



ICTR-98-42-T
12-11-2001
(4843-4839)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 12 November 2001

JUDICIAL RECORDS ARCHIVES
ICTR
2001 NOV 12 15 3: 26
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The PROSECUTOR v. ÉlieNDAYAMBAJE
(Case No. ICTR-96-8-T)
The PROSECUTOR v. Joseph KANYABASHI
(Case No. ICTR-96-15-T)
The PROSECUTOR v. Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI
(Case No. ICTR-97-21-T)
The PROSECUTOR v. Sylvain NSABIMANA & Alphonse NTEZIRYAYO
(Case No. ICTR-97-29-T)

Case No. ICTR-98-42-T

DECISION ON THE PROSECUTOR'S MOTION TO ADD
AND TRANSFER DETAINED WITNESS QBX

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, William C. Matanzima Maqutu and Arlette Ramarosan, (the "Chamber");

BEING SEIZED of the "Prosecutor's Motion to Add and Transfer Detained Witness QBX," filed on 24 September 2001 (the "Motion");

NOTING the "Decision on the Prosecutor's Motion for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses," of 24 July 2001 (the "*Decision to Call Witnesses and Transfer Detained Witnesses*");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rules 54, 73, 73bis(B);

CONSIDERING that pursuant to Rule 73 of the Rules, the Motion will be decided on the basis of the written briefs only, as filed by the Parties.

SUBMISSION OF THE PARTIES

1. The Prosecutor requests leave of the Chamber, pursuant to Rules 54 and 73 of the Rules to add detained witness QBX ("QBX") to her list of Prosecution witnesses, relying on Rule 73bis of the Rules and to transfer him to the United Nations Detention facilities (the "UNDF") in order to testify at trial, pursuant to 90bis of the Rules.
2. The Prosecutor submits that in her Pre-Trial Brief filed on 11 April 2001, she omitted to list QBX as one of her witnesses on her list of witnesses. Thereafter, when granting the transfer of 27 detained witnesses in its *Decision to Call Witnesses and Transfer Detained Witnesses* of 24 July 2001, the Chamber denied the Prosecutor's request to transfer QBX.
3. Nevertheless, the Prosecutor submits that she disclosed, on 15 November 2000, the French original of the redacted witness statements of the said witness and on 4 December 2000, its English version to all six Accused, that is, Nyiramasuhuko, Ntahobali, Nteziryayo, Nsabimana, Kanyabashi and Ndayambaje in this trial (the "Butare Case"). Accordingly, the Prosecutor maintains that the said disclosure gave the Defense sufficient notice of her intention to call QBX.
4. The Prosecutor submits that while regretting the piecemeal fashion of adding one witness, she maintains that the testimony of QBX, who is intended to testify mainly against Nteziryayo, is important to the trial and is in the interests of justice.
5. The Prosecutor draws the attention of the Chamber to the jurisprudence of the Tribunal and, in particular, she makes reference to the definition of the standard by which to add a witness, as articulated in the case of *Prosecutor v. Nahimana, Ngeze, Barayagwiza*, ICTR-99-52-T in the "Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses," of 26 June 2001 (the "*Media Trial*"). Following this standard which was enunciated in the said Trial Chamber's Decision, the Prosecutor maintains that the testimony of QBX is material in proving counts against Nteziryayo, who is co-accused with five others in a large and complex case. This testimony, when given at trial, will not hinder or unduly delay the proceedings.

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6. As regards her request to transfer QBX to the Tribunal, the Prosecutor submits that the conditions laid out in Rule 90bis are satisfied. The Prosecutor relies upon her filing of 13 June 2001 entitled, "Annexe 1, 2 et 3 à la Requête supplémentaire du Procureur aux fins du transfert de témoins détenus en application de l'article 90bis," whereby Witness QBX is listed as one of the witnesses who has satisfied the requirements under Rule 90bis(B) of the Rules (the "Prosecutor's filing of 13 June 2001").

HAVING DELIBERATED

7. The Chamber notes that none of the Defense Teams in the Butare case has responded to this Motion.

The Legal Basis of the Motion

8. The Chamber notes that the Prosecutor brings her Motion pursuant to Rules 54 and 73 of the Rules. Rule 54 of the Rules, a general Rule, provides that "[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the Trial." Rule 73 of the Rules provides *inter alia* that "[a]ny party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the Accused."

9. It is the Trial Chamber's opinion that the Prosecutor's Motion, brought pursuant to Rules 54 and 73 of the Rules, seeking an appropriate ruling on the addition of QBX to her list of witnesses and his transfer to the Tribunal to testify, is properly made thereunder. The Chamber admits the Motion and will now consider the specific requests of the Prosecutor on their merits.

