



UNITED NATIONS
NATIONS UNIES

ICTR-96-10-T
ICTR-96-17-T
12-09-2002
(2314-2310)

2314

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Navanethem Pillay
Judge Andréia Vaz

Decision of: 12 September 2002

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THE PROSECUTOR
v.
ELIZAPHAN NTAKIRUTIMANA
GERARD NTAKIRUTIMANA

Case No. ICTR-96-10-T
and
Case No. ICTR-96-17-T

**DECISION ON THE DEFENCE'S MOTION ON PROSECUTORIAL
MISCONDUCT AND ON THE PROSECUTOR'S COUNTERCLAIM**

Rule 46 of the Rules of Procedure and Evidence

For the Prosecutor:

Mr Charles Adeogun-Phillips
Mr Wallace Kapaya
Ms Boi-Tia Stevens

For the Defence:

Mr Ramsey Clark
Mr David Jacobs

Chr.

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”);

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Navanethem Pillay, and Judge Andréia Vaz (“the Chamber”);

BEING SEIZED OF a Defence motion of 6 May 2002 on “Prosecutorial Misconduct, Request for Full Detailed Disclosure, Request for Witness Protection” (“the motion”);

HAVING CONSIDERED the Prosecution’s “Reply and Counterclaim to the Defence Motion of Prosecutorial Misconduct and for Disclosure of Information”, 28 June 2002 (“Prosecution’s reply” and “Prosecution’s counterclaim”);

HAVING RECEIVED the Defence’s “Response to Prosecutor’s Reply to Defense Motion on Prosecutorial Misconduct”, filed 5 August 2002 (“Defence’s response”);

TAKING INTO ACCOUNT the Registrar’s representations pursuant to Rule 33 (B) of the Rules of Procedure and Evidence;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 2 May 2002, Counsel for the Prosecution commenced his cross-examination of Witness 5 by asking him a series of questions about his identity.¹ He showed the witness two names and asked him whether they were those of his younger brother and father. The witness denied this. Counsel then asked the witness whether he had taken part in attacks at Murambi and Bisesero in April-June 1994 and whether he was wanted by Rwandan prosecutors. The witness denied both propositions. Counsel handed Witness 5 a sheet with three names on it, which names the witness said he did not recognise. Thereupon Counsel asked: “would [it] surprise you if I said that there are allegations that you have been involved in raping those three women?” The witness replied that he was surprised and astonished. Counsel then moved on to other subjects. The Defence objected, and also alleged that Counsel for the Prosecution misstated the evidence and confused the witness.

SUBMISSIONS OF THE PARTIES

2. The Defence complains that Counsel for the Prosecution improperly cross-examined Witness 5 by “accusing” him of being wanted in Rwanda for rape. The effect of the improper questions, according to the Defence, was to slander the witness and destroy his reputation. The Defence also complains that Counsel for the Prosecution repeatedly misstated the testimony of Witness 22 (who was heard before Witness 5) as well as misstating Witness 5’s own testimony in the course of cross-examination of the

¹ Transcripts of 2 May 2002 pp. 156-164.

latter witness. The Defence claims the alleged misstatements had the effect of misleading and confusing Witness 5. The remedy sought by the Defence is full disclosure of the information, if any, on which the "allegations" against Witness 5 were made; additionally, that Prosecution Counsel be sanctioned should it transpire that there was no substantial basis for the allegations, and sanctioned as well for his alleged misstatement of the witnesses' testimony.

3. In reply the Prosecution denies any misconduct and submits that the questions directed at Witness 5 during cross-examination were made on a good-faith basis with the legitimate objective of impeaching the witness's credibility and character and casting doubt upon the accuracy of his evidence-in-chief. In particular, the questions put to Witness 5 were based on confidential information available to the Prosecutor which she believed at the time to be genuine. Disclosure of the identity of its confidential sources would, according to the Prosecution, "not only jeopardize on-going OTP investigations but those of other interested investigative authorities" (para. 26). The Prosecution alleges in its counterclaim that Defence Counsel improperly cross-examined certain Prosecution witnesses, knowingly made false representations in connection with the availability of Defence witness statements, and were unprofessional during the Judges' questioning of Witness 7. The Prosecution calls for the sanctioning of the Defence Counsel.

4. The Defence's response rejects the counterclaim as untimely and adds that improper conduct by one party cannot in any case cancel improper conduct by the other.

5. In his submissions, the Registrar criticized the Defence's use of draft transcripts as supporting material for its motion.

DELIBERATIONS OF THE CHAMBER

6. The Chamber recalls that one of the remedies sought by the Defence in its written motion was dealt with by way of oral decision on 8 May 2002, in which the Chamber gave its reasons for denying the Defence's request to have Witness 5 relocated to another country for security reasons.² The present decision addresses the remaining elements of the motion.

