ICTR-01-72-A
22-07-2009
(751/A - 744/A)

751/A

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

United Nations
Nations Unies

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, *Presiding*
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr Adama Dieng

Date of filing: 22nd July 2009

Simon Bikindi, the Appellant

v.

The Prosecutor, the Respondent

DEFENCE REPLY RE THE ADMISSION OF ADDITIONAL EVIDENCE ON BIKINDI'S SENTENCE

Counsel for Simon Bikindi.
Andreas O'Shea

Office for the Prosecutor
Hassan Bubacar Jallow
Alex Obote-Odora
Dior Fall

A. The assertion that the material cannot qualify for consideration under Rule 115 and that there is therefore no basis for the motion.

1. In the Prosecutor's Respondent's Brief the respondent made the following observation with respect to the national legislation annexed to the Appellant's Brief and forming the foundation of the appellant's motion for admission of evidence:

> The Prosecutor notes at the outset that the seven documents appended as "Annexure" to the Appellant's Brief are not properly filed before the Appeals Chamber. These documents are not part of the trial record and have been presented on appeal for the first time. This is impermissible. Rule 115 requires the Appellant to file a motion, should he wish to proffer any additional evidence on appeal, which the Appellant has not done. The seven documents should therefore not be considered and the arguments they purport to support on appeal should be rejected forthwith.[1]

In its 'Prosecutor's Response to "Defence Motion to Admit Additional Evidence on Sentencing"', he entirely reverses his position and states:

> The Prosecutor concurs that "national legislations and judicial decisions are not evidence stricto sensu, which can fall within the ambit of Rule 115 as much as they are referred to as mere authorities to support a party's submission
>
> The Appellant already placed the documents containing the proffered legal provisions from different countries, including Bulgaria, Canada and Ethiopia, to support his appeal against sentence. He also addressed in his defence reply brief, the Prosecutor's position at paragraphs 158 and 159 of the Prosecutor's Respondent's Brief.
>
> In these circumstances, the Appellant did not have to file a 115 application for the admission of such material that cannot properly be referred to as "'additional evidence'"[2]

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[1] Prosecution Respondent's Brief, para 19.
[2] Prosecution Response to "Defence Motion to Admit Additional Evidence on Sentencing" ('Prosecution Response'), paras 3-5.

2. The question which now arises is whether this inconsistent position as between the Prosecutor's Respondent's Brief and its response to the appellant's motion is determinative of the matter such as to render the appellant's motion moot. While there appears no longer to be any dispute as between the parties on this issue, it remains unclear how the Appeals Chamber will view the status of the documents in question. In the absence of an authority clearly determining this issue, it cannot be said that the initial position taken by the Prosecution is not a live issue.

3. The question of whether the Tribunal has the power to take into account national law and the question of whether it is admitted into the proceedings as law or fact for the purpose of that determination are distinct issues. In some jurisdictions the determination of foreign law is treated as a matter of fact requiring evidence.[3] There is nothing in the Statute or Rules of Procedure and Evidence which determines the status of documents containing national legislation and judicial decisions, in terms of whether they should be treated as evidence of a fact: i.e. the legal position in national jurisdictions to be admitted, or accepted as a category of law which may be freely referred to in the course of submissions. There may be a distinction to be drawn here between the national laws outside Rwanda, which have no specific frame of reference in the Rules and Rwandan court decisions which form part of Rwandan sentencing practice, specifically referred to in Rule 101(B)(iii) of the Rules of Procedure and Evidence.

