ICC-01/04-01/07-HNE-35

TRIAL CHAMBER I

Before:
Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 18 September 2003

THE PROSECUTOR
v.
Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON ADMISSIBILITY OF PROPOSED TESTIMONY OF WITNESS DBY

The Office of the Prosecutor
Barbara Mulvaney
Drew White
Segun Jegede
Alex Obote-Odora
Christine Graham
Rashid Rashid

Counsel for the Defence
Raphaël Constant
Paul Skolnik
Jean Yaovi Degli
David Martin Sperry
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

events prior to that period is admissible to prove the commission of those crimes in 1994. Evidence of events prior to 1 January 1994 may be admitted for one of three purposes: as proof of "ongoing criminal conduct which culminates in 1994"; to place the events of 1994 in their proper context; and under the rubric of "similar fact evidence, as authorised specifically by Rule 93".[3] These submissions are discussed in more detail in the Deliberations section below. In respect of the first purpose, the Prosecution claims in particular that the evidence is probative of an ongoing conspiracy of indeterminate length that existed at the time of the events in 1990.

3. The Defence argues that the Prosecution's reliance on Judge Shahabuddeen's Opinion is misplaced. Rather than addressing the admissibility of evidence of pre-1994 events, that opinion decided only that pre-1994 incidents may be mentioned in an indictment without ruling on the admissibility of such evidence; the question of admissibility of evidence was identified as a distinct issue for the Trial Chamber.[4] Even if evidence of pre-1994 events may, in principle, be admitted, Witness DBY's testimony does not meet the criteria for admission set forth in Rule 89(C) or Rule 93 of the Rules of Procedure and Evidence ("the Rules"). The evidence is neither relevant nor probative of any facts in issue in this case. Further, the evidence is highly prejudicial as it suggests the bad character of the accused. Any probative value that might exist is outweighed by the improper prejudice caused to the Accused. Rule 93 gives the Prosecution no licence to extend the temporal range of events which it may tender and, in any event, should only exceptionally permit the admission of otherwise inadmissible evidence. Finally, the Defence argues that admission of this testimony will greatly complicate and lengthen the trial as it will be obliged to contest these events.

DELIBERATIONS

General Principles

4. Rule 89(C) provides that a Chamber "may admit any relevant evidence which it deems to have probative value". This simple formulation sets out three distinct aspects of the process of determining admissibility. First, the evidence must be in some way relevant to an element of a crime with which the Accused is charged. Second, the evidence must have some value in proving the elements of the crimes with which an Accused is charged. The separate reference to "probative value", and to the requirement that the Chamber must "deem" that the evidence has that quality, suggests that probative value is a different and more complex hurdle than relevance. Third, even where these two criteria are met, Rule 89(C) does not command, but merely permits, admission of the evidence.

5. The issue confronting the Chamber concerns a particular type of relevance: whether testimonial evidence of a witness concerning events prior to 1994 is relevant to, and probative of, charges of crimes committed only within that year.

6. The jurisprudence of the Tribunal on this particular question is limited. However, a discussion of general principles is to be found in decisions in the *Media* case which

addressed whether events prior to 1994 – that is, prior to the temporal jurisdiction of the Tribunal -- may be recounted in an indictment.[5] The Trial Chamber ruled that:

information that falls outside of the temporal jurisdiction of the Tribunal may be useful in helping the accused and the Chamber to appreciate the context of the alleged crimes, particularly due to the complexity of the events that occurred in Rwanda, during 1994. Furthermore the Chamber is of the view that the proper stage to determine the admissibility and evidential value, if any, of the paragraphs that contain information about events that occurred prior to 1 January 1994, is during the assessment of evidence.[6]

That decision was upheld by the Appeals Chamber, which confirmed that the indictment did not purport to charge the Accused with crimes committed prior to 1994, but merely to provide an introduction, and historical background and context, to the crimes committed in 1994. Two separate opinions were filed along with the decision of the Appeals Chamber, of which that of Judge Shahabuddeen is of particular assistance to the question of the admissibility of evidence of pre-1994 events. His principal concern was the jurisdictional question, but in so doing he rejected the assertion that pre-1994 events are categorically irrelevant to crimes within the jurisdiction of the Tribunal:

