UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

75

ICTR-98-39-A
6-APR-2000
(75-62)

IN THE APPEALS CHAMBER

Before: **Judge Claude JORDA, Presiding**
Judge Lal Chand VOHRAH
Judge Mohamed SHAHABUDDEEN
Judge Rafael NIETO-NAVIA
Judge Fausto POCAR

Registrar: **Mr Agwu U OKALI**

Decision of: **6 April 2000**

Omar SERUSHAGO
(Appellant)
v
THE PROSECUTOR
(Respondent)

ICTR-98-39-A

REASONS FOR JUDGMENT

Counsel for the Appellant:
Mr Mohamed ISMAIL

Counsel for the Prosecutor:
Mr Bernard MUNA
Mr Mohamed OTHMAN
Mr Upawansa YAPA
Mr ZHU Wen-qi

I. INTRODUCTION

74

Reasons for Judgment

1. These are the reasons for the Judgment rendered by this Chamber on 14 February 2000, in the appeal brought by Omar Serushago ('the Appellant'), against a sentence of 15 years' imprisonment imposed upon him on 5 February 1999 ('the Sentence') by Trial Chamber I ('the Trial Chamber') of the International Criminal Tribunal for Rwanda ('the Tribunal').

2. The Appellant was initially charged with one count of genocide and four counts of crimes against humanity (murder, extermination, torture and rape).[1] At his initial appearance, he pleaded guilty to all counts, except the charge of rape as a crime against humanity. At the Prosecutor's request, however, the Trial Chamber granted her leave to withdraw that charge.[2] Thereafter, the Appellant was found guilty of the remaining four counts,[3] and, on 5 February 1999, he was sentenced to a single term of 15 years' imprisonment.

3. The Appellant appealed against the Sentence. The Appellant's Brief was filed on 7 August 1999 and on 6 September 1999, the Respondent filed her Brief. The Appellant's Brief in Reply was filed on 23 September 1999. Oral arguments were heard by the Appeals Chamber on 14 February 2000 and this Chamber rendered its Judgment on that date, with reasons to follow.

The Events in Rwanda

4. The crimes in question in this appeal were committed during the events that occurred in Rwanda in 1994. Rwanda went through a period of great violence that year. It is common ground in this appeal that the acts of violence were in the order of genocide and of crimes against humanity, with Tutsis and moderate Hutus as the victims. The parties in

[1] Amended Indictment, filed on 14 October 1998.
[2] Decision Relating to a Plea of Guilty, 14 December 1998, p. 2.
[3] See *ibid.*, p. 3.

73

this appeal agree that a militia organisation known as the *Interahamwe* was particularly responsible for this violence.

5. Hutus and Tutsis are two ethnic groups in Rwanda. It is important to note, for purposes of this appeal, that the immediate excuse offered for the violence was the death of Rwanda's President Juvenal Habyarimana, on 6 April 1994, as a result of a plane crash. He was a Hutu and it is alleged that his plane was shot down. The circumstances of President Habyarimana's plane crash are not the subject matter of this appeal. They are briefly mentioned here merely to facilitate an easier understanding of these Reasons for Judgment.

II. THE APPEAL

A. Appellant's Submissions

6. In this appeal, the Appellant sought a reduction of the sentence imposed on him by the Trial Chamber. He based his argument on the following grounds:

(1) the Trial Chamber erred by not giving due weight to the mitigating factors in his case; and

(2) the sentence is manifestly excessive in view of the sentence he would have received had the Trial Chamber paid due heed to the sentencing practice before the courts of Rwanda.

