



THE DISCIPLINARY BOARD OF THE INTERNATIONAL CRIMINAL COURT

Original: English

Reference: SDO-2020-23-DB decision

Date: 06 July 2020

Before:

Mr Nigel Hampton QC, presiding member

Dr Victor Tsilonis, alternate member

Mr Christian Borikana, *ad hoc* member

**Case re Disciplinary Complaint against Mr Jean Logo Dhengachu (“the Investigator”)
alleging a breach of the Code of Conduct for Investigators.**

Public

Decision of the Disciplinary Board

Alternate Commissioner:

Mr Alexander Milne QC

Counsel for Jean Logo Dhengachu:

Mr David Hooper QC

SUMMARY OF CONCLUSIONS:

1. The Investigator admitted breaches of Sections 5 and 6 of the Code of Conduct for Investigators (“the Investigators’ Code”), which admissions were accepted both by the Alternate Commissioner and the Board; and acting on the basis of the Agreed Statement of Facts, the Investigator was sanctioned by his having imposed on him a suspension of the right to be involved as an investigator in any way in any case or matter before the International Criminal Court (“ICC”) for a period of two (calendar) months from 6 July 2020.

PRELIMINARY MATTERS, PROCEDURAL HISTORY, AND JURISDICTIONAL CHALLENGES:

2. The Investigator earlier raised a challenge to the Board’s jurisdiction; which challenge was determined and rejected by the Board on 3 January 2020. A copy of that Determination is annexed as an appendix to this Decision. It should be noted that this Determination is of some significance as to (a) the anomalies created by reading into the Investigators’ Code “*the procedures spelled out in the Code of Professional Conduct for counsel*” (section 10.1.b of the Investigators’ Code); and (b) the four-year delay in instituting the disciplinary procedure, leading to the present hearing a year further on.
3. The Board adds that it is of the view that point (a) above is deserving of some administrative attention by the Registrar. The delay matter is considered further in the course of this Decision.

AGREED STATEMENT OF FACTS:

4. (a) The Investigator was employed by the defence team for Bosco Ntaganda, as an investigator/resource person, during Bosco Ntaganda’s trial (“the trial”) before the ICC. The Investigator was appointed in February 2015 and, during the course of the trial on 7 March 2015, at the request of the defence legal team, the Investigator met with a person known to the prosecution as witness P-0190.
(b) This meeting in Kampala was intended to be preliminary to a further meeting between the witness and defence lawyers, with a view to his being considered as a possible defence witness.
(c) The witness was in fact a confidential prosecution witness.
(d) The Investigator (supported by defence counsel) states that, prior to the meeting he, and those running the defence team, did not appreciate that P-1090 was a confidential prosecution witness.
(e) During the course of the conversations that the Investigator had with P-0190 (and in the presence of another potential witness) the Investigator discussed

openly the names and identities of two other confidential prosecution witnesses (P-0768 and P-0055).

(f) Both parties accepted that as soon as the defence team became aware that P-0190 was in fact a confidential prosecution witness, all contact was stopped, and the prosecution promptly informed of the error.

(g) When the nature of these discussions came to light, including the open discussion of the names and identities of the two additional confidential prosecution witnesses, the Investigator was suspended from his duties. The Investigator stated that he believed that the other participants to the conversation knew the identities already.

(h) The Investigators' Code provides, *inter alia*:

5.1 *An investigator shall make every effort to ensure that any material and information gained by virtue of his or her position is maintained securely.*

5.2 *An investigator shall not disclose any privileged material or information, or any material or information deemed confidential by the Court, unless authorised to do so.*

6.1 *An investigator shall not engage in any deliberate conduct, or make any disclosure, which places or is likely to place the security of any person at risk.*

(i) The Trial Chamber (ICC-01/04-02/06, of 12 August 2015) noted the Investigator's explanations but expressed the following views: "*However, in the Chamber's view, this does not justify a breach of confidentiality, which, in the circumstances, served no legitimate investigative purpose and would appear to have been done with complete disregard for the applicable legal and ethical framework. The Chamber notes that the manner of the disclosure does not suggest inadvertence, with the witnesses being specifically identified and discussed at some length. The Chamber considers the unauthorised disclosure of identifying witness information to be of the utmost seriousness given, in particular, its potential to place individuals at risk and the allegations of witness interference currently before the Chamber, which were known to the (...) Investigator*".

