ICTR-99-50-A
12-11-2012
(1361/A - 1354/A)

1361/A

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

IN THE APPEALS CHAMBER

NO. ICTR-99-50-A

BEFORE: The Hon. Theodor Meron, Presiding
The Hon. Patrick Robinson
The Hon. Liu Daqun
The Hon. Andresia Vaz
The Hon. Bakhtiyar Tuzmukhamedov

Acting Registrar: Pascal Besnier

Date: 12 November 2012

JUSTIN MUGENZI AND
PROSPER MUGIRANEZA

VS.

THE PROSECUTOR

PROSPER MUGIRANEZA'S REPLY TO THE PROSECUTION'S RESPONSE TO PROSPER MUGIRANEZA'S AND USTIN MUGENZI'S MOTIONS UNDER RULE 68 AND FOR THE ADMISSION OF EVIDENCE PURSUANT TO RULE 115EMERGENCY MOTION FOR ADMISSION OF EVIDENCE

FOR THE PROSECUTION:

Mr. Hassan Bubacar Jallow
Mr. James R. Arguin
Mr. George W. Mugwanya
Ms. Evelyn Kamu
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FOR THE DEFENCE:

Kate Gibson and Christopher Gosnell, for Justin Mugenzi
Tom Moran and Cynthia J. Cline for, Prosper Mugiraneza

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I. INTRODUCTION

1. The Prosecutor's position in arguing against admission of evidence pursuant to Mugiraneza's two Rule 115 motions qualifies it for a chutzpah award such as those given by the United States Court of Appeals for the Federal Circuit.[1] The sum and substance of the Prosecutor's argument is that while it failed to disclose (for whatever reason) exculpatory evidence until literally days before the appellate argument in this case, Mugiraneza should not be allowed to introduce evidence adduced by the Prosecutor in other cases which are relevant to his defence.

2. The Prosecutor's reliance on negligence and mistake for its failure to disclose exculpatory information pursuant to Rule 68 gives a new definition to chutzpah in light of the position it has taken before this Chamber in the past.[2] In that interlocutory appeal, the Prosecutor complained of witness protection measures limiting disclosure of confidential defence information to the immediate prosecution team. The reason given and adopted by this Chamber was so that the OTP is an undivided unit which needed access to confidential defence information to comply with its Rule 68 obligations.

3. Finally, the Prosecutor's position that CHK's testimony was available to Mugiraneza by the use of due diligence gives Chutzpah a new meaning.[3] In view of the Prosecutor's position in 2005 that it was a unitary unit requiring access to defence information in all cases so it could comply with its Rule 68 obligations, the Prosecutor seems to argue that all defence teams have a duty to examine all open session transcripts in all trials looking for exculpatory information.

4. The Prosecutor's failure to make timely disclosure is especially wrongful given the history

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[1] *Refac International, Ltd. v. Lotus Development Corp.,* 81 F.3d1576, 1584 (Fed. Cir. 1996), *citing Checkpoint Systems, Inc. v. United States International Trade Commission,* 54 F.3d 756, 763 (Fed. Cir. 1995).

[2] *Prosecutor v. Bizimungu,* Decision on Prosecutor's Appeal of Witness Protection Measures, No. ICTR-99-50-AR73 (16 November 2005), para. 4.

[3] The classic definition of chutzpah is that quality of a man, having been convicted of killing his father and his mother throws himself on the mercy of the court because he is an orphan. Leo Rosten, *The Joys of Yiddish* at 92 (1968).

of this case.[4] Since neither the Prosecutor nor any accused has appealed that portion of the judgment, it is final and constitutes law of the case.

II. THE PROSECUTOR'S RESPONSE IS NOT TIMELY

5. The Rules of Procedure and Evidence do not set time limits to reply to motions. Rule 115 does set a deadline for supplemental briefing. Therefore, the Appeals Chamber should look to Rule 73(E), giving parties five days to respond to motions.

6. In the instant case, Mugiraneza's first Rule 115 motion related to Witness CHC was filed on 5 October 2012 and distributed to the Appeals Chamber and the parties by the defence on that date. The second Rule 115 motion was filed on 7 October and distributed by the defence to the Appeals Chamber and the parties on that date.

7. It follows directly that the Prosecutor's responses were due on 11 October and 12 October 2012. The Prosecutor's response is dated 5 November 2012 and the e-mail distributing it to Mugiraneza's counsel is dated 5 November. The Prosecutor has not filed a motion for leave to file an out-of-time response. It did not file a timely motion for extension of time to file its response.

8. For these reasons, the Appeals Chamber should strike the Prosecutor's response.[5]

III. MUGIRANEZA EXERCISED DUE DILIGENCE

9. The Tribunal's various Trial Chambers conducted literally dozens of trials, often with two or three being conducted at the same time. These trials resulted in literally tens of thousands of pages of transcript.[6] It is unreasonable to expect defence counsel to either attend every open session of all trials or to read every page of open session transcript in all trials.

   a. The cost to the Tribunal for defence staff to attend every trial would be excessive in the extreme. The time expended on reading those transcripts and the expense of

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[4] *See Prosecutor v. Bizimungu,* Judgment, No. ICTR-99-50-T (30 September 2011), paras. 119-177.