7. In respect of the first ground, the Appellant submitted as follows. He recognised that the Trial Chamber considered certain circumstances as mitigating, namely, his co-operation with the Prosecutor, his voluntary surrender, his guilty plea, his family and social background, the assistance given by him to certain potential Tutsi victims during the genocide, his individual circumstances, and his public expression of remorse. The Appellant, however, argued that the Trial Chamber in its consideration of some of the mitigating factors (*i.e.* co-operation with the Prosecutor, voluntary surrender, guilty plea and public expression of remorse) did not recognise the true importance of such acts. This, he argued, would include encouragement to other suspects or unknown perpetrators to come forward; contribution to the settlement of the wider issues of accountability, reconciliation and the establishment of the truth; judicial economy; and, the showing of a person's true

character. 72

8. The Appellant compared his case with the case of *Prosecutor* v *Erdemović*,[4] a case from the International Criminal Tribunal for the former Yugoslavia ('the ICTY'), where the defendant had also pleaded guilty, but was sentenced to a five-year term of imprisonment due to mitigating factors.

9. In respect of the second ground, the Appellant submitted that the Trial Chamber is required, under Article 23(1) of the Statute of the Tribunal ('the Statute') and Rule 101(B)(iii) of the Rules of Procedure and Evidence of the Tribunal ('the Rules'), to have recourse to the general practice regarding prison sentences in the courts of Rwanda. He recognised that '[r]eference to this practice is for guidance and is not binding'.[5] He submitted, however, that, in order to satisfy one of the purposes for the Tribunal's existence, namely, the fostering of national reconciliation and peace in Rwanda, the Trial Chamber should have attached greater importance to the sentencing practice under the Rwandan Organic Law 08/96 on the Organisation of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity, committed since 1 October 1990, adopted in August 1996 ('the Organic Law 08/96'). The Appellant contended that, under that legislation, he would have received a jail term ranging between seven and eleven years for the crimes to which he pleaded guilty.

10. In respect of the applicable standard of review under Article 24 of the Statute, the Appellant submitted that '[i]t is not in dispute that the person who appeals against a decision has the burden to establish at a persuasive level, or on a balance of probabilities, that an error has been committed by the Trial Chamber.'[6] He submitted further that 'errors mentioned in Article 24(1)(a) and (b) [of the Statute] are errors that do not necessarily make decisions taken by the Tribunal fatal' and that Article 24(2) does not confine the 'Appeals Chamber only to revise errors occasioned by an abuse of [discretion] by the Trial Chamber.'[7]

---

[4] *Prosecutor* v *Erdemović (Sentencing Judgement)*, Case No.: IT-96-22-T*bis* of 5 March 1998 (Trial Chamber).
[5] Appellant's Brief, p. 4.
[6] Appellant's Brief in Reply, p 1.
[7] *Ibid*, p. 2.

71

B. Respondent's Submissions

11. The Prosecutor requested the Appeals Chamber to dismiss the appeal and affirm the sentence of the Trial Chamber.

12. The Prosecutor contended that the Appellant bore the burden of establishing that the sentence imposed involved an error of law invalidating the decision, or an error of fact occasioning a miscarriage of justice, and that the Appellant had failed to establish such an error. The Prosecutor asserted that the Trial Chamber took all relevant factors into account and gave each such factor appropriate and sufficient weight, and that the sentence imposed fell well within the sentencing power of the Trial Chamber.

13. In respect of the applicable standard of review under Article 24 of the Statute, the Prosecutor submitted that the standard of proof that must be satisfied depends on whether the alleged error involves a question of law or a question of fact. She argued that errors of law may include two different categories: an error by the Trial Chamber involving (1) the application of substantive law; and (2) the manner of the exercise of judicial discretion. Regarding the first category of errors, the Prosecutor submitted that, 'the nature of the burden is one of persuasion rather than proof, as questions of law can be decided independently by the Appeals Chamber.'[8] The Prosecutor went on to submit that errors of law falling in the second category, *i.e.* the manner of the exercise of discretion, call for a different standard of review which requires the demonstration of an abuse of the Trial Chamber's discretion. The Prosecutor contended that in the absence of such a demonstration, the Appeals Chamber should not substitute its own view for that of the Trial Chamber.

