

1 International Criminal Court
2 Appeals Chamber - Courtroom 3
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Bosco Ntaganda - ICC-01/04-02/06
5 Presiding Judge Howard Morrison
6 Judgment on Appeal
7 Wednesday, 8 March 2017
8 (The hearing starts open session at 4.30 p.m.)
9 THE COURT USHER: [16:30:10] All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE MORRISON: [16:30:20] Good afternoon, everybody. Would
13 the court officer please call the case.
14 THE COURT OFFICER: [16:30:31] Thank you, Mr President. This is the situation in
15 the Democratic Republic of the Congo in the case of the Prosecutor versus Bosco
16 Ntaganda, case reference ICC-01/04-02/06.
17 And for the record we are in open session.
18 PRESIDING JUDGE MORRISON: [16:30:48] Thank you.
19 Now, my name is Judge Howard Morrison and I'm the Presiding Judge on appeal
20 OA4 arising from the case of the Prosecutor versus Bosco Ntaganda. The other
21 judges of the Appeals Chamber on this appeal are Judge Monageng, Judge Van den
22 Wyngaert, Judge Hofmański and Judge Pangalangan. I'm joined today by Legal
23 Staff of the Appeals Division, Mr Anthony Abato, Mr Jasper Gwasira, Ms Elisabeth
24 Hammargren and Mr Thorgori Mathenge.
25 May I ask the parties and participants, please, to introduce themselves for the record,

1 starting with the Defence of Mr Ntaganda, whose appeal we are deciding today.

2 MR GOSNELL: [16:31:31] Good afternoon, Mr President. Christopher Gosnell

3 appearing for Mr Ntaganda, who is present in the courtroom this afternoon, assisted

4 by Isabelle Martineau, Marlène Yahya-Haage, Dignité Bwiza and Sandrine De Sena.

5 Thank you very much, Mr President.

6 PRESIDING JUDGE FREMR: [16:31:50] Thank you, Mr Gosnell.

7 May I ask the OTP, please, to introduce themselves.

8 MS BRADY: [16:31:54] Good afternoon, your Honour. Helen Brady, senior appeals

9 counsel, appearing for the Prosecution and I'm today with appeals counsel Ms Priya

10 Narayanan. Thank you.

11 PRESIDING JUDGE FREMR: [16:32:06] Thank you. And representatives for the

12 groups of victims.

13 MS RAMBOLAMANANA: [16:32:17] (Interpretation) Thank you, Mr President.

14 Vony Rambolamanana, assistant jurist in the OPCV.

15 MR SUPRUN: [16:32:27] (Interpretation) Good afternoon, Mr President. The

16 victims of the attack are represented by myself, Dmytro Suprun, in OPCV.

17 PRESIDING JUDGE FREMR: [16:32:31] Thank you very much. I note that Mr

18 Ntaganda has indicated he's present in court today. And the Appeals Chamber is

19 delivering its judgment on his appeal against the decision of Trial Chamber VI

20 entitled, "Decision reviewing the restrictions placed on Mr Ntaganda's contacts,"

21 rendered on 7 September 2016. In today's summary, I will refer to this decision as

22 the "Impugned Decision".

23 I shall now summarise the Appeals Chamber's written judgment, which was taken

24 unanimously. This summary is not authoritative. The written judgment, which

25 will be made available to parties and participants at the conclusion of this session, is

1 the only authoritative account of the Appeals Chamber's ruling and reasons.

2 By way of procedural background, on the basis of Registry reports concerning Mr

3 Ntaganda's contacts from detention, and in response to the Prosecutor's allegations of

4 witness interference, the Trial Chamber ordered the active monitoring of Mr

5 Ntaganda's telephone conversations under Regulation 101 of the Regulations of the

6 Court, first on 13 March 2015, continuing them on 18 August 2015.

7 On 1 April 2016, in keeping with its indication in the decision of 18 August 2015 that

8 it would conduct a periodic review of the restrictions, it invited the parties and

9 participants to file written submissions and observations on the restrictions.

10 Submissions were filed by Mr Ntaganda, the Prosecutor and the Registrar and on 7

11 September 2016, the Trial Chamber rendered the Impugned Decision, in which it

12 decided to maintain the restrictions imposed and to continue to review them

13 periodically.

14 Mr Ntaganda filed a request for leave to appeal the Impugned Decision and on 16

15 September 2016, leave was granted by a majority of the Trial Chamber on a single

16 issue, namely, whether the Trial Chamber erred in determining that continuing the

17 restrictions was necessary and proportionate to the objectives being served under

18 Regulation 101(2) of the Regulations of the Court.

19 Mr Ntaganda filed his document in support of the appeal on 6 October 2016 in which

20 he raises seven grounds of appeal. He requests that the Impugned Decision be

21 reversed and remanded to the Trial Chamber for further consideration and that his

22 allotment of telephone calls be increased to two hours per week as a minimum

23 interim measure.

