



Original: English

**No. ICC-01/05-01/08 A
Date: 15 December 2017**

THE APPEALS CHAMBER

Before: Judge Christine Van den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofmański

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public

Public redacted version of “Decision on Mr Bemba’s request for disclosure concerning [REDACTED]” of 29 August 2017 (ICC-01/05-01/08-3557-Conf)

Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Peter Haynes
Ms Kate Gibson

Legal Representative of Victims
Ms Marie-Edith Douzima-Lawson

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled “Judgment pursuant to Article 74 of the Statute” of 21 March 2016 (ICC-01/05-01/08-3343),

Having before it the “Appellant’s request for disclosure” of 11 July 2017 (ICC-01/05-01/08-3541-Conf),

Having before it the “Appellant’s request for leave to reply to ‘Prosecution’s response to Mr Bemba’s request for disclosure’, ICC-01/05-01/08-3544-Conf-Red” of 27 July 2017 (ICC-01/05-01/08-3549-Conf),

Renders the following

DECISION

The above-mentioned requests are rejected

REASONS

I. PROCEDURAL HISTORY

1. On 11 July 2017, Mr Jean-Pierre Bemba Gombo (“Mr Bemba”) requested the Appeals Chamber to order the disclosure of all material benefits provided to witness [REDACTED] by reason of his being a prosecution witness as well as the disclosure of the details of any other prosecution witnesses who have received the same or similar benefits which go beyond the ordinary requirements of subsistence¹ (“Request”).

¹ “Appellant’s request for disclosure”, ICC-01/05-01/08-3541-Conf (A), para. 63.

2. On 21 July 2017, the Prosecutor responded to Mr Bemba's Request² ("Response").

3. On 27 July 2017, Mr Bemba requested leave to reply to the Response.³

II. MERITS

A. Preliminary Issue – Mr Bemba's Request for Leave to Reply

4. Mr Bemba submits that it would be in the interests of justice to grant him leave to reply to two arguments contained in the Response, namely that (i) the Prosecutor did not know what measures had been adopted in relation to witness [REDACTED] because, in 2010, she had handed over the duty of care of [REDACTED] to the Victims and Witnesses Section ("VWS"); and (ii) the Prosecutor was under no obligation to disclose information concerning benefits received by witness [REDACTED] as a result of Mr Bemba being on notice of the witness [REDACTED].⁴

5. The Appeals Chamber notes that regulation 24 (5) of the Regulations of the Court ("Regulations") provides that leave of the Chamber is required to reply to a response. The Appeals Chamber considers that the question of whether leave to reply should be granted lies within its discretionary powers and must be considered on a case-by-case basis. In the circumstances of the present case, the Appeals Chamber is not persuaded by Mr Bemba's submission that a reply on the identified issues would be in the interests of justice and assist the Appeals Chamber in its determination of the matter.⁵ Mr Bemba's request for leave to reply is accordingly rejected.

² "Prosecution's response to Mr Bemba's request for disclosure (ICC-01/05-01/08-3541)", ICC-01/05-01/08-3544-Conf-Exp (A); a confidential redacted version was registered on the same date (ICC-01/05-01/08-3544-Conf-Red (A)).

³ "Appellant's request for leave to reply to 'Prosecution's response to Mr Bemba's request for disclosure', ICC-01/05-01/08-3544-Conf-Red", ICC-01/05-01/08-3549-Conf (A) ("Request for Leave to Reply").

⁴ Request for Leave to Reply, para. 5.

⁵ Request for Leave to Reply, para. 7.

B. Request for Disclosure

1. Submissions

6. Mr Bemba contends that he learnt that witness [REDACTED] was in the [REDACTED] from a decision rendered by the Appeals Chamber in June 2017⁶ (“Decision on Request to Contact [REDACTED]”) concerning the witness in question⁷. He notes that he subsequently requested the Prosecutor to disclose to him information regarding the date of admission of [REDACTED], “the justification for his admission, and the approximate benefit to [REDACTED] in financial terms”, and that the Prosecutor responded that the information could not be shared because it related to the safety and security of the witness.⁸

7. Mr Bemba recalls that during the trial he challenged the evidence of witness [REDACTED] on the basis that the witness testified allegedly in order to receive financial benefits.⁹ He also refers to a security incident reported by witness [REDACTED] on [REDACTED] to the VWS and disclosed to Mr Bemba by the Prosecutor.¹⁰ Mr Bemba submits that, at trial, he questioned the veracity of witness [REDACTED] allegations regarding that incident.¹¹ Mr Bemba contends that his request to Trial Chamber III (“Trial Chamber”) to make additional submissions on the effect that witness [REDACTED] claim had on his credibility was rejected.¹² He further recalls that the Trial Chamber relied on the testimony of witness [REDACTED] to find that Mr Bemba had knowledge of the crimes committed by his subordinates.¹³

8. Mr Bemba submits that “information pertaining to payments, benefits or other forms of assistance that go beyond the ordinary requirements of subsistence may affect the credibility of witnesses and information related thereto may thus be material to the preparation of the Defence and disclosable pursuant to Rule 77 of the Rules”.¹⁴

⁶ “Decision on Mr Bemba’s request for authorisation to contact [REDACTED]”, 9 June 2017, ICC-01/05-01/08-3533-Conf (A).