C. Some Relevant Facts

14. The disagreement between the parties as to the sentence which the Trial Chamber imposed on the Appellant has to be appreciated in the context of certain facts that are not in dispute. These facts appear either in the Appellant's Brief or in the plea agreement entered

70

into by the parties and partly set out in the sentence of the Trial Chamber. They include the Appellant's background and his role during the events in Rwanda.

1. The Appellant's Background

15. A review of the Appellant's Brief reveals the following admissions about his background.

16. He was a prominent member of the *Interahamwe* and of his local Prefecture of Gisenyi. His family background made this possible. His father was a close associate of the late President Habyarimana. Consequently, contact with President Habyrimana came easily and naturally to the Appellant.

17. When the *Interahamwe* militia was formed, the Appellant became a member, upon his father's reference. Owing to his family's strong connections with President Habyarimana, the Appellant rose in stature within the *Interahamwe*. Although holding no official position within the *Interahamwe*, the Appellant was, nevertheless, a *de facto* leader of that militia. As a result, he was feared and respected among the local population in Gisenyi, where he lived. He enjoyed many privileges and wielded considerable power there.

18. The Appellant was invited to a number of secret Hutu meetings, including one at Ruhengeri where President Habyarimana is alleged to have threatened to kill the Tutsis using the *Interahamwe*.

2. The Appellant's Role during the Events in Rwanda

19. Equally important in this appeal are the following admissions, which the Appellant has made regarding his role during the events in Rwanda:

- From April to July 1994, many people were killed in his home Prefecture of Gisenyi and throughout Rwanda. The majority of the victims were killed

[8] Respondent's Brief, para. 5.8.

69

because they were identified as Tutsis. The other victims of these killings were moderate Hutus: they were killed because they were considered to be sympathetic to Tutsis and opposed to Hutu extremism or were related to Tutsis by marriage.

- In addition, he admitted being one of the leaders of groups of *Interahamwe* militia most involved in the killing of Tutsis and moderate Hutus in the Gisenyi Prefecture, during the events in Rwanda. And he admitted leading these militiamen in these killings.

- The Appellant acknowledged that between April and June 1994, his own band of *Interahamwe* militiamen were involved in repeated attacks against refugees in a parish Church at Nyundo. Many people were killed during these attacks. Some three hundred people were abducted from this Church, paraded before the Gisenyi town and then executed by militiamen at a place known as '*Commune Rouge*'.

- The Appellant admitted being part of a group of people who, on 20 April 1994, abducted about twenty Tutsis who had taken refuge at the house of a certain bishop in Gisenyi. They took these captives to the *Commune Rouge* and executed them there. The Appellant admitted to executing four of the captives (one man and three women) personally with a rifle.

- The Appellant admitted being part of a group of people who, towards the end of April 1994, went to the Gisenyi military camp and abducted several Tutsis and moderate Hutus who had been detained in the *gendarmerie* station jail. They took these captives to the *Commune Rouge* where they were killed by *Interahamwe* members. The Appellant further admitted giving his rifle to his younger brother and bodyguard, Feiruz Ayabagabo, who killed one of the Tutsis who had attempted to escape.

- The Appellant admitted that on or about 30 April 1994, he was among a group of people who went to the premises of Rwandex, a commercial enterprise, and abducted some Tutsis who had been taking refuge there. They beat to death a Tutsi guard who had tried to stop them: they abducted four people who had been

68

identified to them as Tutsis: and they took their captives to the *Commune Rouge* where the captives were killed by certain members of the group.

- The Appellant admitted that from April to July 1994, he and his group of militiamen travelled throughout Gisenyi in search of Tutsis and moderate Hutus. Upon locating their victims, he and his group would either kill them on the spot or take them to the *Commune Rouge* and kill them there.

20. It is against this factual background that this appeal is being decided.

III. APPLICABLE PROVISIONS

A. Relevant Provisions of the Statute

Article 23: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2. In imposing sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24: Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) An error on a question of law invalidating the decision; or

(b) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

67

B. Relevant Provisions of the Rules

Rule 101: Penalties

(A) A person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23(2) of the Statue, as well as such factors as:

(i) Any aggravating circumstances;

(ii) Any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) The general practice regarding prison sentences in the courts of Rwanda;

(iv) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9(3) of the Statute.

