



UNITED NATIONS
NATIONS UNIES

ICTR-98-44D-T
17-12-2009
(2972-2965)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

2972
AM

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 17 December 2009

THE PROSECUTOR
v.
Callixte NZABONIMANA
Case No. ICTR-98-44D-T

2009 DEC 17 P 17
JUDICIAL RECORDS/ARCHIVES
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DECISION ON DEFENCE MOTION TO RECALL WITNESS CNAL

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Defence Counsel
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INTRODUCTION

1. In a letter dated 18 September 2009, the Prosecution notified the Defence informally that it had received allegations that a certain Defence investigator was revealing confidential information about protected Prosecution witnesses.¹
2. At a Status Conference held on 1 October 2009, the Presiding Judge of the Pre-Trial Chamber asked the Prosecution to desist from making such allegations unless it was in a position to substantiate them.²
3. Witness CNAL testified on 1 and 2 December 2009. During his testimony on 2 December 2009, Witness CNAL testified that a member of the Defence team had “disclosed my statement to Callixte Nzabonimana’s family members. He read my statement to Callixte Nzabonimana’s family members.” The witness concluded that he felt threatened.³
4. Later, on 2 December 2009, the Trial Chamber held that the Defence had been given sufficient time to cross-examine Witness CNAL and ordered that the Defence conclude its cross-examination.⁴ The Defence made an oral application seeking leave to appeal the Trial Chamber’s Decision concluding the cross-examination.⁵ The Prosecution responded arguing that the motion should be made in writing.⁶ The Trial Chamber informed the parties that it would render a decision in due course.⁷
5. Also on 2 December 2009, the Prosecution filed a motion alleging that a Defence investigator was revealing protected information of protected Prosecution witnesses, contrary to Rule 77 of the Rules of Procedure and Evidence (“RPE”). This motion was based in part on a complaint by Witness CNAL. The Prosecution appended an affidavit from the Witness to its Motion.⁸ On 7 December 2009, the Defence filed a Response in which it denied the allegations.⁹

¹ Letter from Prosecution Lead Counsel, Paul Ng’arua to lead Defence Counsel, Vincent Courcelle-Labrousse, dated 18 September 2009 re: Callixte Nzabonimana’s investigator’s disregard for Witness’ Protective measures.

² T. 1 October 2009, pp. 21, and 22-26 (ICS).

³ T. 2 December 2009, pp. 19, 21 (ICS).

⁴ T. 2 December 2009, p. 36.

⁵ T. 2 December 2009, p. 40.

⁶ T. 2 December 2009, p. 40.

⁷ T. 2 December 2009, p. 40.

⁸ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Urgent Motion for Prohibition of Conduct Contrary to Rule 77 (C) of the Rules of Procedure and Evidence, 2 December 2009 (“Contempt Motion”).

⁹ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Nzabonimana’s confidential response to Prosecutor’s Urgent Motion for Prohibition of Conduct Contrary to Rule 77 (C) of the Rules of Procedure and Evidence, 7 December 2009 (“Contempt Response”).

6. On 7 December 2009, the Defence also filed a motion requesting that the Trial Chamber recall Prosecution Witness CNAL for further cross-examination.¹⁰
7. On 14 December 2009, the Prosecution filed a Response to the Motion.¹¹
8. On 15 December 2009, the Trial Chamber issued Decision on the Contempt Motion in which it directed the Registry to appoint an *amicus curiae* to investigate the allegations made by the Prosecution.¹²
9. By the deadline set by the Trial Chamber for the expedited filing of the Defence Reply, the Trial Chamber had not received a Reply.

Submissions of the parties

10. The Defence asks the Trial Chamber to recall Witness CNAL for further cross-examination. It submits that the President of the Trial Chamber put a premature end to the cross-examination of the witness and that she refused to hear a Defence Motion for reconsideration or leave to appeal the decision.¹³ It further argues that the Trial Chamber did not afford the Defence the opportunity to outline the issues it still wished to raise with the witness.¹⁴ The Defence concludes that it was therefore unable to put Gacaca records to the witness pertaining to his claim to have been a victim of the genocide rather than a perpetrator.¹⁵
11. Referring to the Prosecution's Contempt Motion, the Defence alleges that the Prosecution breached its disclosure obligations pursuant to Rule 66 (A) (ii) by failing to disclose a statement made by Witness CNAL on 24 November 2009 alleging that a Defence investigator had breached his protective measures.¹⁶ The Defence further alleges that the Prosecution deliberately misled the Trial Chamber and the Defence pointing out that when the Defence asked the witness about the number of prior statements he had signed, the Prosecutor interrupted stating: "Now the Defence counsel has shown the witness two statements...those are his statements...Now we know exactly the mischief that Defence

¹⁰ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Motion for the recall of Witness CNAL, 7 December 2009 ("Motion").

¹¹ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for the recall of Witness CNAL, 14 December 2009 ("Response").