But there is a distinction between the legal elements of a crime and and the evidence of their existence. The prosecution has to prove that all the legal elements of a crime were present at the time of commission of the crime, that is to say, at the time within the mandate year when the crime is alleged to have been committed. However, there is no reason why the evidence of their existence at that point in time cannot (in some cases, at any rate) include evidence deriving from a time prior to the commencement of the mandate year.[7]

7. Having so found, Judge Shahabuddeen specifically disclaimed ruling on the admissibility of any particular evidence that might be tendered at trial:

My holding is only that the amended indictment does not charge the appellant with any crimes committed before the commencement of the mandate year. That holding does not exclude the competence of the Trial Chamber in the course of the actual trial from shutting out evidence of previous crimes on the ground that, in the circumstances of the case, the particular evidence *is not in fact relevant or that, if it is, its prejudicial effect on the accused exceeds its probative value. That is an evidentiary issue, not a jurisdictional one*....[8]

8. Evidence of events prior to 1 January 1994 is not clearly separated from crimes charged in the indictment. Such events may be relevant to, and probative of, the commission of crimes in 1994. In deciding the jurisdictional question, Judge Shahabuddeen sets out three possible avenues, all of which have been invoked by the Prosecution, by which evidence of such events may properly be considered relevant. These three bases of relevance are discussed at the outset, before considering the

probative value of the specific evidence tendered, or whether its value is outweighed by its prejudicial effect.

i) Evidence Relevant to an Offence Continuing Into the Mandate Year

9. The Prosecution does not exceed its mandate by charging an individual with an offence that begins at some date prior to 1994, but continues into that year. In respect of conspiracy, "the charge could correctly be for a conspiracy made in, or continuing into, the mandate year even though the original conspiracy agreement was made prior thereto".[9] Accordingly, evidence tending to show the existence of an ongoing criminal act that began prior to 1994 but whose object was only realized in 1994 is admissible. The Prosecution claims generally that Witness DBY's testimony is relevant to the existence of a conspiracy that commenced before 1994 and continued into that year.

ii) Context or Background

10. Where an event is not itself part of the crime charged, but without which "'the account...would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence'".[10] Evidence of the nature of the relationship between a victim and an accused, and possible motives for the commission of a crime, may be admitted on this basis.[11] Establishing motive may also be relevant to *mens rea*. Judge Shahabuddeen noted that this category should be viewed broadly, in light of the "scale of events, in space and time", and the fact that prejudicial background information will be less damaging when heard by professional judges than a jury.[12]

(iii) "Similar Fact Evidence"

11. The third avenue for admission of evidence of pre-1994 events is based on an exception, long-established in the common law, for admitting evidence of particular category of acts committed prior to the time of the act which is charged.

12. The exception can only be described in relation to the general rule. A long-standing principle of common law jurisdictions, adopted by the International Criminal Tribunal for Yugoslavia, is that "as a general principle of criminal law, evidence as to the character of an accused is generally inadmissible to show the accused's propensity to act in conformity therewith."[13] This means that prior criminal offences by the accused – even of precisely the same offence with which the accused is charged – are not admissible if the only purpose for their introduction is to establish that the accused was capable of committing the offence, is inclined to commit the offence, or on some prior occasion actually did have the intent to commit the criminal offence. Such evidence is excluded because the evidence may so severely blacken the reputation of the accused as to make acquittal virtually impossible, even though the direct evidence of the commission of the offence is weak. Further, dealing with evidence of past conduct may be unduly

distracting and time-consuming, leading to an unfocused trial that undermines the truth-finding function.[14]

13. The definition of similar fact evidence in the Shahabuddeen Opinion is taken from an Australian case:

'[I]f the evidence of the other offence or offences goes beyond showing a mere disposition to commit crime or a particular kind of crime and points in some other way to the commission of the offence in question, then it will be admissible if its probative value for that purpose outweighs or transcends its merely prejudicial effect. The cases in which similar fact evidence may have sufficient additional relevance to make it admissible are not confined, but recognized instances occur where the evidence is relevant to prove intent, or to disprove accident or mistake, to prove identity or to disprove innocent associations....'[15]

