 July 2006 p. 21.
[11] T. 13 July 2006 p. 22.
[12] T. 13 July 2006 p. 22.
[13] T. 13 July 2006 p. 27.
[14] T. 12 July 2006 pp. 41-50.

does not justify the introduction of evidence that he was involved in a national scheme to supply a national civil defence program. The testimony introduces new elements which broaden the facts imputed to the Accused and the nature of his culpability.

(g) Paracommando Soldiers Killings Opponents of the MRND Using a List Given by the Accused Ntabakuze

11. The Prosecution relies on evidence that Paracommando soldiers committed massacres of civilians an area adjacent to Camp Kanombe on the night of 6 April 1994 as justification for leading evidence from Mr. Kambanda that Paracommando soldiers killed opponents of the MRND party on the night of 6 April 1994 on the basis of a list of a names given to them by the Accused Ntabakuze.[15]

12. As characterized by the Prosecution, the testimony which it seeks to adduce through Mr. Kambanda introduces several new elements: that the Accused personally distributed a list of names of civilian targets to his soldiers; that the targets were specifically identified as opponents of the MRND political party; and that his soldiers committed massacres on the basis of this particular list. The Prosecution has failed to offer specific references from its case showing that this evidence would not broaden the facts imputed to the Accused or the nature of his culpability.

(iii) Remedy

13. The Defence requests three alternative remedies: severance of the trial of the three co-Accused; exclusion of the entirety of Jean Kambanda's testimony from consideration as against the three co-Accused; or exclusion of the specifically impugned portions of testimony as against the three co-Accused.[16]

14. The Chamber observes that severance and exclusion do not represent sharply different alternatives in the circumstances of the present case. Even after severance, the three Accused would continue to be tried by the same bench, and on the basis of all of the evidence which has been heard in the joint trial up until the moment of severance. On the other hand, severance now would have the unfortunate and potentially anomalous effect of bifurcating the evidence heard between now and end of the case, including those other than Kambanda. The Chamber has previously discussed the benefits of a joint trial.[17] Where a less drastic remedy is available, it should be chosen. Excluding the improper evidence offers a remedy which is no less effective than the alternatives available in the present case. Accordingly, the Chamber shall declare inadmissible evidence which broadens the facts imputed to the Accused or the nature of his culpability.

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[15] Response, para. 30 ("The Prosecution submits that issue of Para Commando soldiers killings opponents of the MRND on the night of 6 to 7 April using a list of names Ntabakuze gave his soldiers is not a "new" area or "new" evidence. Trial Chamber has head evidence of the killings perpetrated by members of the Para Commando Battalion during the night of 6 to 7 April 1994 in the Akajali neighbourhood near the Kanombe Military Camp").

[16] Motion, p. 8.

[17] Kambanda Severance Decision, para. 3 ("A joint trial relieves the hardship that would otherwise be imposed on witnesses, whose repeated attendance might not be secured; enhances fairness as between the accused by ensuring a uniform presentation of evidence and procedure against all; and minimizes the possibility of inconsistencies in treatment of evidence, sentencing, or other matters, that could arise from separate trials").

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(iv) Evidence Introduced for Credibility

15. The Prosecution argues that the matters on which it has asked, or wishes to ask, questions are independently justified by the need to test the witness's credibility, and are "built upon the prior statements" of the witness.[18]

16. In order for questions on cross-examination to be permitted on this basis, there must be some basis to believe that the prior statements are, in fact, inconsistent with the witness's testimony. None of the questions can be so justified. As an initial matter, of the testimony which has been elicited so far, only the proposition about the setting up of a special brigade in Kigali is arguably inconsistent with Mr. Kambanda's prior statements.[19] In all other respects, the testimony given by the witness appears to be consistent with his prior statements. As to the areas on which questions have not yet been asked, there is no indication that the witness gave inconsistent testimony in respect of those matters during his examination-in-chief by the Defence, either expressly or implicitly. Indeed, his testimony did not venture close to the matters on which the Prosecution wishes to pose questions to test the witness's credibility. Allowing the Prosecution to venture into any matter discussed by the witness in his voluminous prior statements to the Prosecution would, in effect, lead to an unlimited cross-examination whose effect is to introduce substantive evidence on a wide range of matters. Such an approach would undermine the order of proof prescribed by Rule 85 and, as the questioning on that basis so far indicates, has little value in establishing the witness's credibility. The probative value of questions which are unrelated the examination-in-chief, or for which there is no indication of a potential inconsistency, are outweighed by their prejudicial effect.

FOR THE ABOVE REASONS, THE CHAMBER

EXCLUDES the evidence of Mr. Kambanda that: (i) General Kabiligi had more power than General Bizimungu as a commander in the Rwandan Army during the period at issue in this trial; (ii) Kabiligi and General Bizimungu were informed by Kambanda that active or deserting soldiers were committing massacres; (iii) Kabiligi set up a special brigade to discipline uncontrolled elements of the Rwandan Army which were committing massacres; (iv) Kabiligi was in charge of all troops of the Rwandan Army after the flight of those forces from Rwanda; (v) Nsengiyumva procured weapons in Goma for national distribution throughout Rwanda; (vi) Paracommando soldiers killed opponents of the MRND party on the night of 6 April 1994 on the basis of a list of a names given to them by the Accused Ntabakuze.

Arusha, 11 September 2006

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

[Seal of the Tribunal]

[18] Response, para. 33.
[19] T. 13 July 2006 p. 21.