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(D) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.

IV. DISCUSSION

A. Whether Due Weight Was Given to Mitigating Circumstances

21. The Appellant argued, as his first ground of appeal, that the Trial Chamber erred in law by failing to give due weight to some of the mitigating circumstances of his case. The Appeals Chamber finds no merit in this argument.

22. Under the Statute and the Rules of the Tribunal, a Trial Chamber is required as a matter of law to take account of mitigating circumstances. But the question of whether a Trial Chamber gave due *weight* to any mitigating circumstance is a question of fact. In putting forward this question as a ground of appeal, the Appellant must discharge two burdens. He must show that the Trial Chamber did indeed commit the error, and, if it did,

66

he must go on to show that the error resulted in a miscarriage of justice. The Appellant in this case has not discharged these burdens.

23. Article 23(3) of the Statute outlines the factors which the Trial Chamber ought to take into account during sentencing. These factors are elaborated upon in Rules 101(B) and (C) of the Rules. Although Rule 101(B)(ii) requires a Trial Chamber to consider any mitigating circumstances, the question of the due weight to be attached to any such circumstance is a matter of discretion for the Trial Chamber. The Trial Chamber's decision in this regard may not be disturbed on appeal unless the Appellant shows the following: (a) the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have, taken into account in the weighing process involved in this exercise of the discretion; and, (b) if it did, that this resulted in a miscarriage of justice. The Appellant has made out no case in these respects to warrant an intervention by the Appeals Chamber.

24. The Sentence shows amply that the Trial Chamber took into account the same factors which the Appellant says were not given due weight. They include the Appellant's cooperation with the Prosecutor, his voluntary surrender, his guilty plea, his family and social background, the assistance which he gave to certain potential Tutsi victims during the Genocide, his circumstances, and his public expression of remorse or contrition.[9] Having taken all these circumstances into account, the Trial Chamber afforded the Appellant some clemency,[10] and sentenced him to 'a single term of fifteen 15 years imprisonment for all the crimes of which he has been convicted.'[11]

25. It is particularly noteworthy that the Appellant's counsel did not argue that the 15-year imprisonment imposed on the Appellant may be characterised as a miscarriage of justice within the meaning of Article 24 of the Statute. He conceded that his client's case, in terms of the length of the sentence, 'would be on weaker grounds, much weaker grounds'[12] but for his other argument that the Trial Chamber had not paid due regard to the sentencing practice in Rwanda. That issue will be addressed shortly.

[9] See paras. 31 to 42 of the Sentence.
[10] *Ibid.*
[11] *Ibid.*, p. 15.
[12] Transcript of the hearing before the Appeals Chamber on 14 February 2000, p. 52.

65

26. Before moving on, it is proper to address the Appellant's effort to rely on *Prosecutor* v. *Erdemović*. His counsel argued that there exists a disparity between the sentence imposed on his client and that imposed by the ICTY on Erdemović, even though both cases share the same elements of confession and guilty plea. He complained that Erdemović was sentenced to five years in prison, whereas his client was sentenced to fifteen.

27. In our view, the *Erdemović* case does not assist the Appellant. The facts of the two cases are materially different. In *Erdemović*, the defendant pleaded duress, and the Prosecution conceded the plea. The duress would have entailed his immediate execution had he refused to kill. By contrast, the case at bar is marked not only by the absence of any plea of duress, but also by evident indicia of volition to commit the crimes. Furthermore, this Appellant was a *de facto* leader in the *Interahamwe*, as well as an elite member of society who commanded respect, engendered fear and exerted power in his community.[13] There was no evidence that Erdemović had a similar profile. *Erdemović* is distinguishable.

B. Whether Due Regard was Paid to Rwandan Sentencing Practice

28. The Appellant's case is further founded on the argument that the Trial Chamber had not paid due regard to the general sentencing practice in the courts of Rwanda.