¹² *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Decision on the Prosecution's Urgent Motion Alleging Contempt of the Tribunal, 15 December 2009 ("Contempt Decision").

¹³ Motion, para. 2.

¹⁴ Motion, para. 13.

¹⁵ Motion, paras 10-12.

¹⁶ Motion, paras 2-4.

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counsel is trying to elicit from this witness, and that is that there are other statements which the Prosecutor has hidden or failed to produce...”¹⁷

12. The Defence submits that had it had access to this prior witness statement, it could have put questions to the witness about inconsistencies in that statement and others that would have undermined his credibility.¹⁸
13. In its Response, the Prosecution submits that Rule 66 (A) (ii) does not apply to the statement made by Witness CNAL, on 24 November 2009 alleging a violation of his protective measures.¹⁹ It suggests that interpreting such statements as Rule 66 (A) (ii) material “will lead to an obvious absurdity. The absurdity would be that each time such a situation arose, then the trial will have to be postpone for 60 days to allow the defence to investigate into their [sic] own conduct...”²⁰
14. The Prosecution further contends that allowing any further cross-examination of the Witness would amount to “harassment and badgering of the witness,”²¹ noting that the witness has already complained of intimidating behavior by the Defence.²²
15. With respect to the further cross-examination of Witness CNAL on 2 December 2009, the Prosecution submits that in bringing an end to the cross-examination of Witness CNAL, the Trial Chamber acted within its powers, duties and responsibilities pursuant to Rule 90 (F).²³ The Prosecution notes that the Defence is not claiming that it received new material, or Gacaca records, following Witness CNAL’s testimony. It argues that if the Defence failed to put relevant questions to the witness it is because of the Defence’s own lack of diligence, and concludes that it would be unfair to recall the witness to Arusha because the Defence did not properly plan its cross-examination.²⁴
16. The Prosecution also rejects the Defence argument that it would like to further cross-examine the witness with regard to his alleged participation in the 1994 genocide. The Prosecution argues that it is manifestly unfair for the Defence to imply the guilt of a witness who was tried and acquitted. It further submits that the jurisprudence does not support recalling a witness on the basis of Gacaca records.²⁵

¹⁷ Motion, para. 16.

¹⁸ Motion, paras 6-7, 18-24.

¹⁹ Response, paras 12-17.

²⁰ Response, paras 16.

²¹ Response, paras 18-21.

²² Response, paras 20-21.

²³ Response, paras 22-24.

²⁴ Response, paras 28-31.

²⁵ Response, paras 36-42.

DELIBERATIONS

Applicable Law

17. Rule 66 (A) (ii) provides that:

Subject to the provisions of Rules 53 and 69;

(A) The Prosecutor shall disclose to the Defence [...]

ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the Defence within a prescribed time.

18. In *Blaskić*, the Appeals Chamber held that “the usual meaning of a witness statement in trial proceedings is an account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime.”²⁶

19. In a discussion regarding Rule 66 (A) (ii), the Appeals Chamber in *Niyitegeka* later noted that neither the ICTY nor the ICTR had provided a clear definition of the term “statement.”²⁷ It then affirmed that “[r]ecords of questions put to witnesses by the Prosecution and of the answers given constitute witness statements pursuant to Rule 66(A) (ii) of the Rules.”²⁸ The Appeals Chamber added that “[t]he fact that a particular witness statement does not correspond to the standard set out above does not free a party from its obligation to disclose it to the other party pursuant to Rule 66(A)(ii) of the Rules.”²⁹

20. Rule 90 (F) states that

The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

- (i) Make the interrogation and presentation effective for the ascertainment of the truth; and
- (ii) Avoid needless consumption of time.

²⁶ *Prosecutor v. Tihomir Blaskić*, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and additional filings, 26 September 2000, para. 15.

²⁷ *Prosecutor v. Eliézer Niyitegeka*, ICTR-96-14-A, Judgement, 9 July 2004 (“Niyitegeka Appeals Judgement”), para. 30.

²⁸ Niyitegeka Appeals Judgement, para. 33.

²⁹ Niyitegeka Appeals Judgement, para. 35.

