



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No.: IT-95-17/1-T
Date: 16 July 1998
Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Florence Ndepele Mwachande Mumba, Presiding
Judge Antonio Cassese
Judge Richard May

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 16 July 1998

PROSECUTOR

v.

ANTO FURUNDŽIJA

DECISION

The Office of the Prosecutor:

Ms. Brenda Hollis
Mr. Michael Blaxill

Counsel for the Accused:

Mr. Luka Misić
Mr. Sheldon Davidson

I. INTRODUCTION

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ('International Tribunal') is seised of a 'Defendant's Motion to Strike the Testimony of Witness A Due to Prosecutorial Misconduct or, in the Event to a Conviction, for a New Trial' filed on 10 July 1998 (Official Record at Registry Page ('RP') D1603 - D1642) ('Motion') and the "Prosecutor's Response to Defence Motion to Strike Testimony of Witness 'A' or Order a New Trial, dated 09 July 1998' filed on 13 July 1998 (RP D1652 - D1666) ('Response').

2. The trial of Anto Furundžija concluded on 22 June 1998. On that date, the closing arguments of the parties were heard and the hearing was closed with judgement reserved to a later date. On 29 June 1998, the Office of the Prosecutor ('Prosecution') disclosed to the Defence a redacted certificate dated 11 July 1995 and a witness statement dated 16 September 1995 from a psychologist from the Medica Women's Therapy Centre in Zenica, Bosnia-Herzegovina concerning Witness A and the treatment that she received there ('Material'). The Motion and Response are to do with the late disclosure of the Material.

3. On 14 July 1998, the Trial Chamber, having considered the Motion and the Response, and having heard the oral submissions of the parties in an open session hearing, issued an oral decision and undertook to deliver its reasoning in writing. Following the oral decision, the Defence asked the Trial Chamber to reconsider its decision to order the re-opening of the trial, on the grounds that this was an inappropriate remedy. The Trial Chamber declined to do so and **HEREBY ISSUES** its written decision.

II. SUBMISSIONS OF THE PARTIES

A. The Defence

4. It was argued that by knowingly and intentionally failing to disclose evidence casting doubt on Witness A's memory, the Prosecution violated Rule 68 of the Rules of Procedure and Evidence of the International Tribunal ('Rules'). Rule 68 requires that the Prosecution "*as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence*".

5. The Defence argued that this prosecutorial misconduct prejudiced the accused and deprived him of his right to a fair trial. The alleged inability of Witness A to recollect events accurately was a central plank of the accused's defence to the charges against him, and the belatedly disclosed Material directly affects the credibility of this witness and would have been acted upon had the Defence had knowledge of the contents therein. The Defence was therefore denied the opportunity of conducting pre-trial investigations about Witness A's psychiatric condition and medical treatment and the statements which she made to persons at Medica concerning her captivity. It was also denied the vitally important opportunity of cross-examining this witness and other prosecution witnesses on these issues.

6. Failure by the Prosecution to disclose the Material in a proper manner impacted upon the entire trial strategy of the Defence in countering the allegations of the Prosecution. Two examples of the prejudice suffered by the Defence were cited in the Motion. Had it been aware prior to trial of the medication being taken by Witness A, the Defence would have called an expert witness to testify on the effect of such medication upon the memory, and its expert witness, Dr. Elizabeth Loftus, could have directly addressed the reliability of Witness A's memory in the light of this information.

7. The following cases from the United States of America were cited by the Defence in support of their submissions: *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983), *United States v. Partin*, 493 F.2d 750 (5th Cir. 1974), *Greene v. Wainwright*, 634 F.2d 272.

8. In its oral rebuttal, the Defence objected to factual statements made by the Prosecution which were unsupported by affidavit or witness testimony, and also to the absence from court of the Trial Attorney who made the decision not to disclose the Material.

9. The remedy sought by the Defence was that the Trial Chamber should either 'strike' the testimony of Witness A or order a new trial in the event of conviction.

B. The Prosecution

10. According to the Response, the decision to withhold disclosure of the Material was made on the basis of professional assessment of its content. This decision was taken by Mrs. Patricia Viseur-Sellers, who was on vacation and therefore unable to address the Trial Chamber personally, following a conclusion that "*there was nothing about the material which distinguished Witness A's condition from any other rape victim*". There were also, *inter alia*, concerns that the Material was inadmissible because its probative value was minimal and disclosure would have been a gross invasion of the witness' privacy. This decision was not made in bad faith for an improper purpose, or to gain a tactical advantage. Disclosure was eventually ordered by the Prosecutor herself, "*so that the issues could be litigated before the Trial Chamber*".

11. The Prosecution challenged the Defence characterisation of the Material as coming within the remit of Rule 68 of the Rules and objected to their "*greatly*" exaggerated submissions on the significance of the Material. According to the Prosecution, there is nothing in the Material to cast doubt on the credibility of Witness A.

12. The authorities cited by the Defence were also distinguished from the case at hand.

13. Notwithstanding the Prosecution's denial that the Material should have been disclosed further to Rule 68, it was argued that the Defence received adequate notice under that rule. They had been given express oral notice by the Prosecution prior to commencement of the trial of Witness A's contacts with Medica and her 1995 Witness Statement put them on sufficient notice. It is argued that the recent disclosures are redundant and of a cumulative nature: they "*add nothing of import*".