29. Under the Rwanda Penal Code, the sentence in this case would be fully competent. It should, however, be noted that a special scheme has been instituted by a law adopted by Rwanda on 30 August 1996, which provides for sentences between 7-11 years' imprisonment in the case of certain crimes.[14] The Appellant maintains that this provision would have applied to him had he been prosecuted in Rwanda. This law does not entirely

[13] In this context the Appeals Chamber notes the following passage from a judgment rendered by the Appeals Chamber of the ICTY: 'In the opinion of the Appeals Chamber, the Trial Chamber's decision, when considered against the backdrop of the jurisprudence of the International Tribunal and the International Criminal Tribunal for Rwanda, fails to adequately consider *the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict in the former Yugoslavia.*' [Emphasis added]. See *Prosecutor v. Duško Tadić* (*Judgement in Sentencing Appeals*), Case No.: IT-94-1-A and IT-94-1-A*bis* of 26 January 2000 (Appeals Chamber), at para. 55.

[14] Organic Law 08/96 on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990.

64

displace the general law of Rwanda; it is limited in certain respects.[15] These limitations raise the question whether or not the law is included in the reference in Article 23(1) of the Statute to 'the general practice regarding prison sentences in the courts of Rwanda'. For purposes only of this decision, the Appeals Chamber will assume in the Appellant's favour that it does. On that basis, the Appeals Chamber considers that the submission of the Appellant should be overruled for the following reason.

30. It is the settled jurisprudence of the ICTR that the requirement that 'the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda' does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice. The Appeals Chamber construes paragraphs 17 and 18 of the decision of the Trial Chamber in this case to mean that that is the way in which the Trial Chamber regarded the operation of that requirement and that accordingly the Trial Chamber did have recourse to the relevant practice of the courts of Rwanda.

31. The conclusion reached by the Trial Chamber was that a sentence of 15 years' imprisonment should be imposed on the Appellant in respect of his conviction on one count of genocide and three counts of crimes against humanity. When all the circumstances are taken into account, the Appeals Chamber has difficulty in appreciating any basis for contending that the sentence of 15 years' imprisonment was erroneous.

V. CONCLUSIONS

32. Under Article 24 of the Statute, the Appeals Chamber has the power to 'affirm, reverse or revise' a sentence imposed by a Trial Chamber. The Appeals Chamber considers that it should not exercise that power except where it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law.

33. In the instant case, the Trial Chamber gave full consideration to all of the issues pertaining to sentencing, taking into account the nature of the offences in question and all

[15] E.g. a Confession and Guilty Plea Procedure introduced by the law was to remain in force for 18 months subject to renewal by presidential order. Also, the law was to apply only to certain categories of persons who committed crimes contemplated by that law during the period 1 October 1990 to 31 December 1994 and

63

those elements referred to in Article 23 of the Statute and in Rule 101 of the Rules. As long as the sentence imposed by the Trial Chamber thereafter is within the 'discretionary framework'[16] provided to it by the Statute and the Rules, the Appeals Chamber would see no reason to depart from the Trial Chamber's sentence.

finally, eligibility of an accused person to benefit from the law was subject to conformity with certain other requirements.

[16] *Prosecutor* v *Tadić (Judgement in Sentencing Appeals)*, Case No.: IT-94-1-A and IT-94-1A*bis* of 26 January 2000, (Appeals Chamber), at para. 20.

VI. DISPOSITION

34. For these reasons, **THE APPEALS CHAMBER**, on 14 February 2000;

1) **DISMISSED** the appeal;

2) **AFFIRMED** the Trial Chamber's Sentence of 5 February 1999.

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

s/.

Claude JORDA
Presiding

s/.

Lal Chand VOHRAH

s/.

Mohamed SHAHABUDDEEN

s/.

Rafael NIETO-NAVIA

s/.

Fausto POCAR

Dated this sixth day of April 2000
At The Hague,
The Netherlands.

[Seal of the Tribunal]