24 Responses to the appeal were filed by the Prosecutor and the Common Legal

25 Representative of the Victims of the Attacks and the Representative of the Former

1 Child Soldiers, who I shall refer to collectively as the "victims".

2 I shall first address the Prosecutor's request for the appeal to be dismissed in limine.

3 The Prosecutor argues that the appeal in general is unsubstantiated and that Mr

4 Ntaganda fails to allege errors of law, fact or procedure with clarity. She argues that

5 the appeal should be dismissed in limine.

6 Although there are some specific arguments that the Appeals Chamber finds to be

7 unsubstantiated, the Appeals Chamber finds that Mr Ntaganda's submissions

8 generally meet the minimum requirements of substantiation allowing the Appeals

9 Chamber to consider their merits.

10 In Mr Ntaganda's first ground of appeal, he argues that the Trial Chamber erred

11 when it ignored the fact that the Prosecutor has had ample time since the start of the

12 trial to call all of her insider witnesses and she has failed to do so.

13 The Appeals Chamber finds Mr Ntaganda's argument to be speculative and it

14 considers in any event that the amount of time that the Prosecutor had to call her

15 insider witnesses is not in and of itself a relevant factor to the review of whether the

16 risk of witness interference remains high at a given stage of the proceedings.

17 Mr Ntaganda also argues that the Trial Chamber's reference to the number of

18 remaining non-insider witnesses reflects either a failure to state reasons or the taking

19 into account of an irrelevant fact, noting that he is not aware of any allegations of

20 intimidation of non-insider witnesses.

21 The Appeals Chamber finds that, although the Trial Chamber mentioned non-insider

22 witnesses, it referred only to allegations of intimidation of certain specific insider

23 witnesses. Thus, it has not relied upon the risk of interference with non-insider

24 witnesses.

25 The Appeals Chamber dismisses Mr Ntaganda's arguments under the first ground of

1 appeal.

2 Under the second ground of appeal, Mr Ntaganda argues that the Trial Chamber
3 erred in relying on alleged recent acts of interference with Prosecution witnesses to
4 continue the restrictions.

5 He argues that, at the time, he was in detention and his telephone calls were subject to
6 active monitoring when the alleged acts took place, and any implied connection
7 between these events and Mr Ntaganda's conduct is therefore unfounded.

8 The Appeals Chamber finds that the overall approach of the Trial Chamber to
9 consider information that had recently become available was correct.

10 Contrary to Mr Ntaganda's assertions, the Appeals Chamber finds that the Trial
11 Chamber did not imply a connection between the recent events and Mr Ntaganda's
12 conduct. However, it is not necessarily the case that such a link should have been
13 drawn in order for the Trial Chamber to conclude that the restrictions on Mr
14 Ntaganda's contacts should be maintained.

15 As noted in the Impugned Decision itself, the Trial Chamber had previously found
16 reasonable grounds to believe that Mr Ntaganda personally engaged in witness
17 interference and directed others to do so.

18 A finding that there are reasonable grounds to believe that Mr Ntaganda personally
19 engaged in witness interference is relevant, not only to the imposition of restrictions
20 under Regulation 101 of the Regulations of the Court, but also for their continuation.

21 Under the circumstances, where the Trial Chamber found that witness interference
22 appeared to be ongoing, and where the Trial Chamber had previously found that Mr
23 Ntaganda had personally engaged in such conduct, it was not unreasonable for the
24 Trial Chamber to find that there was an ongoing risk to the proceedings and that it
25 should maintain the restriction on Mr Ntaganda's contacts in order to reduce this risk.

1 Thus, the Appeals Chamber dismisses Mr Ntaganda's arguments under the second
2 ground of appeal.

3 Under the third ground of appeal, Mr Ntaganda argues that the Trial Chamber erred
4 in assuming that active monitoring is the least restrictive way of preventing the harm
5 caused by witness coaching in addition to raising the Trial Chamber's purported lack
6 of reasoning on this issue.

7 He argues that active monitoring is not the least restrictive means and, in his view,
8 passive monitoring is equally effective, as any examples of alleged coaching identified
9 by a passive review could be put to the witness during cross-examination.

10 The Appeals Chamber first recalls that, as argued by the victims, the Trial Chamber
11 explicitly referred to and provided reasons for the rejection of Mr Ntaganda's
12 proposal before the Trial Chamber that active monitoring should be discontinued in
13 favour of weekly random monitoring.