Regarding the Request to Add QBX to the Prosecutor's List of Witnesses

10. The Chamber notes that the Prosecutor makes her request, pursuant to Rule 73bis(E) of the Rules, according to which, "[a]fter commencement of trial, the Prosecutor, if he considers it to be in the interest of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called".

11. In this regard, the Chamber recalls the jurisprudence relied upon by the Prosecutor in the Media Trial *supra* that, "[t]he final decision as to whether it is in the interests of justice to allow the Prosecution to vary its list of witnesses rests with the Chamber." Accordingly, the said Trial Chamber assessed the "interests of justice" and "good cause" before it granted the addition of a witness, which it evaluated in terms of "[t]he materiality of the testimony, the complexity of the case, prejudice to the Defense, including elements of surprise, on-going investigations, replacements and corroboration of evidence [...] the presentation of the best available evidence [...] balanced against the right of the accused to have adequate time and facilities to prepare his Defense and his right to be tried without undue delay."

12. In the instant case, it is noteworthy that the Prosecutor had indeed disclosed the French original and English translation of the statements of QBX to the Defense, well before she filed her Pre-Trial Brief in April 2001, in which she omitted QBX from her list of

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witnesses.¹ Such disclosure is mandatory as prescribed under Rule 66(A)(ii), which provides that, “[t]he Prosecutor shall disclose to the Defense, 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 defense within a prescribed time.” In such a scenario, the Prosecutor need not show good cause for the addition of copies of the statements of QBX, as these have already been disclosed to the Defense. Furthermore, the eventual element of surprise, resulting from late disclosure of the witness statements of QBX, is not present since the Defense has had ample time to study them.

13. The Chamber has also considered the Prosecutor’s submissions that the testimony of QBX is allegedly the best evidence, in particular, against Nteziryayo. The Chamber also notes that, as submitted by the Prosecutor, the testimony of QBX will not unduly prolong the trial, as it should last for only one day.

14. Accordingly, the Chamber is satisfied that adding QBX to the witness list will not prejudice the Defense and that it is in the interests of justice to hear the testimony of QBX. The Chamber, therefore, grants the Prosecutor’s request to add QBX to her list of witnesses, cautioning that the Prosecutor satisfy all her disclosure obligations provided for under the Rules.

Regarding the Request for the Transfer of QBX to the UNDF

15. The Chamber notes that conditions for the transfer of detained witnesses are laid out under Rule 90*bis* of the Rules that, (i) the presence of detained witness is not required for any criminal proceedings in progress in the territory of the requested state during the period the witness is required by the Tribunal, and that (ii) the transfer of witness does not extend the period of his detention as foreseen by the requested state.

16. In the present case, the Chamber notes that the Prosecutor relies on her filing of 13 June 2001 in support of the Motion for transfer of detained witnesses. After perusal the Chamber finds that the Prosecutor has satisfied the conditions laid out under Rule 90*bis* of the Rules. Accordingly, the Chamber orders the temporary transfer of QBX to the UNDF from the time the witness is due to testify at trial and for a period not exceeding two months.

17. Mindful of the practical arrangements necessary for the organization of the transfer of detained witnesses, the Chamber requests from the Prosecutor, in co-operation with the Registry, that it be informed in advance of the date at which this detained witness could in practice come to testify at trial. From this date of transfer, the Chamber decides that the detained witness shall remain at the UNDF for a period not exceeding two months.

¹ This is supported by Attachment I and II to the Prosecutor’s Motion whereby a letter and acknowledgment filed 15 November 2000 and 4 December 2000 proves service through the Registry of disclosure materials in French and English for witness QBX and others in the Butare Case to Counsel for the Defense in the said cases.

AMS

FOR THE ABOVE REASONS, THE TRIBUNAL,

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GRANTS the Prosecutor's Motion to add witness QBX to her witness list;

GRANTS the Prosecutor's Motion to order the transfer of detained witness QBX;

- I. **ORDERS**, pursuant to Rule 90*bis* of the Rules, that the Detained Witness with pseudonym QBX shall be transferred temporarily to the Tribunal Detention Facilities in Arusha from the time when he is due to testify at trial, at a date which has to be subsequently specified by the Prosecutor, and for a period not exceeding two months from the date of transfer;
- II. **REQUESTS** the Government of Rwanda to comply with this order and to arrange for the transfer in liaison with the Registrar and the Tanzania Government;
- III. **INSTRUCTS** the Registrar to:
 - A. transmit this order to the Government of Rwanda and Tanzania;
 - B. ensure the proper conduct of the transfer, including the supervision of the witness in the UNDF, and to;
 - C. remain abreast of any changes which might occur regarding the condition of detention provided for by the requested state and which may possibly affect the length of the temporary detention and, with the shortest delay, inform the Trial Chamber of any such change.

Arusha, 12 November 2001



William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramaroson
Judge

(Seal of the Tribunal)