⁷ Request, paras 7, 25, 55.

⁸ Request, paras 7-8.

⁹ Request, paras 14, 38-42.

¹⁰ Request, paras 17, 43, 50-51.

¹¹ Request, paras 18, 43-44, 47, 50-51.

¹² Request, paras 19, 44-45.

¹³ Request, paras 20, 42.

¹⁴ Request, para. 5.

Mr Bemba further argues that when prosecution witnesses are taken to reside in a different location by reason of their being witnesses for the prosecution, this may affect their credibility and information relating to the relocation is thus material to the preparation of the defence.¹⁵ In his view, this is because relocating a witness necessarily goes beyond the ordinary requirements of subsistence.¹⁶ In support of his contention, Mr Bemba refers to jurisprudence of other international tribunals and that of this Court, including decisions rendered by the Trial Chamber in this case.¹⁷

9. According to Mr Bemba, “almost all payments and benefits provided to Prosecution witnesses are in some way linked to their security” and, as such, the fact that a benefit is related to the security of a witness does not exempt the Prosecutor from disclosure.¹⁸ Mr Bemba finally submits that the Prosecutor cannot argue that, because the payments and arrangements of [REDACTED] are handled by the VWS, she is under no obligation to disclose this information.¹⁹ In Mr Bemba’s view, this is because requests [REDACTED] originate from the parties.²⁰

10. The Prosecutor opposes the Request on the basis that “the Prosecution granted no benefits to its witnesses, including [REDACTED], going beyond the ordinary requirements of subsistence”.²¹ She further contends that the Request is based on an incorrect factual premise, namely that Mr Bemba had no knowledge of witness [REDACTED].²² The Prosecutor submits that witness [REDACTED] and that since then, she “has had no responsibility for the measures taken on [REDACTED] behalf, or any allowances that he may have received”.²³ She further contends that VWS has not informed her of the measures taken with respect to witness [REDACTED].²⁴

11. The Prosecutor submits that referring a witness to the VWS is not a benefit “going ‘beyond those of ordinary subsistence’”.²⁵ She argues that [REDACTED] are

¹⁵ Request, para. 27.

¹⁶ Request, paras 28, 37.

¹⁷ Request, paras 5-6, 29-36, 53, 59-61.

¹⁸ Request, paras 53-54.

¹⁹ Request, para. 57.

²⁰ Request, para. 58.

²¹ Response, para. 2.

²² Response, paras 2, 4, 37-42.

²³ Response, para. 16.

²⁴ Response, paras 16-17.

²⁵ Response, paras 5-6, 18.

mechanisms of last resort and do not constitute benefits.²⁶ She contends that, as a neutral entity, the VWS determines whether [REDACTED] is warranted and, if so, administers a witness's [REDACTED].²⁷ The Prosecutor submits that this “substantially insulates the requesting party from any knowledge of the measures subsequently taken by the VWS for such witness”.²⁸ Referring to jurisprudence of the Appeals Chamber, the Prosecutor asserts that [REDACTED] of a witness is not her prerogative but that of the VWS.²⁹

12. She further submits that the jurisprudence referred to by Mr Bemba does not assist him, given that the cited case law does not suggest that “information about [REDACTED] is ‘necessarily’ disclosable”.³⁰ The Prosecutor also recalls that, in the instant case, the Trial Chamber made specific rulings based on the circumstances of specific witnesses, but “did not make a general ruling that Prosecution referrals to the VWS” necessarily go “beyond the ordinary requirements of subsistence”.³¹

2. *Determination by the Appeals Chamber*

13. Rule 77 of the Rules of Procedure and Evidence (“Rules”) provides, *inter alia*, that the Prosecutor “shall [...] permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence.” Rule 84 of the Rules provides for orders by the Chamber for the disclosure of documents or information that have not been previously disclosed. The Appeals Chamber has held that “[r]ules 77 and 84 of the Rules of Procedure and Evidence apply to the appeals phase by virtue of article 83 (1) of the Statute and rule 149 (1) of the Rules of Procedure and Evidence.”³²

14. At the outset, the Appeals Chamber notes Mr Bemba’s submission that he did not know of witness [REDACTED] before the rendering of the Decision on Request to Contact [REDACTED] on 9 June 2017.³³ Contrary to this assertion, the Appeals

²⁶ Response, paras 8, 12, 18.

