



UNITED NATIONS
NATIONS UNIES

1C12-98-44D-T
31-03-2011
6301-6295
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

6301
Am

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 31 March 2011

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

JUDICIAL RECORDS ARCHIVE
RECEIVED
2011 MAR 31 PM 3:56
[Signature]

**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OF DECISION ON
PROSECUTION MOTION TO CALL REBUTTAL EVIDENCE**

Rules 54 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Paul Ng'arua
Memory Maposa
Simba Mawere
Mary Diana Karanja

Counsel for Callixte Nzabonimana

Vincent Courcelle-Labrousse
Philippe Larochelle

88

INTRODUCTION

1. On 31 January 2011, the Prosecution filed a Motion seeking leave to call Witness CNR1 to rebut the Defence alibi.¹
2. On 8 March 2011, the Trial Chamber granted the Prosecution Motion for Rebuttal ("Impugned Decision").²
3. On 15 March 2011, the Defence filed the instant Motion seeking reconsideration of the Impugned Decision.³
4. On 21 March 2011, the Prosecution filed a response opposing the Instant Motion.⁴
5. No reply was filed by the Defence.

SUBMISSIONS OF THE PARTIES

Defence Motion

Prejudice caused by late filing of Rebuttal Motion

6. The Defence submits that in the Impugned Decision the Trial Chamber abused its discretion resulting in an injustice to the Accused.⁵ Specifically, it argues that it will be unable to conduct a proper investigation of Witness CNR1 due to the late filing of the Rebuttal Motion and the fact that the Prosecution is expected to call the witness immediately after the close of the Defence case.⁶ According to the Defence, the Trial Chamber acknowledged that the Prosecution was on early notice that the alibi of the Accused involved his presence at the French Embassy from 7-11 April 1994. Despite this early notice, it did not inform the Chamber that it intended to call rebuttal witnesses until 21 May 2010,⁷ and did not disclose identifying information for Witness CNR1 until 31 January 2011.⁸ Had the Prosecution disclosed the identifying information of the

¹ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Motion to Call Rebuttal Evidence Pursuant to Rules 54, 73 and 85 (A) (iii) of the Rules of Procedure and Evidence ("Rebuttal Motion"), 31 January 2011.

² *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Prosecution Motion to Call Rebuttal Evidence "Impugned Decision", 8 March 2011.

³ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Motion for Reconsideration of Decision on Prosecution's Motion to Call Rebuttal Evidence ("Instant Motion"), 15 March 2011.

⁴ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for Reconsideration of Decision on Prosecution's Motion to Call Rebuttal Evidence ("Response"), 21 March 2011.

⁵ Instant Motion, para. 7.

⁶ Instant Motion, paras. 10 – 11.

⁷ See Proposed Provisional List of Rebuttal Witnesses for the Prosecutor, dated 21 May 2010.

⁸ Instant Motion, para. 12.

witness in May 2010, the Defence would have had ample time to conduct its investigations.⁹ The Defence further contends that while it met briefly with Witness CNR1, the witness indicated that he did not want to testify at the Tribunal. Consequently the Defence did not focus its investigations on him.¹⁰

Timing of the Alibi Notice

7. The Defence reiterates its argument that the Prosecution was on notice from 19 June 2009 that the Defence would adduce evidence that he was at the French Embassy in Kigali in April 1994.¹¹
8. The Defence concludes that to allow the Prosecution to call rebuttal evidence on a matter which it has repeatedly disclosed to the Prosecution amounts an abuse of discretion by the Trial Chamber resulting in an injustice.¹²

Alternative Remedy Sought

9. In the alternative, the Defence submits that should the Trial Chamber deny reconsideration, it requests that the cross-examination of Witness CNR1 be suspended to allow the Defence time to carry out its investigations in Rwanda and elsewhere.¹³ It recalls that in this trial proceedings have been adjourned twice to allow further investigations in respect of matters arising in examination-in-chief.¹⁴

Prosecution Response

Timing of the Alibi Notice

10. The Prosecution submits that the Defence has not demonstrated that the Trial Chamber abused its discretion in granting the Motion for rebuttal.¹⁵ The Prosecution submits that the Trial Chamber correctly interpreted Rule 67 (A) (ii).¹⁶ Finally, while the Defence contests the Trial Chamber's finding on its notice of alibi, it fails to show an error in law or fact and thus, the Instant Motion must fail.¹⁷

⁹ Instant Motion, paras. 13 and 20.

¹⁰ Instant Motion, paras. 14 and 20.

¹¹ Instant Motion, paras. 15-18.

¹² Instant Motion, para. 20.

¹³ Instant Motion, para. 21.

¹⁴ Instant Motion, para. 22.

¹⁵ Response, para. 26.

¹⁶ Response, paras. 27-28, 30, 32, 42.

¹⁷ Response, paras. 39-40.

