ICTR-99-50-AR73
27 FEBRUARY 2004
(404/H - 395/H)

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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

UNITED NATIONS
NATIONS UNIES

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge Florence Mumba
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 27 February 2004

ICTR Appeals Chamber
Date: 27 ii 04
Action: PG
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NAME / NOM: RHYS BURNS
SIGNATURE: 27 ii 04

THE PROSECUTOR

v.

PROSPER MUGIRANEZA

Case No. ICTR-99-50-AR73

DECISION ON PROSPER MUGIRANEZA'S INTERLOCUTORY APPEAL FROM TRIAL CHAMBER II DECISION OF 2 OCTOBER 2003 DENYING THE MOTION TO DISMISS THE INDICTMENT, DEMAND SPEEDY TRIAL AND FOR APPROPRIATE RELIEF

Counsel for the Prosecution

Mr. Paul Ng'arua
Ms. Melinda Y. Pollard
Mr. Elvis Bazawulu
Mr. George William Mugwanya

Counsel for the Defence

Mr. Tom Moran

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal");

BEING SEISED OF "Prosper Mugiraneza's Notice of Appeal of the Trial Chamber's Decision Overruling Prosper Mugiraneza's Motion to Dismiss for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and for Appropriate Relief" ("Notice of Appeal"), filed on 3 November 2003, and "Prosper Mugiraneza's Amended Notice of Appeal of the Trial Chamber's Decision Overruling Prosper Mugiraneza's Motion to Dismiss for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and For Appropriate Relief", filed on the same date;

BEING SEISED OF "Prosper Mugiraneza's Appellate Brief on Denial of His Motion to Dismiss the Indictment for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and Appropriate Relief" ("Appeal"), filed on 5 November 2003, and an "Appendix to Prosper Mugiraneza's Appellate Brief on Denial of His Motion to Dismiss the Indictment for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and Appropriate Relief", filed on 6 November 2003;

NOTING the "Prosecutor's Response in Opposition to Prosper Mugiraneza's Appeal of Denial of His Motion to Dismiss the Indictment for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and Appropriate Relief" ("Prosecutor's Response to Appeal"), filed on 18 November 2003;

NOTING the "Decision on Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and for Appropriate Relief" ("Trial Chamber Decision"), delivered on 3 October 2003, whereby the Trial Chamber, in dismissing the motion, stated "(t)hat there is no need to inquire into any role the Prosecutor might have played about the alleged undue delay";[1]

NOTING the "Decision on Prosper Mugiraneza's Request Pursuant to Rule 73 for Certification to Appeal Denial of His Motion to Dismiss for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and Appropriate Relief", delivered on 29 October 2003;

CONSIDERING that the Appeals Chamber takes the view that it is necessary to consider, *inter alia*, the following factors when determining whether there has been a violation of the right to be tried without undue delay:

(1) The length of the delay;
(2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law;
(3) The conduct of the parties;
(4) The conduct of the relevant authorities; and
(5) The prejudice to the accused, if any;

CONSIDERING that the Trial Chamber erred in considering the factor of the fundamental purpose of the Tribunal in its determination of whether the delay was undue;

CONSIDERING that one of the central factors to consider is the conduct of the parties, including that of the Prosecutor;

FINDING that the Trial Chamber, by stating, "(t)hat there is no need to inquire into any role that the Prosecutor might have played about the alleged undue delay",[2] has failed to conduct a full enquiry and thus failed to take into account a necessary factor to determine whether there has been undue delay;

FINDING, therefore, that the Trial Chamber erred in applying the correct legal standard;

[1] Trial Chamber Decision, para. 14.
[2] *Id.*

FOR THE FOREGOING REASONS,

HEREBY, Judge Shahabuddeen and Judge Pocar dissenting, allows the Appeal, vacates the Trial Chamber Decision, and remits the matter to the Trial Chamber for reconsideration in light of the foregoing observations.

Done in French and English, the English text being authoritative..

Mohamed Shahabuddeen
Presiding Judge

Judge Shahabuddeen appends a dissenting opinion to this decision.
Judge Pocar appends a dissenting opinion to this decision.

Done this 27th day of February 2004,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. As Presiding Judge I have authenticated this decision. I regret that as a member of the bench I am not able to support it,[1] particularly with respect to the matter being remitted "to the Trial Chamber for reconsideration in the light of" the Appeals Chamber's finding "that the Trial Chamber, by stating '(t)hat there is no need to inquire into any role that the Prosecutor might have played about the alleged undue delay', has failed to conduct a full enquiry and thus failed to take into account a necessary factor to determine whether there has been undue delay;". The real ground offered there is the omission of the Trial Chamber to inquire into the conduct of the prosecution.

