A4360 - A4355
07 DECEMBER 1999

4360

UNITED
NATIONS

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:	IT-96-21-A
	Date:	7 December 1999
	Original:	English

IN THE APPEALS CHAMBER

Before: Judge David Hunt, Presiding
Judge Fouad Riad
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge Mohamed Bennouna

Registrar: Mrs Dorothee de Sampayo Garrido-Nijgh

Order of: 7 December 1999

PROSECUTOR

v

Zejnil DELALIĆ, Zdravko MUCIĆ (aka "PAVO"), Hazim DELIĆ and Esad LANDŽO (aka "ZENGA")

ORDER ON MOTION OF THE APPELLANT, ESAD LANDŽO, FOR PERMISSION TO OBTAIN AND ADDUCE FURTHER EVIDENCE ON APPEAL

Office of the Prosecutor:

Mr Upawansa Yapa
Mr Christopher Staker
Mr Norman Farrell
Mr Rodney Dixon

Counsel for the Defence

Mr John Ackerman for Zejnil Delalić
Mr Tomislav Kuzmanović and Mr Howard Morrison for Zdravko Mucić
Mr Salih Karabdić and Mr Tom Moran for Hazim Delić
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

THE APPEALS 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"):

BEING SEISED of the "Motion of Appellant, Esad Landžo, for Permission to Obtain and Adduce Further Evidence on Appeal" filed on 27 September 1999 ("Motion");

NOTING the "Prosecution Response to Motion of Appellant Esad Landžo for Permission to Obtain and Adduce Further Evidence on Appeal", filed on 7 October 1999;

NOTING the "Defendant Esad Landžo's Notice of Appeal", filed on 1 December 1998, wherein he sets out his grounds of appeal, which include, *inter alia*, that his right to a fair and expeditious trial pursuant to Articles 20 and 21 of the Statute of the International Tribunal "were violated when verdict and sentence were rendered by a Trial Chamber whose presiding Judge was permitted to sleep through much of the proceedings" ("Fourth Ground of Appeal");

NOTING that, in the Motion, the Appellant contends that an issue arising in relation to the Fourth Ground of Appeal is whether the Appellant should be held to have waived his right to assert this ground of appeal by reason of a failure to raise the issue at trial, and that the Appellant seeks to obtain and adduce further evidence relating to this issue;

NOTING that the evidence sought by the Appellant consists of:

(i) testimony and written records of the Former President of the International Tribunal, Judge Antonio Cassese ("Former President"),

(ii) testimony and written records of the Registrar of the International Tribunal, Mrs Dorothee de Sampayo Garrido-Nijgh ("Registrar"), and

(iii) testimony of a Senior Legal Officer of the International Tribunal, Mr John Hocking ("Senior Legal Officer"), who served with the Trial Chamber during the trial of the Appellant

concerning discussions they are alleged to have had with counsel then appearing for the Appellant;

NOTING that the Appellant wishes also to obtain and adduce further evidence from the Senior Legal Officer in relation to whether the presiding Judge was asleep during the trial;

NOTING that, in the Motion, the Appellant applies to the Appeals Chamber –

(i) to order or request the appropriate official to waive any privilege or immunity in respect of the Former President, the Registrar, and the Senior Legal Officer ("proposed witnesses"),

(ii) to order or request the proposed witnesses to testify by deposition, and

(iii) to order or request the Former President and the Registrar to produce documents;

NOTING that the Office of the Prosecutor ("Prosecution") opposes the Motion and submits that the Appellant is requesting an anticipatory remedy as the parties have not yet filed their submissions on the issue of waiver;

NOTING, however, that both –

(i) in the "Prosecution's Submissions Concerning Esad Landžo's Motion to Preserve and Provide Evidence", filed on 26 February 1999 in response to the Appellant's earlier "Motion to Preserve and Provide Evidence" filed on 4 February 1999, and

(ii) in the "Prosecution Response to Esad Landžo's Second Motion to Preserve and Provide Evidence", filed on 4 June 1999 in response to the Appellant's "Second Motion to Preserve and Provide Evidence" filed on 4 June 1999,

the Prosecution has raised the issue of waiver in answer to the Fourth Ground of Appeal;

NOTING that the Prosecution submits in the alternative that, on the basis that the issue is material to the proceedings, evidence relevant to the issue of waiver should be admitted but that the evidence of the proposed witnesses is not necessary for the disposition of the matter and that the proposed relief is not necessary;

NOTING FURTHER that the Prosecution:

(i) is prepared to accept certain undertakings from counsel then appearing for the Appellant that she met separately with each of the proposed witnesses but that it is not in a position to accept the particulars of the conversations which took place in these meetings,

(ii) would not dispute that the letter dated 18 August 1997, annexed to the Motion in Exhibit 'B', was sent to the Former President by the Appellant and that the letter in response, dated 3 September 1997, and also exhibited to the Motion in Exhibit 'B', was sent by the Former President to the Appellant, and

(iii) would not dispute that the counsel for the Appellant prepared the documents "Motion for Mistrial" and "Cynthia McMurrey's Resignation Under Protest", both exhibited to the Motion as Exhibit C;