Witness CNAL's statement of 24 November 2009 and Rule 66 (A) (ii)

21. At issue here is whether the statement of Prosecution Witness CNAL, dated 24 November 2009, alleging Contempt of Tribunal can be considered a "statement", within the meaning of Rule 66 (A) (ii). The Trial Chamber notes that neither party has cited jurisprudence in support of its position. The Trial Chamber recalls the definitions set out in *Blaskić*, and in *Niyitegeka*, as cited above. It considers that a reasonable interpretation of "statement", within the meaning of Rule 66 (A) (ii), is a statement pertaining to the allegations in the Indictment, and not to any statement made by a witness to the Prosecution. Thus, the Trial Chamber concludes that the Defence did not violate its disclosure obligations in this matter.
22. Nevertheless, the Trial Chamber observes that in his statement alleging Contempt of the Tribunal, Witness CNAL states that he first approached the Prosecution about problems with the Defence investigator in early September.³⁰ The Prosecution then brought the allegations to the attention of the Defence on 18 September 2009.³¹ The Prosecution, however, did not file its Motion based on these allegations until the day of-- or immediately after-- the conclusion of the cross-examination of Witness CNAL, although his affidavit is dated a week earlier. The Prosecution has provided no explanation for the delay in pursuing the grave allegations made by its own witnesses.
23. The Trial Chamber recalls that in its Contempt Decision the Trial Chamber directed the Registry to appoint an *amicus curiae* to investigate the allegations made, *inter alia*, by Witness CNAL.³² The Defence will thus have an opportunity to make further submissions on the credibility of Witness CNAL raised by his 24 November 2009 statement to the *amicus curiae*, and the *amicus* will then report to the Trial Chamber. Should *amicus* determine that the witness' credibility is at issue, the Trial Chamber will take the finding into account at the appropriate time. Therefore, the Trial Chamber sees no need to recall Witness CNAL on the basis of his 24 November 2009 statement.

Further Cross-examination of Witness CNAL based on Gacaca records

24. The Trial Chamber observes that in its Motion, the Defence explained that it wished to recall the witness so that it could "put to him Gacaca records...these records all

³⁰ *Prosecutor v. Callixte Nzabonimana*, Prosecutor's Urgent Motion for Prohibition of Conduct Contrary to Rule 77 (C) of the Rules of Procedure and Evidence, 2 December 2009, Annex B.

³¹ Letter from Prosecution Lead Counsel, Paul Ng'arua to lead Defence Counsel, Vincent Courcelle-Labrousse, dated 18 September 2009 re: Callixte Nzabonimana's investigator's disregard for Witness' Protective measures.

³² Contempt Decision, Disposition.

indicate that CNAL was involved in the Genocide contrary to what CNAL has repeatedly stated before this Chamber.”³³ The Defence has provided no material suggesting that the witness was actually convicted in Gacaca proceedings. Indeed, the Trial Chamber recalls that during the cross-examination of the witness, the Defence stated: “Yes, Witness, we know you have been acquitted.”³⁴ Although, in its Motion, the Defence appears to have cited allegations made in the context of Gacaca hearings against the witness,³⁵ it did not refer to specific questions it still wished to raise with the Accused or inconsistencies among his statements or in his testimony. This lack of specificity is unhelpful.

25. During the cross-examination of Witness CNAL and in its submissions to this Motion, it appeared that Defence intended not only to impugn the credibility of the witness but to assail the integrity of the Gacaca process. The Trial Chamber considers that the latter could not be properly achieved through this witness. Thus, the Trial Chamber determined that the line of questioning was “not effective for the ascertainment of the truth,” pursuant to Rule 90 (F). If the Defence wishes to show that Gacaca Trials before which this witness stood as a defendant were improperly conducted—or indeed that the Gacaca system as a whole is flawed—it may do so during its case.
26. The Trial Chamber observes that Witness CNAL testified in chief for approximately 2 hours, and that he testified on cross-examination for approximately 6 ½ hours before the Trial Chamber requested that the Defence conclude its cross-examination. This was after the Trial Chamber granted extensions of time to the Defence at least twice.³⁶ The Trial Chamber is of the view that the Defence has not established good cause for recalling Witness CNAL in order to complete its cross-examination.
27. On a final note, the Trial Chamber notes that contrary to the submissions of both parties, it did not make a decision on the Defence application for reconsideration or leave to appeal the Trial Chamber’s Decision that the cross-examination of Witness CNAL should come to an end. Contrary to the Prosecution’s arguments, the Trial Chamber finds that such motions may be made through oral application. However, it notes that the Defence did not argue that the Impugned Decision involves an issue that

³³ Motion, paras 10-11.

³⁴ T. 2 December 2009, p. 34.

³⁵ Motion, para.11.

³⁶ T. 1 December 2009, p. 71, T. 2 December 2009, pp. 26, 66.

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, pursuant to Rule 73 (B). Therefore, the Trial Chamber denies the Defence Motion for reconsideration of the Impugned Decision. It also denies leave to appeal the Decision.

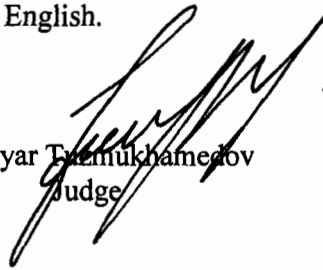
FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

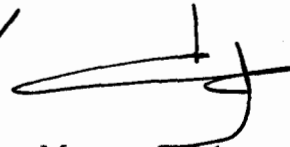
Arusha, 17 December 2009, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar T. Mukhamedov
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