2. The Trial Chamber's decision was not elaborate, but it was not defective. The Appeals Chamber can determine from the decision what led the Trial Chamber to make it; it can in turn interpret the decision in the light of its reasons. In my opinion, the decision was made for the following reasons and is to be interpreted in the following way:

3. In paragraphs 10 to 12 of its decision, the Trial Chamber referred to a citation from *Kanyabashi*[2] to the effect that the European Court of Human Rights opined that the "Court has to have regard, *inter alia*, to the complexity of the factual or legal issues raised by the case, to the conduct of the applicants and the competent authorities, ...". Hence, the Trial Chamber knew that, among other things, the conduct of the prosecution was a factor to be considered. It nevertheless said:

> 13. The Chamber consequently finds that undue delay depends on the circumstances. In this case, for the above mentioned reasons, the Trial Chamber considers that the time between the arrest of the Accused and the imminent commencement of his trial is not to be assessed as being undue. (Footnote omitted).

[1] Dissents in part were filed by the presiding judges in, *inter alia*, *Erdemović*, IT-96-22-A of 7 October 1997, *Delalić*, IT-96-21-A of 20 February 2001, and *Jelisić*, IT-95-10-A of 5 July 2001. Presidents of the International Court of Justice have also appended dissenting opinions to decisions which they have authenticated. See, *inter alia*, *Ambatielos Case, I.C.J. Reports 1952*, p. 28 at 58; *Interhandel Case, I.C.J. Reports 1959*, p. 6 at 75; *Maritime Safety Committee, I.C.J. Reports 1960*, p. 150 at 173; *Certain Expenses of the United Nations, I.C.J. Reports 1962*, p. 151 at 227; *South West Africa, I.C.J. Reports 1962*, p. 319 at 449; and *Phosphate Lands in Nauru, I.C.J. Reports 1992*, p. 240 at 301.
[2] Paragraph 12 of the impugned Decision, citing *Kanyabashi*, ICTR-96-15-I, of 23 May 2000.

14. Having held in the circumstances of this case that there is no undue delay, the Trial Chamber considers that there is no need to inquire into any role the Prosecutor might have played about the alleged undue delay.

4. It is thus the case that the Trial Chamber's conclusion that there was no undue delay was made without first inquiring into the conduct of the prosecution. That, as I have said, is the real ground offered by the Appeals Chamber in support of its decision. The question then is how could the Trial Chamber come to such a conclusion without first making that inquiry.

5. I think that the answer lies in a difference between the method by which the Trial Chamber makes a finding that there has been undue delay and the method by which it makes a finding that there has been no undue delay. A Trial Chamber cannot find that there has been undue delay unless it first inquires into the conduct of the prosecution and is not satisfied by it. But it can find that there has been *no* undue delay either after inquiring into the conduct of the prosecution or at an earlier stage if it considers that the material presented by the accused does not suffice to disclose a prima facie case of undue delay; in the latter situation inquiry into the conduct of the prosecution is not necessary.

6. The Trial Chamber, as was its right, did not use the term "prima facie", but I think that it was guided by the principles represented by the term. References to the standard of proof do not obscure the procedural norm derived from the established principle that he who alleges must prove. The first question before a court is to say whether, taken at their highest, the allegations of the moving party can satisfy the applicable requirements, that is to say, whether they disclose a prima facie case. Only if the answer is in the affirmative does the court look into the opposing case. If the answer is in the negative, the court dismisses the claim without further inquiry.

7. In *Eckle*, the European Court of Human Rights found that the delay was "undoubtedly inordinate and is, as a general rule, to be regarded as, exceeding the 'reasonable time' referred to in Article 6 par. 1" of the European Convention for the Protection of Human Rights and Fundamental Freedoms; it was only at that point that the court said that in "such circumstances, it falls to the respondent State to come forward with explanations."[3] In *Little*, a national court, interpreting the convention, said that "[t]he period of 11 years and one month - ... was prima facie unreasonable, and called for some compelling explanation. None had so far been offered by the Crown. ...".[4] In

[3] *Eckle, v. Federal Republic of Germany* (A/51) (1983) 5 E.H.R.R. 1.
[4] *HM Advocate v. Little*, [1999] S.L.T. 1145 at 1149.

effect, the court considered that what called for an explanation was the fact that the accused had succeeded in making out a prima facie case of undue delay. Dr Alistair Brown correctly understood *McNab*[5] when he cited that case as authority for the proposition that the "correct approach is for the court to consider whether the period involved is prima facie unreasonable. Only if it so considers does the onus pass to the prosecutor to explain the delay."[6]

8. The appellant ran his case in the Trial Chamber on the basis that the length of the pre-trial detention period – of four years – was conclusive evidence of undue delay. As stated by the Trial Chamber in paragraph 2 of its decision –

> The Defence considers that the 4-year period since the arrest of the accused constitutes undue delay *as a matter of law.*[7] It considers further that there is no excuse for a delay of this length while a presumptively innocent man is confined in pre-trial detention.

The Trial Chamber was not persuaded by the proposition that undue delay fell to be inferred from the passage of time *as a matter of law*. There is no legal authority for the assertion that after a fixed period of time undue delay automatically and conclusively arises.