Shahabuddeen's gloss on this passage is that "evidence of prior offences is admissible to prove a pattern, design or systematic course of conduct by the accused where his explanation on the basis of coincidence would be an affront to common sense."[16]

14. Other discussions of similar fact evidence explain that it is admissible because it reveals a propensity that "'is so highly distinctive or unique as to constitute a signature'".[17] In such cases, the evidence is of type which is not probative of merely a general propensity to commit the criminal act, but is probative of some peculiar feature of the case which substantially enhances its probative value in relation to the charge. Defining what type of evidence is sufficiently specific so as to migrate out of the prohibited zone of general propensity evidence, is a difficult exercise which depends on the facts of each case. The prejudicial effect on the character of the accused must also be considered, and whether the prosecution can achieve its stated object using less prejudicial evidence.[18]

iv) Probative Value and Prejudice

15. Probative value is a second criterion of admissibility set out in Rule 89(C). It has been described simply as "'evidence that tends to prove an issue'" and is sometimes conceived as overlapping with the concept of relevance: "For one fact to be relevant to another, there must be a connection or a nexus between the two which makes it possible to infer the existence of one from the other. One fact is not relevant to another if it does not have real probative value with respect to the latter."[19]

16. Though not expressly mentioned in Rule 89, prejudice is also relevant to the determination of admissibility.[20] It is clear from Judge Shahabuddeen's Opinion in the *Media* case that relevant and probative evidence may be excluded on the grounds of "prejudice":

It being recognised that all relevant prosecution evidence is prejudicial to the accused and the more probative the more prejudicial, still it is possible in some cases to say that the

probative value of the particular evidence is outweighed by its prejudicial effect; in such a case the evidence is to be excluded.[21]

17. Evidence of past crimes, introduced merely to blacken the character of the Accused and show a propensity and capacity to commit the crimes charged, is improper. This is so because the damning effect of the evidence tends to outweigh its true probative value and to obscure more direct evidence of the crime alleged. In this sense, the evidence is "prejudicial" in a manner that compels exclusion.

18. Relevance, probative value and even prejudice are all relational concepts. The content of the putative facts must be defined and then evaluated in relation to their possible value as proof of the existence of a crime as described in the indictment. The nature of this evaluation explains the discretion conferred on the Trial Chamber by Rule 89(C).

Application of General Principles to the Evidence of Witness DBY

19. The Prosecution accepts that the charges against the Accused concern crimes committed between 1 January and 31 December 1994.[22] The sole issue confronting the Chamber here is whether evidence of events prior to that period is relevant to those alleged crimes, and whether the probative value of that evidence outweighs its prejudicial effect on the assessment of the crimes alleged.

i) Ongoing Criminal Offence

20. On the basis of the case law summarized above (para. 9), it is the view of the Chamber that evidence tending to show the existence of an ongoing criminal act that began prior to 1994 but whose object was only realized in 1994 is admissible.[23] The Prosecution claims generally that Witness DBY's testimony is probative of the existence of a conspiracy that continued into 1994 and should be admitted on that basis.

21. The purported evidence in Category III is plainly relevant and admissible on this ground. It is alleged that one of the Accused requested weapons in 1992 for distribution to militia, which are alleged to subsequently have been seen in the possession of militia and used to commit criminal acts in 1994. The evidence may tend to show the existence of an ongoing criminal plan; the existence of an armed militia in 1994 and its relationship with the military; and the militia's relationship with the Accused and his individual criminal responsibility for their acts. Of course, none of these conclusions have yet been proven, and the Chamber is making no assessment here of the reliability or credibility of the evidence. The standard for admissibility, however, is simply that the evidence is relevant and has the prospect of probative value. This evidence satisfies both of these conditions and does not improperly prejudice the Accused.

22. The relevance of the evidence in Category II is difficult to assess under this heading, and is deferred to the next section, concerning background evidence.