²⁷ Response, paras 9-10, 13-15, 25-28.

²⁸ Response, para. 9.

²⁹ Response, para. 11.

³⁰ Response, paras 19-26.

³¹ Response, paras 30-36.

³² “Decision on Mr Thomas Lubanga’s request for disclosure”, 11 April 2013, [ICC-01/04-01/06-3017 \(A5 A6\)](#), para. 9.

³³ Request, paras 7, 25, 55.

Chamber observes that Mr Bemba had been put on notice of this fact on more than one occasion. As noted by the Prosecutor,³⁴ a decision on in-court protective measures rendered by the Trial Chamber on [REDACTED] refers to witness [REDACTED].³⁵ Counsel for Mr Bemba was also reminded of witness [REDACTED] during the testimony of the witness on [REDACTED].³⁶ It follows that Mr Bemba has been on notice of witness [REDACTED] for more than six years and certainly when the trial was still ongoing.

15. In his request, Mr Bemba seeks “disclosure of all material benefits provided to [REDACTED] by reason of his being a witness for the [Prosecutor].”³⁷ He justifies his request by arguing, *inter alia*, that the question of benefits received by [REDACTED] has been a “live issue” in this case.³⁸ The Appeals Chamber notes, however, that in his appeal brief, Mr Bemba did not argue that witness [REDACTED] credibility was affected by an interest in receiving financial benefits from the Court. Mr Bemba’s challenge to the Trial Chamber’s reliance on [REDACTED] is limited to alleged inconsistencies in his evidence that would, in Mr Bemba’s view, affect the credibility of the witness’s testimony.³⁹ The information sought by Mr Bemba is therefore not relevant to any of the grounds of his appeal. In addition, the Appeals Chamber notes that Mr Bemba was put on notice of the [REDACTED] long before the filing of his appeal brief and therefore arguments concerning witness [REDACTED] alleged interest in receiving financial benefits from the Court in exchange for his testimony could have been advanced on appeal. In these circumstances, it is not clear, and Mr Bemba fails to indicate, in what way the information sought would advance the arguments made on appeal.

16. Furthermore, assuming *arguendo* that the information sought by Mr Bemba is relevant to a potential application for variation of grounds of appeal under regulation 61 of the Regulations, in circumstances where Mr Bemba was aware that

³⁴ Response, para. 41.

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ Request, para. 63.

³⁸ See *e.g.* Request, paras 38-41.

³⁹ “Appellant’s document in support of the appeal”, 19 September 2016, ICC-01/05-01/08-3434-Conf, [REDACTED]. A public redacted version was registered on 28 September 2016, [ICC-01/05-01/08-3434-Red \(A\)](#).

[REDACTED] had been [REDACTED] and could have therefore sought disclosure of information related thereto as soon as he knew of that fact, any such application would necessarily fail. This is because Mr Bemba would in effect seek to raise on appeal an issue, which he could have raised at trial. In the circumstances, it would have been more appropriate for him to raise the issue at trial. Had the Trial Chamber ordered the disclosure of the information sought by Mr Bemba and had that information proved relevant to his challenge to the credibility of witness [REDACTED], he would have been able to cross-examine the witness on that information and/or to lead his own evidence regarding this issue.

17. For these reasons, the Appeals Chamber finds that Mr Bemba has not demonstrated that the information sought by him is relevant to his appeal. He therefore fails to demonstrate that the information sought by him is “material to the preparation of the defence”, within the meaning of rule 77 of the Rules.

18. In light of the foregoing considerations, Mr Bemba’s request for disclosure of all material benefits provided to witness [REDACTED] by reason of his being a prosecution witness is rejected. For the same reason, his request for disclosure of the details of any other prosecution witnesses who have received the same or similar benefits which go beyond the ordinary requirements of subsistence is also rejected.

19. The Appeals Chamber notes the arguments raised by the parties as to whether [REDACTED] constitute benefits going beyond the ordinary requirements of subsistence and whether information regarding such benefits is subject to disclosure.⁴⁰ However, in light of its above determination, the Appeals Chamber finds it unnecessary to address this issue.

⁴⁰ Request, paras 5-6, 27-37, 53, 59-61; Response, paras 5-6, 8-15, 18-28.

Done in both English and French, the English version being authoritative.



Judge Christine Van den Wyngaert
Presiding Judge

Dated this 15th day of December 2017

At The Hague, The Netherlands