9. The Trial Chamber may certainly hold that, *in the circumstances of a particular case*, a long period of time prima facie means that there has been undue delay; but, in my view, the correct interpretation of the decision which it made is that such a holding would not be right *in the circumstances of this case*, as presented by the accused, and I do not see that the Appeals Chamber can hold otherwise. Having, in effect, decided that a prima facie case of undue delay had not been made out, the Trial Chamber concluded that there was nothing for the prosecution to explain: the complexities of the legal and factual issues and the associated problems of investigating allegations of gravity and of concern to the international community were apparent and were enough.

10. The right of an accused to have his case heard without undue delay must be vigilantly defended by the Tribunal – on its own initiative, if need be. But, valuable as it is, the idea is not a brooding omnipresence in the sky: a balance needs to be maintained between the rights of an accused and those of the international community, even bearing in mind that the rights of the international community include responsibility to ensure observance of the right of an accused to a hearing within a reasonable time. That balance is struck by the need for an accused to satisfy the

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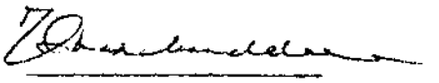
[5] *McNabb v. HM Advocate*, [2000] S.L.T. 99.
[6] Dr Alistair N. Brown, "A Hearing Within a Reasonable Time," in H.R.& UK P. 2001, 2.3(4), p. 3.

Trial Chamber that there is some justification to inquire into the role played by the Prosecutor– i.e., that there is a prima facie case of undue delay. Otherwise, the inquiry is gratuitous.

11. In this case, the accused failed to establish a prima facie case. As I understand the decision of the Trial Chamber, his allegations, even if true, did not suffice to make out his claim that there was undue delay. Thereupon, the Trial Chamber correctly held that there was no undue delay without needing "to inquire into any role that the Prosecutor might have played about the alleged undue delay."

12. I appreciate the outlook which leads to the view that the established criteria always require inquiry into the conduct of the prosecution before there could be a finding that there was no undue delay. However, in my respectful opinion, more convincing reasons speak for a different conclusion. They persuade me to consider that I should affirm the decision of the Trial Chamber and dismiss the appeal.

Done in English and in French, the English text being authoritative.



Mohamed Shahabuddeen

Dated this 27 February 2004
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

[7] Emphasis added.

DISSENTING OPINION OF JUDGE POCAR

The Appeals Chamber in its decision lists five factors which it deems "necessary to consider, *inter alia*,...when determining whether there has been a violation of the right to be tried without undue delay."[1] These factors are listed in the following manner in the decision:

> (1) The length of the delay;
> (2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law;
> (3) The conduct of the parties;
> (4) The conduct of the relevant authorities; and
> (5) The prejudice to the accused, if any[.][2]

In my view, the majority should not have set out such a list. The Appeals Chamber should not attempt to identify *in abstracto* the factors to be assessed in determining if there has been undue delay in a particular case. This is a question that should be decided on a case by case basis. Moreover, the description of the factors as set out by the majority raises issues of interpretation of their precise scope—for example, who are the "relevant authorities"? What kind of "prejudice" is being referred to, prejudice relating to matters of procedure, or substantive prejudice relating to the personal circumstances of the accused, or both? Indeed, these factors may be misleading.

If the law on the question of undue delay had to be established, one would also have to consider factors not to be taken into account. In this case, the Appeals Chamber should have stated that the gravity of the offenses charged is not to be considered when assessing whether there is a case of undue delay. Indeed, there were good reasons to do so. In paragraph 12 of the Trial Chamber's decision, it is stated:

> The Trial Chamber recalls its position stated previously in the case of *Mugenzi* that the Accused's right to be tried without undue delay should be balanced with the need to ascertain the truth about the serious crimes with which the Accused is charged.[3]

In my view, the Trial Chamber improperly considered the gravity of the offenses when analyzing whether the delay in this case is undue. The implication of the Trial Chamber's reasoning is that the gravity of the charges permits a prolongation of delays. But it is only if undue delay is found to

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[1] Decision, p. 3, para. 1.
[2] *Id.*
[3] Trial Chamber decision, para. 12.

exist that the gravity of the offenses may become relevant; only at that later stage may this factor be taken into account when considering what remedies are appropriate.[4]

But the Appeals Chamber in its decision fails to address this crucial point, which renders its decision incomplete. Instead, it seems to focus primarily on the Trial Chamber's failure to inquire into the conduct of the Prosecution, and states:

> FINDING that the Trial Chamber, by stating, "(t)hat there is no need to inquire into any role that the Prosecutor might have played about the alleged undue delay", has failed to conduct a full enquiry and thus failed to take into account a necessary factor to determine whether there has been undue delay[.][5]

In my view, it is the Trial Chamber's improper consideration of the gravity of the crimes charged which vitiates its decision.

For the foregoing reasons, the decision of the Trial Chamber should be quashed. I cannot agree with the decision to remit "the matter to the Trial Chamber for reconsideration in light of the foregoing observations," given my views on the said observations.

Done this 27th day of February 2004,
At The Hague,
The Netherlands.

Judge Fausto Pocar

[4] *See Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000.
[5] Decision, p. 3, para. 4. (footnote omitted).