[5] Mugiraneza's reply, filed 11 November 2012, is timely in that it is filed on the next working day after the fifth day after the Prosecutor's response was filed. Rule 7*ter*(B)

[6] Undersigned counsel's data base of the transcript in the *Government II* case contains more than 30,000 pages of record.

providing defence counsel in Arusha to attend all sessions of all trials would incredibly expensive and a severe waste of United Nations funds.

b. As applied to CHK, it appears Mugiraneza was without counsel at the time of his testimony. The evidence related to CHC sought to be admitted is in a transcript of testimony of 29 May 2002. While Mugiraneza has been unable to locate the Registrar's decision removing prior counsel and the decision assigning current counsel, he believes that he was not represented by counsel on that date.[7] Therefore, Mugiraneza could not have sent a representative to the case because he did not have one.[8]

c. As applied to the testimony of Augustin Ngirabatware, that testimony was received in the interim between final arguments in the *Government II* case and delivery of the Trial Chamber's judgment. During that period, Mugiraneza's legal team was not authorized to go to Arusha and had no reason to do so.

10. Conversely, the Prosecutor has representatives at all trial sessions, both open and closed session. The Prosecutor receives transcripts of every trial session, both open and closed. The unitary Office of the Prosecutor had possession of all of the relevant exculpatory material.

11. While the Prosecutor asserts that Mugiraneza failed to use due diligence,[9] it fails to suggest what Mugiraneza could or should have done in the exercise of due diligence to find this evidence. Further, if the Prosecutor's claims of good faith in failing to disclose the exculpatory information[10] is truthful, the Office of the Prosecutor with its much greater access to data from other trials was unable to locate it, presumably while exercising due diligence to meet its Rule 68 obligations. Mugiraneza, with fewer resources that the

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[7]*See* Tr. (5 April 2002) 20-24 (Closed Session).

[8]The Prosecutor also argues that since Ntagerura was a defence witness the defence presumably reviewed all of the evidence at Ntagerura's trial. Prosecutor's Response, para. 41. However, neither Mugiraneza nor Mugenzi called Ntagerura as a witness. He was called by Casimir Bizimungu, a person who is not a party to this appeal. *See* Judgment, page 318.

[9]Prosecutor's response, para. 39.

[10]Prosecutor's response, paras. 3-7.

Prosecutor cannot be said to have failed to use due diligence when the Prosecutor had representatives in both trials and copies of each transcript in its possession.

12. The Prosecutor's position that Mugiraneza did not exercise due diligence is amazing in view of its failure to comply with Rule 68 in long delays – in the case of CHC, more than a decade – in disclosing exculpatory evidence. This delay, almost a year after the Trial Chamber judgment was delivered, is amazing in view of the Trial Chamber's treatment of the Prosecutor's Rule 68 violations in its judgment.[11]

IV. THE PROSECUTOR MISAPPLIES OR MISUNDERSTANDS *ALEKSOVKI* AND RULE 67(A)

13. In its response, the Prosecutor again seems to assert that Mugiraneza failed to comply with Rule 67(ii) by failing to give notice of the issue of duress and failed to raise it at trial.[12] The Prosecutor is wrong on both counts.

A. Duress is not a Rule 67(A) Special Defence

14. The leading case in the *ad hoc* Tribunals on duress is *Erdemovic*. The Trial Chamber judgment shows on its face the duress defence was first raised at the time Erdemovic entered his guilty plea.[13] Neither the ICTY Trial Chamber nor the Appeals Chamber mentioned a requirement for prior notice of a duress defence.[14] The *Erdemovic* Trial Chambers and Appeals Chamber did not consider duress to be a Rule 67 special defence. The Prosecutor offers no argument why the Appeals Chamber at the end of the Tribunals' lives should make

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[11]*See Prosecutor v. Bizimungu,* Judgment, No. ICTR-99-50-T (30 September 2011), paras. 119-77. Because that portion of the Trial Chamber's judgment was not appealed, it should constitute law of the case. It is final.

[12]Prosecutor's Response, para. 16.

[13]*Prosecutor v. Erdemovic,* Sentencing Judgment, No. IT-96-22-T (29 November 1996), para. 10. The ICTY Rule in effect on the date of the judgment required notice of special defences as well as notification of the witnesses who would present evidence for the defence. ICTY Rules of Procedure and Evidence 67(A)(2)(a)(ii) (Revision 9 1996).