Alleged prejudice caused by late filing of Rebuttal Motion

11. With respect to the timing of the Rebuttal Motion, the Prosecution recalls that the Trial Chamber ruled that the Defence had knowledge of the statement of Witness CNR1 from the start of the Prosecution case.¹⁸ Accordingly, the Impugned Decision was neither unfair nor unreasonable, and therefore did not constitute an abuse of discretion by the Trial Chamber.¹⁹
12. The Prosecution also recalls that when the Defence first responded to the Prosecution request to call this witness in rebuttal, it alleged that the witness was actually a Defence witness and that the Prosecution had contacted him in violation of protective measures accorded to Defence witnesses.²⁰ Thus, it concludes that the Defence has had sufficient contact with the Witness CNR1 to probe his credibility and reliability.²¹
13. In response to the Defence request that the Chamber consider postponing the cross-examination of the witness, the Prosecution argues that the analogy with the postponed cross examination of certain Defence witnesses is inapposite. In the cases cited by the Defence, the Prosecution requested stays of cross-examination because the witnesses raised issues on examination in chief for which the Prosecution had no notice.²² The Prosecution also submits that the Defence has failed to substantiate its claims that it cannot conduct investigations related to the witness prior to his testimony.²³
14. The Prosecution concludes that the Defence has shown no exceptional circumstances warranting reconsideration of the Impugned Decision or the stay of the cross-examination of Witness CNR1.²⁴

DELIBERATIONS

Applicable Law

Reconsideration

¹⁸ Response, para. 42; *citing* Impugned Decision, para. 45.

¹⁹ Response, para. 44.

²⁰ See Response, 7 February 2011, paras. 20-26.

²¹ Instant Response, para. 51.

²² Instant Response, paras. 53-56.

²³ Instant Response, para. 59.

²⁴ Instant Response, para. 58.

15. As affirmed in *Karemera*, Trial Chambers have the “inherent power” to reconsider their own decisions, under the following “exceptional” circumstances:

- i. when a new fact has been discovered that was not known by the Trial Chamber;
- ii. where new circumstances arise after the original decision;
- iii. where there was an error of law or an abuse of discretion by the Trial Chamber resulting in an injustice.²⁵

The Chamber recalls that it is for the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.²⁶

Analysis

16. At the outset, the Trial Chamber notes that the Defence has not suggested that there is a new fact or set of circumstances warranting reconsideration. In addition, the Defence reiterates many of the same submissions it made in its response to the Rebuttal Motion, such as arguments regarding the timing of the notice of alibi. The Trial Chamber will not address these issues again here. The only novel contention advanced by the Defence in the Instant Motion is that the Chamber abused its discretion resulting in an injustice. The Trial Chamber will therefore limit its deliberations to that issue.

Prejudice caused by late filing of motion for rebuttal

17. The Defence argues that it has been prejudiced by the late filing of the Prosecution Motion to call rebuttal evidence. Although the Prosecution first indicated that it would call rebuttal evidence on 21 May 2010, it did not provide identifying information for its proposed rebuttal witness until 31 January 2011. According to the Defence, the delay has meant that the Defence has not had adequate time to investigate the witness and his proposed evidence.

18. The Prosecution responds that on 28 September 2009 it disclosed to the Defence, pursuant to Rule 66(A) (i), a statement provided by the witness.²⁷ The Trial Chamber recalls a prior decision on protective measures in which it found that this disclosure did

²⁵ See e.g., *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera*, ICTR-99-44-T, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 2; *Karemera*, ICTR-99-44-T, Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY, 28 September 2007, paras. 10-11.

²⁶ *Karemera et al.*, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions (TC), 8 November 2007.

²⁷ Response, paras. 8-9

not, in and of itself, suffice to inform the Defence that it intended to call the witness to testify at trial.²⁸ Thus, it finds the Prosecution contention has no merit.

19. The Trial Chamber recalls that in the Impugned Decision it observed that

...the Prosecution received indications, as early as 19 June 2009 that the Accused intended to adduce evidence that he sought refuge at the French Embassy in Kigali between 7-11 April 1994, the Defence did not provide any information regarding its prospective witnesses, or any other evidence on which it intended to rely, as required by Rule 67 (A) (ii), until 22 February 2010.²⁹

20. In its submissions, the Defence contends that while it met briefly with Witness CNR1, the witness indicated that he did not want to testify at the Tribunal. Consequently the Defence did not focus its investigations on him.³⁰ The Trial Chamber observes that this Defence submission is irreconcilable with the alternative Defence submission that CNR1 was actually a Defence witness, whose name was disclosed to the Prosecution on 22 February 2010, and that the Prosecution had violated his protective measures.³¹ Thus, the Defence claim that it was first put on notice of the proposed evidence of this witness on 31 January 2011 is equally devoid of merit.

21. The Trial Chamber concludes that it did not abuse its discretion in allowing the Prosecution to call this witness in rebuttal.

Alternative Remedy Sought

22. As an alternative remedy, the Defence requests that the cross-examination of Witness CNR1 be suspended to allow it time to carry out its investigations in Rwanda and elsewhere.³² The Trial Chamber accepts that the Defence was first put on notice that the witness might testify in this trial on 31 January 2011. It will have had over two months to investigate the witness and his proposed testimony by the time he is called to testify.

²⁸ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Prosecution Motion for the Appointment of Amicus Curiae to Investigate Breach of Protective Measures of Prosecution Witnesses CNBB, CNAD and CNR1, ("29 March 2011 Decision"), 29 March 2011, para. 34.

²⁹ Impugned Decision, para. 42.

³⁰ Instant Motion, paras. 14 and 20.

³¹ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Defence Response to Prosecutor's Motion to Call Rebuttal Evidence Pursuant to Rules 54, 73 and 85 (A) iii) of the Rules of Procedure and Evidence ("Response"), 7 February 2011, para. 41.


³² Instant Motion, para. 21.

The Defence has not substantiated its claim that this period of time will not suffice to conduct thorough investigations.


FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Dated in Arusha, this 31 day of March 2011, done in English.


Solomy Balungi Bossa
Presiding Judge


Bakhtiyor Tuzmukhamedov
Judge


Mparany Rajohnson
Judge

[Seal of the Tribunal]