ICTR-01-72-A
22-07-2009
(759/A - 752/A)

759/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 TAKING OF JUDICIAL NOTICE and/or ADMISSION OF ADDITIONAL EVIDENCE

Counsel for Simon Bikindi.
Andreas O'Shea

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

758/A

A. The issue of relevance

1. The respondent claims that the facts as set out in paragraph 21 of the Defence Motion are irrelevant to the issues on appeal.[1] According to the respondent these facts 'cannot in any way support the speculative contentions that he could not have committed the offence "in the manner alleged"'.[2]

2. This submission misrepresents the appellant's argument and by doing so attempts to reverse the burden of proof. This evidence is not, contrary to the respondent's contention, directed at proving that the appellant *could not* have committed the offence in question but to introduce a significant factor into the question as to the likelihood of the offence being committed by this accused in such circumstances. The accused in a criminal trial does not have to prove that he could not have committed an offence. He only has to raise a reasonable doubt with respect to the allegation against him. Taken together with other evidence before the Trial Chamber, it therefore contributes to raising a reasonable doubt over the prosecution case.

3. Furthermore, the respondent is essentially saying that this evidence would not meet the burden and standard of proof required, but again this is a separate issue from that of relevance for the purpose of admission under Rule 115. Evidence may be relevant to an issue for the purposes of admission into the proceedings, but the question as to whether it is sufficient in isolation or together with other evidence to raise a reasonable doubt is a distinct question which comes later. To be relevant for the purpose of admission, evidence only needs to have probative value.

4. The presence and movement of United Nations armed personnel in the very zone and on the very route and around the time when it is alleged that the appellant was moving along with a convoy of buses of *interhamwe* calling for the killing of Tutsi, and the killings which follow, is naturally probative to the

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[1] Prosecutor's Response to To "Defence Motion to Take Judicial Notice and/or Admit Additional Evidence" ('Prosecutor's Response'), para 14.
[2] Ibid., para 4.

question whether this particular appellant would have taken such a step. It is also probative as to whether political meetings would have been permitted at Kayove, lying on the route to Kibuye where the troops were heading. The fact that peacekeepers were in that particular location of Rwanda at that time, taken together with other evidence led on the time of killings in Gisenyi and the time when Hutu fled to Goma, is further probative as to the question whether the incitement and killings in that area had not already taken place at an earlier time as suggested by defence evidence.[3]

5. The reference to the speculative nature of the contention is misplaced in the appellant's submission. Naturally, there is no way to disprove that an offence could have been committed. A party is perfectly entitled to present evidence which shows that an event is more or less likely having regard to the character and position of the accused as well as the circumstances at the time.

6. The respondent then addresses specific facts as to their relevance, but the facts of course need to be viewed together in that respect. With respect to the fact that Operation Turquoise consisted of French and Senegalese troops, the respondent adds the word 'only',[4] but this is not part of the fact that the appellant seeks judicial notice of. There is no suggestion that the word 'only' should be there. All the appellant seeks to establish is that these troops came from countries outside Rwanda and were not confined to French troops. This is relevant to establishing their having no close connection to the politics or killings within the country. It can further be said to be relevant to the issue of ineffective assistance of counsel since these matters should have been put to the witness AKJ.[5]

7. With respect to the zone of operation from 22 June 1994, the movement from Goma to Kibuye as mentioned in sub-paragraph (a) of paragraph 3, page 3 of report 794, annexed to the respondent's response, necessarily takes these troops along the same route as Bikindi in the allegation. The road to Kibuye

[3] See Defence Appellant's Brief, paras 42-48.
[4] Prosecution Response, para 5.
[5] See Defence Appellant's Brief, Ground Five of appeal.

from Goma runs from Goma to Pfunda junction through the commune of Nyamyumba to Kivumu sector and then onto Kayove commune in the direction of Kibuye prefecture. This is a matter which was established by the site visit, and the point is therefore closely interconnected to the appellant's complaint about the recording of the site visit.[6] It is further demonstrated by the statement of and sketch map drawn up by the defence assistant, Celestin Buhuru, and annexed to the Defence Appellant's Brief as Annexure "F", and partially re-annexed to the Confidential Motion to Admit Additional Evidence on Events Relating to Kivumu.[7] Mr Buhuru will be available at the hearing to explain this route, its exclusivity and the movements he took himself. The appellant hereby requests the respondent to stipulate as to which facts in the statement which he agrees with.

8. This evidence of the geography and route allegedly taken by Bikindi has only become necessary because of the failure of the Trial Chamber to provide an adequate record of the site visit.[8] One of the purposes of this visit, initiated by the defence, was to establish the route running from Goma to Kayove in the direction of Kibuye. The route was taken as far as Kivumu and the prosecution did not contest the assertion made by the defence at the site visit that this route continued onto Kibuye prefecture. The respondent is in a position to assist the Appeals Chamber by fairly admitting the nature and progression of this route, about which it is of course very well aware being an essential aspect of its case. There is nothing confusing about this information to the respondent and instead of blurring the issue by asserting that the quoted document merely establishes four main routes followed by Operation Turquiose, it should provide assistance to the Appeals Chamber by agreeing the geography with the defence and making appropriate admissions to the Appeals Chamber, which has not seen the location. This includes the fact that the route running from Goma to Kibuye is the same route which takes one through Kivumu sector and Kayove commune. It is misleading to state that there is no evidence

[6] See Defence Appellant's Brief, paras 44-45.
[7] See Defence Motion
[8] See Defence Appellant's Brief, paras 44-45.

that there were troops deployed along the road between Kivumu and Kayove,[9] when these locations are on the route specified in the report. It is obvious that the available United Nations documents will not mention every sector and commune falling along the road. The appellant should not be placed in an impossible position.