4. The respondent in its response states the issue as being beyond dispute on the basis of the appellant's observation that Rule 115 itself requires reference to the finding of fact to which the evidence is directed. This assists in determining what the rule was designed to deal with, as earlier submitted by the appellant. It does not however necessarily exclude its application to situations where one is not dealing with a finding of fact. It merely provides an

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[3] In an English court, for example, 'subject to certain exceptions, foreign law is a question of fact which must be specifically pleaded by the party relying upon it, and must be proved to the court': *Halsbury's Laws of England*, Fourth Edition, vol. 8, para 794

indication that the drafters did not foresee situations where there would not be a finding of fact to which additional evidence relates. Taking a purposive approach, the rule may possibly be read as requiring that where the additional evidence is directed at the determination of a fact, then that fact must be clearly identified. It is not uncommon for Rules to require a purposive reading to deal with situations not envisaged at the time of drafting, though for other reasons deemed to be falling under the Rule. The respondent therefore made an arguable point, although it is not one with which the appellant accepts. It is just that if there is room for argument the appellant is obliged to deal with it in order to protect his position in the event that his primary submission is incorrect.

5. While the parties now appear to agree on their primary submission in this respect, it remains an important issue yet to be finally determined judicially. If the Appeals Chamber disagrees with both parties and finds, as is the case in some jurisdictions, that documents containing national legislation and judicial decisions proffered in support of submissions on sentencing are to be treated as matters of fact requiring evidence rather than matters of law before its jurisdiction, then the issue of compliance with the conditions set out in the rule remains a live issue to be determined. However, if the Appeals Chamber agrees with the current position of both parties, then the Appeals Chamber may confirm that it is in a position to consider the documents, but not under Rule 115, and thus declare the motion for the admission of additional evidence as moot.

6. The appellant takes the position that however the documents in question are categorised, it is in the interests of justice that they be considered in his appeal. Having heard the first submission of the respondent and not knowing the position of the Appeal's Chamber, the appellant is caught between a rock and a hard place. If he gambles that his interpretation of the Rule is correct and does not file a motion, the potential consequences for his case, if he is wrong, are serious. It could mean exclusion of the documents for non-compliance with the directive in Rule 115 to file a motion and the appellant may not know this until it is too late: at the time of judgment. It is therefore reasonable to file

a motion in compliance with Rule 115 to preserve his rights in the event that the Appeals Chamber considers documents containing national law to be evidence relating to a question of fact.

B. The assertion that the appellant has no right to put a motion in the alternative

7. The respondent contends that there is something wrong or abusive about putting in a motion as an alternative basis for one's case.[4] He cites no authority for this proposition.

8. What the appellant is seeking to do is to ensure that the said documents are considered, how ever the Appeals Chamber ultimately categorises them. It is of no concern to his case under which rule the documents are considered but the rules make a division. Rule 115 only requires a motion if the documents constitute evidence, not if they are treated as matters of law. The appellant sees nothing wrong or unusual about pleading his case in the alternative so as to preserve the rights of the defendant in the event that his primary position is not sustained. It is submitted that a party is entitled to plead his case in the alternative where the relief he seeks is satisfied in both alternative scenarios. He should not be required to gamble with his substantive rights and choose to only deal with one legal scenario because the rules provide for different procedures for each. Where the manner in which the alternative positions of a party are placed before the Chamber, as in this instance, depend upon procedural directives, justice dictates that it should be assumed that his ability to put his case fully and protect his rights are not removed by such directives.

9. The appellant invites the Chamber to consider the hypothetical situation where Rule 115 required an oral motion at the appeal hearing. At that hearing, this appellant would submit that he can refer to the documents containing national law as legal guidance, but would then submit in the alternative that if the

[4] Prosecution Response, para 6.

Chamber was of the view that the documents related to matters of fact then the conditions under Rule 115 were fulfilled in so far as they applied to the situation at hand. The respondent would probably not suggest in that case that the appellant was not allowed to plead his position in the alternative. After all he does it himself in his response when having submitted that there was no basis for the appellant's motion, he then goes on to consider whether the conditions of Rule 115 are fulfilled.[5]

10. In this case, it is only the procedural framework in the Rules which leads to a situation where for the appellant's primary submission, no motion is required, but for his alternative submission a motion is required. No complaint would be made if alternatives sat the other way round and the ability to plead in the alternative should not depend on that.