CONSIDERING therefore that much of the testimony of the proposed witnesses is rendered unnecessary as a substantial number of the facts sought to be established by the Appellant may be established by the undertakings offered by the Prosecution;

CONSIDERING FURTHER that there is no indication that the Appellant is unable to produce evidence as to any of the remaining matters otherwise than by the testimony of the proposed witnesses, and that counsel then appearing for the Appellant is able to give evidence of such remaining matters;

NOTING the reference made in the Motion to Article 30 of the Statute of the International Tribunal and to the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, ("Convention on Privileges and Immunities") in relation to the immunities enjoyed by the International Tribunal and its officers;

CONSIDERING that, assuming (but not deciding) that the Convention on Privileges and Immunities does apply in respect of proceedings before the International Tribunal, the immunities thereby provided to the proposed witnesses could not, in the circumstances of this case, impede the course of justice and therefore that the appropriate official would not waive those immunities;

BUT CONSIDERING that it is unnecessary in the present case to consider the possible application of the Convention on Privileges and Immunities to proceedings before the International Tribunal, as the matters raised in the Motion can appropriately be resolved by reference to wider legal grounds;

CONSIDERING that a survey of the relevant jurisprudence of municipal legal systems indicates that the general principles of law recognise an adjudicative privilege or judicial immunity from compulsion to testify in relation to judicial deliberations and certain other related matters;

CONSIDERING MOREOVER that it is an inherent quality of an independent judicial institution such as the International Tribunal that it be able to maintain confidentiality in relation to its basic judicial functions, that the independence of judges and other officers of the Tribunal exercising judicial functions should be safeguarded from being drawn into the controversies before it by being

compelled to testify on behalf of any of the parties to proceedings before it, and that judicial deliberations and observations in relation to matters on which the judges are required to adjudicate should not be the subject of compelled evidence before the International Tribunal or exposure in any forum other than the proper forum of published reasons for decision in a particular matter ("fundamental considerations");

CONSIDERING FURTHER that these fundamental considerations would be undermined if those officers of a court or tribunal who assist judges in their judicial functions were compelled to give evidence in relation to their knowledge of those judicial functions or other confidential judicial matters;

CONSIDERING that the discussions of counsel then appearing for the Appellant with the Former President were in substance an application to the then President to exercise his powers in relation to the composition of a Chamber of the Tribunal, and these powers require the complete independence and impartiality of the judge exercising them, evidence as to these matters also falls within the scope of the privilege or immunity;

NOTING that the Appellant seeks the evidence of the Senior Legal Officer regarding his knowledge of the presiding Judge's alleged sleeping in court;

CONSIDERING that the knowledge of an officer of the International Tribunal in relation to his observations of proceedings in open court is also a matter falling within the scope of the privilege or immunity described above;

CONSIDERING (by majority)[1] that the Registrar, in view of her official role at the International Tribunal which includes assisting Chambers and certain functions of a judicial nature, should not be drawn into proceedings before the International Tribunal to give evidence for either of the parties unless such evidence is not available from another source and is otherwise necessary;

AND CONSIDERING that the evidence of the Registrar, for the reasons already given, is not necessary to establish any of the matters sought to be established by the appellant;

---

[1] Judge Riad and Judge Nieto-Navia consider that the Registrar, in view of her official role at the International Tribunal which includes assisting Chambers and certain functions of a judicial nature, should not be drawn into proceedings before the International Tribunal to give evidence for either of the parties except in exceptional circumstances, and that no such circumstances have been established which would make it appropriate for the Registrar to give evidence in this case.

CONSIDERING (by majority)[2] that, although the privilege or immunity described above operates principally to prevent judges and other officers of the court from being compelled to testify, in view of the conclusion that the relevant evidence is available from other sources, and consistently with the fundamental considerations already referred to, it is also inappropriate to request the proposed witnesses to testify;

NOTING Article 16 of the *Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal*, which provides that counsel must not act as advocate in a matter in which they are likely to be a witness except where the testimony relates to an uncontested issue or where substantial hardship would be caused to the client ("Article 16");

CONSIDERING that the effects of Article 16 have been a necessary consideration ever since counsel appearing for the Appellant in the trial was, at his request, assigned as one of two counsel for the Appellant in the hearing of his appeal;

AND CONSIDERING that the operation of Article 16 would cause no hardship to the Appellant, as the co-counsel for the Appellant can present any argument on the Fourth Ground of Appeal;

HEREBY UNANIMOUSLY DISMISSES the Motion.

Done in English and French, the English version being authoritative.

David Hunt
Presiding Judge

Done this 7th day of December 1999
At The Hague,
The Netherlands.

Judge Bennouna appends a Declaration to this Decision.

[Seal of the Tribunal]

[2] Judge Riad and Judge Nieto-Navia consider that, so far as the immunity for judges of the Tribunal against giving evidence is concerned, it is not open to a judge to waive that immunity in order to give evidence voluntarily, but they otherwise agree that it is inappropriate to request the other two proposed witnesses to testify.