(j) The Investigator accepts that his discussions constituted a breach of his duty of confidentiality under (Sections) 5 and 6 of the Investigators' Code.

SANCTION

Submissions by Alternate Commissioner:

5. Mr Milne spoke to his written submissions of 19 March 2020. *Inter alia*, he highlighted the seriousness of the breach of confidentiality; the potential three-fold consequences (risk to safety of witnesses, risk to witnesses' family and acquaintances and the chilling effects on potential future witnesses in this, or other trials). In his words: "*Any threat to the integrity of (this) trial would be hard to overstate.*"

6. In his submission, although the initial contact by the Investigator with the witness (P-0190) may have been inadvertent, it was what the Investigator said which had

resulted in these proceedings. The Investigator, as an experienced investigator, should have well known the risks and avoided any such breach as occurred.

7. Mr Milne, having dealt with what he characterised as aggravating features, then fairly listed some features that he suggested went to mitigation: a 'one-off' event, no evidence of physical harm resulting, the Investigator's candid admission and his remorse, the lack of any previous disciplinary history, the Investigator having done no further ICC work over the last five years and the delays (both in commencing these procedures and then in awaiting the result, with neither the Investigator's fault).
8. Mr Milne submitted that the sanctions provision in the Code of Professional Conduct for counsel ("CPCC"), Article 42, should apply and be available here (*mutatis mutandis*); and, given that this was the first time that an investigator had been disciplined by the Board, he suggested that the Board might look at an earlier Board decision in *Keta*, where a three month suspension was imposed on a counsel for a breach of confidentiality. In discussion, Mr Milne accepted that although in the present case there were the risk factors already enunciated, and that those risks were not present in *Keta*, that additional aggravating (risk) feature might be seen to be balanced off against the obligations owed by counsel ("*in a position of authority within a Defence team*") which might be seen as more onerous than those owed by investigators – and that, arguably, one might balance the other out.
9. Mr Milne suggested that a period of suspension, running from the present date, would be an appropriate sanction.

Submissions on behalf of the Investigator:

10. Mr Hooper spoke to his written submissions of 6 April 2020 (and referred to the annexures to those submissions).
11. *Inter alia*, he stressed the immediacy of the Investigator's acceptance of his wrongdoing, and the consistent acceptance of his personal responsibility throughout the five-year period (the delays not being of his making), coupled with the Investigator's contrition.
12. Mr Hooper characterised the breach as an isolated one, with the Investigator perhaps not receiving as much support as might be seen as required for such difficult and demanding work, the Investigator being new to this Defence team. Mr Hooper described the offending as "*clumsy and misguided...a mis-disclosure*" with the Investigator fully accepting that he should not have done what he did and that, in doing what he did, he accepted the risks that potentially might arise.
13. Counsel submitted that the people being spoken to by the Investigator "*knew one another...(and) that the people he was speaking to knew that the people he was speaking of were protected witnesses*". Mr Hooper suggested that the type of breach of confidentiality which occurred here, best fitted as a breach of the duty of an investigator under Section 5.2 of the Investigators' Code. With this latter

- submission, the Board agreed – and that assessment was factored into the Board’s decision as to sanction, which follows.
14. Mr Hooper amplified and emphasised the six mitigating features touched on by Mr Milne; and suggested that the Board might deal with the matter by a sanction short of suspension, perhaps by admonition or reprimand.
 15. He went on to submit that, if a suspension was to be imposed it should run retrospectively, and be seen as time already served.