11. It might rather be arguably abusive to deliberately evade a requirement under a rule in order to wait and see whether his primary interpretation of the rule is correct and then attempt to comply with the rule belatedly once the judges had expressed their views on the matter against that position and excluded the evidence on that basis. In the absence of clear authority it cannot be inappropriate to recognise that the Appeals Chamber may take a different view from one's own position and thus protect one's rights by filing a motion as an alternative position if required to do so under the Rules in the event that one's primary position is incorrect.

C. Non-availability at trial

12. Having described the appellant's motion as having no foundation in Rule 115, the respondent then proceeds to make his alternative submission on the question of availability at trial and states that there is no exception to this condition. While no exception is expressly provided for in the rule, it is submitted that the application of the condition must be viewed in the light of the circumstances of the case. The issue which the documents in question go

[5] Prosecution Response, paras 7-18.

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to is the Trial Chamber's finding that a sentence of 15 years imprisonment was appropriate on the facts.[6] While the documents existed before the judgment, this finding was not known at that time. Nor was it anticipated that the Trial Chamber would refer to the fact that under Rwandan law the offence of genocide carries a sentence of life imprisonment without referring to how incitement has been treated in the courts in Rwanda or how direct and public incitement has been treated in other jurisdictions. These factors should be taken into account in assessing the issue of due diligence.

13. Parties are in fact expected to select what they place before the Trial Chamber in order to facilitate the expeditiousness of the trial. One must remember that the parameters of the extent of evidence which should be brought in relation to sentencing issues are even more limited. Indeed, counsel was in fact encouraged not to bring too much evidence on the question of mitigation. Moreover, in this case the appellant was charged with a number of crimes and it could not be known whether one or all of them would be taken into account in the sentencing process and on the basis of which combination of facts. There is a limited extent to which the appellant could be expected to allocate time and resources to producing documents relevant to all the alternative scenarios of sentencing. Evidence which may not have been so important as compared to other evidence during trial when the defendant was facing multifarious charges may become highly significant in the appeal in the light of how the judgment was framed. The appellant had a reasonable expectation on the basis of the evidence that if he was acquitted for the killing of Father Gatore in June 1994 on the basis that this killing occurred in April 1994, that the evidence of AKK could not be relied upon to establish his guilt for direct and public incitement, and that he could not be convicted on the basis of AKJ's evidence considering the complete lack of clarity in the time of the offence.[7] These are matters that are the subject of this appeal. The appellant reasonably took the view that the other incidents of direct and public incitement mentioned in the indictment would stand or fall with the credibility of witnesses placing murders at his door. Accordingly the appellant had good

[6] TC Judgment, p.109-110 at paras 446-8.

[7] See Defence Appellant's Brief, paras 10-17.

reason not to foresee the possibility of a conviction and sentence based upon a single incident of direct and public incitement to commit genocide and unconnected to a conviction for crimes against humanity or genocide.

14. So, it is submitted that the evidence in question could not necessarily have been expected to have been brought before the Trial Chamber applying the criteria of due diligence.

D. Miscarriage of justice

15. The submissions of the respondent overlook the fact that regardless of the issue of availability at trial, it is the appellant's submission in his appeal that these national laws should have been taken into account. It is submitted that had they been taken into account they would have been instrumental to the determination of an appropriate sentence. It is therefore in the interests of justice to consider their content.

E. Relevance to the proceedings

16. The respondent bases his arguments on relevance on his own submission that there was no obligation on the part of the Trial Chamber to have regard to the provisions of national law.[8] However, the ultimate issues in dispute under the second ground of appeal in the appellant's Appeal Brief, to which the national legislation is directed is first whether on the facts of this case the Trial Chamber was obliged to have regard to global trends in sentencing for the crime of direct and public incitement to genocide, and second whether under the first ground of appeal the sentence was disproportionate to the offence. It is submitted that these documents must be relevant to these issues.[9]

Andreas O'Shea

Counsel for the appellant 22nd July 2009

[8] Prosecution Response, para 9.

[9] See Defence Appellant's Brief, paras 116-121.

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Dates:	Transmitted: 22-07-2009		Document's date: **22 July 2009**	
No. of Pages:	7	**Original Language:** ☒ English	☐ French	☐ Kinyarwanda
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