B. Rule 115: availability at trial

9. The appellant's alternative submission to the taking of judicial notice was the admission of additional evidence under Rule 115.[10] The respondent takes an unduly restrictive view of Rule 115 by its suggestion that the mere fact that evidence was raised before the Trial Chamber means that it cannot constitute evidence for the purposes of appeal.[11] The Trial Chamber refused to take judicial notice of the evidence, so it was not available at trial for consideration. The issue of due diligence does not arise because the evidence was found at the time of the trial although late in the process. In the appellant's submission it was not too late to request the taking of judicial notice under Rule 94. This of course forms part of the appeal.[12] The fact that the appellant is employing different arguments to ensure that this material is before the Appeals Chamber is no obstacle to its admission under one or other head, as it is in the interests of justice that the material be considered. Nor is it impermissible, as suggested by the respondent, for the appellant to remedy failings at the trial level,[13] whoever's fault, if it is in the interests of justice to do so and it may prevent a continuing miscarriage of justice against the appellant. The respondent cites no authority for that proposition and in the appellant's submission, since this evidence was not treated at trial level despite being brought to the attention of the Trial Chamber, this does not reach the level of attempting to turn the appeals process into a trial *de novo*.

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[9] Prosecution response, para 8.
[10] Defence Motion, para 3.
[11] Prosecution response, para 11.
[12] Defence Appellant's Brief, paras 42-48.
[13] Prosecution response, para 12.

10. The appellant does not need, as suggested, to show that the Trial Chamber was incorrect in its decision to refuse to take judicial notice for the purposes of this motion,[14] because the application is at this stage requesting the Appeals Chamber to take judicial notice of facts, not the Trial Chamber. The reasons for the appellant's submission that the Trial Chamber wrongly refused to take these facts into account, as well as the reason for not appealing that decision, form part of the appellant's appeal brief[15] and is incorporated here by reference in so far as the Appeal's Chamber deems it relevant to the issue in this motion.

C. Rule 115: Specific findings of fact

11. The respondent prays the Appeals Chamber to reject the motion for technical reasons involving alleged non-compliance with Rule 115 and the Practice Direction on Formal Requirements for Appeals from Judgments.[16] He suggests that on this basis the motion should be dismissed without detailed consideration of the merits, thus impliedly inviting the Appeals Chamber to disregard the interests of justice and ignore the substantive rights of the defendant in favour of strict compliance with procedural requirements.

12. The respondent alleges that the appellant does not propose any specific arguments to show how each of the proffered facts, or the evidence contained in the supporting documents, relate to a specific material fact or an essential element of the offence for which the Appellant was convicted.[17] While the appellant does not take each fact one by one and relate it to a specific material fact, he does provide argument as to how the issue of the presence and movement of troops from Operation Turquoise relates to the Chamber's finding of fact, found at paragraph 281 of the Judgment, that the appellant did incite genocide on the road between Kivumu and Kayove towards the end of

[14] Prosecution response, para 13.
[15] See Defence Appellant's Brief, paras 44-46, and especially Defence Appellant's Reply, at paras 27-29.
[16] Prosecution response, para 15.
[17] Ibid.

June 1994.[18] While the appellant identifies this fact by reference to the likelihood of the offence being committed by the appellant in the circumstances alleged, it is plain that the above finding of fact is what is being referred to. This specific finding of fact contains the elements of commission by the appellant, the incitement to genocide, that this took place on the road between Kivumu and Kayove and that this occurred towards the end of June 1994. In case of doubt, it is hereby confirmed. The relevance of the facts in question is fully explained in the motion and this reply.

13. In so far as the appellant has not strictly complied with the procedural requirements as set out in Rule 115 or the said Practice Direction, the appellant submits that such non-compliance is *de minimus* in nature in the light of the fact that the essential issue is outlined and the matter is further clarified in this reply. If there is any failure in the appellant's expression of the identification and explanation with respect to the relevance in relation to findings of fact, it is submitted it must be viewed as more a question of form and style than substance.

14. Accordingly, in no circumstances should it be employed as the basis for excluding the consideration of material relevant to the issues in this appeal and the determination of an injustice done to the appellant, as proposed by the respondent. It is submitted that such an approach would be contrary to the interests of justice.

D. Miscarriage of justice

15. It is suggested by the respondent that the facts in question could not and would not have been a decisive factor in the appellant's conviction.[19] It is submitted that its relevance has been demonstrated and that it could and would have been a decisive factor in establishing reasonable doubt, taken together with a plethora of other evidence establishing the unlikelihood of Bikindi going into the hills of Nyamyumba and as far as Kayove to incite killings in late June

[18] Defence Motion, paras 25-26.
[19] Prosecution Response, para 16.

1994, some of which was not properly considered by the Trial Chamber and forms part the premise of this appeal.

Andreas O'Shea

Counsel for the appellant 22nd June 2009

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