DECISION BY THE BOARD AS TO SANCTION:

16. For the reasons expressed by the Alternate Commissioner, summarised above at paragraphs 5 and 6 (and as alluded to by the Trial Chamber in its Decision of 12 August 2015), the Board considered that the breaches here were signally serious ones, carrying with them potential serious risks and consequences, both to persons and to systemic integrity.
17. As a consequence, in the Board’s view, a substantive sanction should follow, and that such sanction should still have meaningful future consequences.
18. The Board was aware, at all times, of the need for a sanction imposed for such conduct to carry publicly some deterrent aspect.
19. In the circumstances the Board considered that, at the least, a sanction for such conduct should be a suspension for a term of some significance. The Board discussed such a suspension being for even a term of one year (where the maximum period which might be imposed is a period of two years), but ‘stepped back’ from such a one year term primarily because of the five-year delay (from circa June 2015 to the present) during which the Investigator had not engaged in any ICC work (a sort of *de facto* suspension). A secondary reason for so ‘stepping back’ was found in the precedent value of the *Keta* matter already mentioned, and to be discussed further later.
20. But, the Board wished to make it clear – if it had not been for the extraordinary delay here, a significant period of suspension would have resulted. Meaningful consequences must – and shall – follow serious breaches of confidentiality and security.
21. In imposing the future term of suspension which the Board arrived at, it brought into account, and gave weight to (in favour of the Investigator) the following factors: (a) this was an isolated incident, one event only on 7 March 2015, carried out not in bad faith. The Board accepted Mr Hooper’s description of it as a blunder, not purposeful but, rather, clumsy and misguided, a “*mis-disclosure*”.
(b) perhaps with a degree of fortune, no actual harm was done.
(c) immediately and consistently, the Investigator made candid admissions of responsibility, coupled with expressions of remorse and regret, which expressions the Board accepted as genuine.

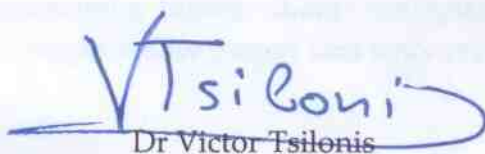
- (d) from the time of the event (on 7 March 2015) until the Investigator's formal suspension from work on the trial (by the Trial Chamber on 12 August 2015), there were no further transgressions by the Investigator.
- (e) and although only formally suspended from the trial, the Board noted that the Investigator had played no part in any ICC work over the last five years.
- (f) the time between commencement of the disciplinary procedure and this hearing, resulting in concern and some distress to the Investigator awaiting the result.
- (g) the Investigator is a person of otherwise good character and repute.
22. In addition, the Board considered the effects of the *Keta* decision and any guidance which might be gained from that decision. The Board saw it as being helpful and as something to 'benchmark' the present case beside.
23. As outlined at paragraph 8 above, the Board was prepared to accept the suggestion that the risks present here (of harm to persons and integrity of process) were, in effect, balanced out by the more onerous obligations of counsel.
24. The Board took guidance from both *Keta* and the CPCC and determined that a similar term of suspension (in *Keta* three months) should be imposed here and that such a suspension, to have signal effect, should run from the date of hearing.
25. However, the Board did step back from imposing three months as the term, taking the view that, given the delays that had occurred, there should be some further discounting in favour of the Investigator; with the Board settling on a two-month term in these uniquely exceptional circumstances.

FORMAL SANCTION:

26. Jean Logo Dhengachu hereby has imposed upon him a suspension of the right to be involved as an investigator in any way in any case or matter before the ICC for a period of two (calendar) months from 6 July 2020.
27. There will be no order as to costs.
28. It should be noted that this Decision as to sanction, with short reasons, was delivered orally by the Board on 6 July 2020, and that the 30 day appeal period (per Article 43 CPCC) runs from that date.

The Hague, 6 July 2020

Mr Nigel Hampton QC


Dr Victor Tsilonis


Mr Christian Borikana