[14]The ICTY rules in effect on the date of the *Erdemovic* judgment required disclosure not only of special defences but the identity of witnesses who would present testimony in support of it. ICTY Rules of Procedure and Evidence, R. 67(A)(2)(a) (Revision 9 1996).

such a chance to what has been the law almost since the birth of the Tribunals.

B. *Aleksovski* Distinguished

15. The Prosecutor also relies on *Aleksovski* for the proposition that the duress defence cannot be raised the first time on appeal.[15] It is correct in this assertion.

16. However, the Prosecutor is wrong on its facts. Mugiraneza raised the issue of duress before the Trial Chamber.[16] The issue was joined before the Trial Chamber and decided by it, albeit only as to sentencing.[17] It follows that the Prosecutor's argument is frivolous and without merit.

C. This Motion Is Not a Vehicle To Reargue the Prosecutor's Case

17. Much of the Prosecutor's argument on duress is nothing more nor less than a reargument of its earlier arguments in its appellate brief. A Rule 115 motion is not the proper vehicle for reargument of legal issues already before the Appeals Chamber.

V. REQUIREMENTS FOR ADMISSION PURSUANT TO RULE 115

18. In arguing against admitting the evidence mixes the Rule 68 with the requirements of admissibility under Rule 115. For example, the Prosecutor spends much of his response arguing that CHC's testimony was not exculpatory or of limited probative value and their nondisclosure presented no material prejudice.[18]

19. Rule 115 does not require that additional evidence be either exculpatory or that the Prosecutor's failure to disclose prejudiced the accused. Rule 115(B) requires that it only be 1) unavailable at trial; 2) relevant and credible; and 3) that this Chamber determine if it *could* have been a decisive factor in the Trial Chamber's decision.

20. CHC's testimony was in the hands of the Office of the Prosecutor for more than a year

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[15]Prosecutor's response, para. 16, citing *Prosecutor v. Aleksovki,* Judgment, No. IT-94-14/1-A (24 March 2000), para. 51.

[16]*Prosecutor v. Bizimungu,* Prosper Mugiraneza's Corrected Closing Brief (24 November 2008), paras. 592-600. RP 31263-65.

[17]*Prosecutor v. Bizimungu,* Judgment, No. ICTR-99-50-T (30 September 2011), paras. 2012 and 2018.

[18]Prosecutor's response, pg. 6.

before Mugiraneza's trial commenced. It learned of the contents of Ngirabatware's testimony on 7 December 2010, after he responded to questions from the Prosecutor. Mugiraneza had no way reasonably to learn of either testimony without the expenditure of resources far beyond those provided to Mugiraneza.[19]

21. The testimony is relevant. CHC's testimony directly corroborates Mugiraneza's testimony as to the events at the cabinet meeting on 17 April 2012. It directly corroborates Mugiraneza's testimony which was rejected by the Trial Chamber.[20] Ngirabarware's testimony about the requirement that ministers attend presidential speeches when requested by the chief of protocol mirrors Mugiraneza's testimony of 26 May 2008 quoted in Mugiraneza's motion.[21]

22. For these reasons, the testimony is admissible if, in light of all of the evidence, the Appeals Chamber *could* find it would have been decisive. As set out in his motions, Mugiraneza did not know of CHC's testimony at the time he testified. Ngirabarware was not even in the custody of the Tribunal when Mugiraneza testified. In both instances, the testimony was adduced by the Prosecutor.

VI. CONCLUSION

23. The proffered testimony from CHC and Ngirabarware should be admitted pursuant to Rule 115 and considered by this Chamber in its deliberations of the sufficiency of the evidence, including the standard for convictions based on circumstantial evidence. All of the proffered testimony is relevant, has indicia of reliability and could have been decisive at trial.

24. The Appeals Chamber should reject the Prosecutor's suggestion that it is inadmissible because it is not exculpatory. While Mugiraneza believes it is exculpatory, that is not a

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[19]If the Appeals Chamber determines that defence counsel have a duty to monitor *all* testimony in *all* proceedings before, during and after trial, Mugiraneza and all other defendants would be deprived of the right to effective assistance of counsel by the failure of the Registrar to provide them with sufficient resources to do so. Mugiraneza does not believe such a duty exists but if this Chamber so determines, he was deprived of effective assistance of counsel by the Tribunal itself and this Chamber should vacate his convictions based on that fact.

[20]Judgment, para. 1231,1235/

[21]RP 1073/A-1074/A.

requirement for admission of new evidence under Rule 115. It should reject the Prosecutor's suggestion to graft this requirement onto Rule 115.

25. Mugiraneza acted with due diligence in procuring this evidence. Given the Prosecutor's actual possession of the transcripts at all relevant times, its failure to disclose them promptly and its own claims of good faith in complying with Rule 68, the Prosecutor's assertion of lack of due diligence on Mugiraneza's part is without merit and an example of chutzpah.

26. Finally, the Appeals Chamber should strike the Prosecutor's response as untimely.

Tom Moran

Cynthia J. Cline

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