14. The Prosecution denies that the Defence was prejudiced by the belated disclosure. The Material should be viewed in context, not in isolation. In the absence of its disclosure, the Defence was already on notice as to the matters raised in the Material. The Prosecution argued that the Defence had adequate opportunity to examine prosecution witnesses on Witness A's mental condition, mental stability and ability to recollect events accurately, and that the record demonstrates that they did in fact pursue these issues.

15. In the event of a determination by the Trial Chamber that the Defence was denied the right to cross-examine on issues arising from the Material, the Prosecution suggested that the appropriate remedy would be to re-open the trial, rather than 'strike' the testimony of Witness A, as had been suggested by the Defence. Witness A could be recalled to address any unresolved concerns. To 'strike' the evidence of Witness A would run counter to the search for truth with which the International Tribunal is entrusted and would not be appropriate in the circumstances, where there was no bad faith on the part of the Prosecution.

III. FINDINGS

16. The Trial Chamber finds that there has been serious misconduct on the part of the Prosecution. Rule 66(C) of the Rules affords the Prosecution the opportunity to seek the guidance of the Trial Chamber in camera on any matter where it has evidence or a document or anything that is relevant to the Prosecution where they are doubtful as to whether or not such materials are open to disclosure. This is the procedure that should have been followed in this instance. The text of Rule 66 (C) is as follows:

Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from the obligation to disclose pursuant to Sub-rule (B). When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

17. Disclosure of exculpatory material is dealt with in Rule 68 of the Rules:

The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

The Material clearly had the potential to affect the “*credibility of prosecution evidence*” and the Prosecution was obliged under Rule 68 to either inform the Defence that they had these documents in their possession or to provide them with copies as part of the disclosure process. This failure to comply with the Rules amounts to serious misconduct on the part of the Prosecution.

18. Witness A is the survivor of deeply traumatising events, part of which form the subject matter of the charges against the accused. Her testimony has been pivotal to the Prosecution’s case. In the course of the proceedings leading up to and including trial, it has been obvious that she received either counselling or treatment as a result of the events which she endured. The accused’s defence has been conducted on the basis that Witness A’s memory was flawed. Any evidence relating to the medical, psychiatric or psychological treatment or counselling that this witness may have received is therefore clearly relevant and should have been disclosed to the Defence. The Trial Chamber therefore concludes that the Prosecution failed to comply with its discovery obligations.

19. Prejudice was suffered by the Defence, which was unable to fully cross-examine relevant prosecution witnesses and to call evidence to deal with any medical, psychiatric or psychological treatment or counselling that may have been received by Witness A. The right to examine, or have examined, the witnesses against him is a fundamental right of every accused person, and this is enshrined in Article 20 of the Statute of the International Tribunal. The Trial Chamber believes that Article 20 of the Statute assumes a situation of full, proper and timely discovery by the Prosecution. The Trial Chamber has noted that the trial strategy of the Defence was based on the materials provided to it in advance of trial by the Prosecution and that this strategy permeated the handling of the defence case. The Trial Chamber is alive to the importance of avoiding any prejudice to the accused and the absolute need to prevent a miscarriage of justice.

20. The remedies sought by the Defence are that the Trial Chamber should either 'strike' the testimony of Witness A or order a new trial in the event of conviction. There has, in this instance, been a serious procedural error by the Prosecution and the Trial Chamber finds that the relevant witness, who in this instance is also a victim, should not be made to suffer as a consequence of such misconduct by 'striking' her evidence. Furthermore, there has been no conviction in this case and the Trial Chamber did not schedule a date for delivery of judgement. The Trial Chamber therefore finds that the suggested remedy of a new trial in the event of conviction is inappropriate. In any event, it is not within the powers of the Trial Chamber to order a re-trial; Rule 117(C) of the Rules provides that "[i]n appropriate circumstances the Appeals Chamber may order that the accused be retried according to law".

21. In the circumstances, the Trial Chamber believes that the interests of justice require a re-opening of the proceedings. This re-opening would enable the prejudice suffered by the accused to be remedied by allowing the Defence to re-call and re-examine any Prosecution witness, including Witness A, strictly on issues arising from the Material. The Defence is also given leave to re-call witnesses or bring new witnesses to address the issues concerning any medical, psychiatric or psychological treatment or counselling that may have been received by Witness A, or to address any issues related to the Material. The Prosecution may call witnesses to rebut the testimony of those brought by the Defence.

IV. DISPOSITION

The Trial Chamber, for the reasons set out above

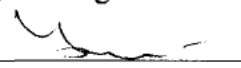
A. **ORDERS** that the proceedings in this matter be re-opened and that they be limited as follows:

- (1) The Defence may recall any Prosecution witness for cross-examination strictly on any medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993;
- (2) The Defence may recall any Defence witness to address any medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993 and may call new evidence to address these same issues;
- (3) The Prosecution may call witnesses in rebuttal, if the need arises;

B. **FURTHER ORDERS** that:

- (1) By 31 July 1998, the Prosecution shall disclose any other documents in their possession relating to the Material and relevant to the issue of any medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993;
- (2) Pending the issuing of a Scheduling Order fixing a definitive date, the parties shall be on notice that the week commencing 31 August 1998 is set aside for the re-opening of this matter, it being understood that the parties are at liberty to apply to the Trial Chamber for an adjournment should they not be fully prepared to proceed at that time.

Done in both English and French, the English text being authoritative.



Florence Ndepele Mwachande Mumba
Presiding Judge

Dated this 16th day of July 1998
At The Hague,
The Netherlands.

[Seal of the Tribunal]