7. The Chamber observes that it is commonplace for a cross-examiner to ask a witness questions about his or her identity. In the present case it appears that the Prosecution had information raising a possibility that Witness 5 was not the person he claimed to be. Questions were put to the witness on that basis. The Chamber will not allow the harassment of any witness and remains alert to signs of discomfort by a witness. It is certainly improper for a prosecutor to accuse a person without foundation. But that was not the conduct of Prosecution Counsel in this instance. He asked questions on what he asserts was a good-faith basis, not in order to accuse but in order to test the credibility of the witness. Witness 5 answered the questions without hesitation and without visible discomfort. Consequently, the Chamber cannot see any basis for criticism in relation to the questions relating to the identity of the witness.

² Transcripts of 8 May 2002 pp. 1-2.

8. As to the Defence's allegation that in continuing cross-examination the Prosecution "repeatedly misstated testimony to mislead and confuse" Witness 5, the Chamber has carefully considered the instances cited by the Defence, as well as the Prosecution's reply on each point, and has concluded that there is no evidence that Counsel for the Prosecution intentionally misstated the testimony of Witness 5 or Witness 22. Testimony is not always clear in its entirety, and Counsel's interpretation of it in those instances complained of was not far-fetched. Witness 5 effectively was given an opportunity to clarify the record, which he attempted to do without any indication that he was being led into confusion.

9. Counsel for the Prosecution also put to Witness 5 that he had been "involved in raping ... three women". The witness answered that he was very surprised and astonished to hear of such allegations. The Chamber observes that Counsel must have a foundation for making such statements, whether they are in the form of questions or allegations. In its reply, the Prosecution stressed that the questions were based "on confidential information available to the Prosecutor as to the witness's antecedents which the Prosecutor had in her possession and which she believed at the time to be genuine" (reply para. 8, see also paras. 12, 14 and 16). Defence has requested that all sources of these elements of information be disclosed. The Chamber agrees with the Prosecution that such materials are to be considered internal working documents and are not, in the present circumstances, subject to disclosure under Rule 70.

10. On 4 September 2002, the Prosecution submitted a memorandum entitled "Ex-parte Disclosure of Confidential Material to the Trial Chamber Pursuant to Rule 66 (C) for consideration along with the Prosecutor's Reply to the Defence Motion for Prosecutorial Misconduct and Disclosure of Evidence filed on 28 June 2002". According to the Prosecution a copy of the memorandum, but not the three enclosures appended to it, should be copied to the Defence. The Chamber notes that this information has been volunteered by the Prosecution without any request from the Chamber. Two of the enclosures were written after the Defence motion was filed. Under these circumstances, the Chamber does not find it appropriate to receive the memorandum or its three enclosures and has returned them to the Prosecution. In the Chamber's view, the Prosecution has not provided a sufficient basis for the allegation that Witness 5 was involved in the rape of three women.

11. The Chamber does not exclude that Counsel for the Prosecution felt that he acted in good faith, but emphasizes that Counsel must be cautious and not make grave allegations against a witness without sufficient foundation. This also applies to witnesses testifying under pseudonyms. It is also noted that the line of questions under consideration here was limited to a minimum by the Judge presiding at the hearing and that the witness simply rejected the allegation without showing any sign of stress or discomfort. Counsel's conduct was not such as to attract a warning under Rule 46 of the Tribunal's Rules of Procedure and Evidence, which is a precondition for the imposition of sanctions pursuant to that provision.

12. The Chamber finds that the Prosecution's counterclaim has no merit. It retrospectively raises complaints about matters going back many months, which should

have been dealt with, if at all, closer to the time of the alleged misconduct. The fact that they were not raised, or, as was the case with one matter, raised and then withdrawn, means that they cannot have weighed heavily with the Prosecution at the time of the conduct.

13. Turning finally to the Registrar's representations, the Chamber reiterates that the "uncertified rough draft transcripts cannot be quoted in any pleading or for any other purpose and may not be filed with any court". This follows explicitly from the disclaimer printed on draft transcripts provided by the Registry shortly after the daily proceedings as a matter of courtesy and as assistance to the parties and the Chamber. Even if the Defence felt that the interests of justice were served by filing its motion as quickly as possible (Defence's response pp. 10-11) it could have approached the Registry with a view to obtaining the final transcripts as a matter of urgency.

FOR THESE REASONS THE CHAMBER

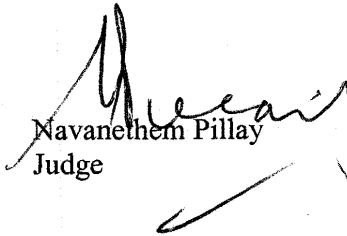
DENIES the Defence's motion;

DENIES the Prosecutor's counterclaim.

Arusha, 12 September 2002



Erik Møse
Presiding Judge



Navanethem Pillay
Judge



Andréia Vaz
Judge

(Seal of the Tribunal)