14 In that regard, the Trial Chamber stated that Mr Ntaganda's proposal would not
15 adequately guard against the potential for further conduct listed in Regulation 101(2)
16 of the Regulations of the Court, given that any such conduct could only be
17 ascertained after it had already occurred.

18 Therefore, the Appeals Chamber finds Mr Ntaganda's argument that the Trial
19 Chamber failed to consider alternative measures to have no merit.

20 Regarding the alternative measure put before the Appeals Chamber, the Appeals
21 Chamber notes that Mr Ntaganda did not raise this specific argument regarding
22 witness coaching before the Trial Chamber, and therefore the Trial Chamber cannot
23 be expected to have addressed it in that context. Furthermore, as argued by the
24 victims, the Trial Chamber considered the question of the necessity of active
25 monitoring based on all of the information it had before it and not only the

1 information which concerned witness coaching. In the view of the Appeals
2 Chamber, the Trial Chamber did not err in doing so and, as a result, it was
3 unnecessary for it to enter into the question of coaching specifically and, in particular,
4 whether active monitoring was the least intrusive measure in that respect.
5 Whether witness coaching alone could be a basis for maintaining restrictions,
6 including active monitoring, does not arise in the present appeal and therefore will
7 not be considered.

8 As a result, the Appeals Chamber rejects Mr Ntaganda's arguments under the third
9 ground of appeal.

10 In relation to the fourth ground of appeal, Mr Ntaganda argues that the Trial
11 Chamber's failure to define and properly apply the standard for witness coaching was
12 an error of law, and the consequent finding that there were reasonable grounds to
13 believe that Mr Ntaganda had engaged in witness coaching was an error of law and
14 fact.

15 In Mr Ntaganda's view, the Trial Chamber misconstrued the relevant passages relied
16 upon for its conclusion that Mr Ntaganda told his interlocutors which story to tell.
17 The Appeals Chamber notes that in the decision on restrictions of 18 August 2015, the
18 Trial Chamber considered that coaching of witnesses is a form of witness interference
19 and has the potential to severely affect the integrity of the proceedings.

20 In that regard, it found that there were reasonable grounds to believe that Mr
21 Ntaganda had instructed his interlocutors to coach witnesses, or directly told his
22 interlocutors which story to tell, stressing the need to tell the story in the manner as
23 described by him and the necessity of synchronising their stories.

24 The Appeals Chamber finds that, in the circumstances where the focus of the Trial
25 Chamber's examination is whether the terms of Regulation 101(2) were met, the Trial

1 Chamber provided sufficient indication as to the type of behaviour in relation to the
2 coaching of witnesses that it deemed to be legally impermissible and which fell within
3 the terms of that provision.

4 In relation to the remaining argument, Mr Ntaganda argues that the relevant passages
5 relied upon by the Trial Chamber to reach its finding of coaching do not go beyond a
6 discussion of a particular sequence of events and encouragement that witnesses
7 remind each other of the whole story.

8 However, despite the fact that in the relevant passages Mr Ntaganda does ask how
9 particular events unfolded, the Appeals Chamber finds that it is not clear that the
10 passages only reflect Mr Ntaganda encouraging witnesses to remind themselves of
11 the whole history.

12 The Appeals Chamber recalls that it will only interfere with a factual finding of the
13 Trial Chamber in limited circumstances. In this case, the Appeals Chamber finds
14 that Mr Ntaganda has not demonstrated that it was unreasonable for the Trial
15 Chamber to draw the conclusion it did, that this amounted to impermissible witness
16 coaching.

17 For the foregoing reasons, the Appeals Chamber dismisses Mr Ntaganda's arguments
18 under the fourth ground of appeal.

19 In relation to the fifth ground of appeal, Mr Ntaganda submits that the Trial Chamber
20 failed to consider alternative, less intrusive measures, as well as other relevant factors,
21 when determining the restrictions to Mr Ntaganda's communications.

22 He argues the Trial Chamber erred by failing to take into account the period of time
23 since the alleged misconduct, which he says was approaching two and a half years at
24 the time of the Impugned Decision, and it did not properly take into account his
25 efforts to avoid the misconduct during the period of active monitoring.

1 The Appeals Chamber finds no merit in Mr Ntaganda's argument that the Trial
2 Chamber erred by dismissing the impact of the amount of time that had passed since
3 the imposition of the restrictions.

4 The Trial Chamber explicitly noted the guidance provided by the European Court of
5 Human Rights on the need to carefully review the necessity of the measures in
6 question in light of the passage of time and the severity of the measures imposed. It
7 was clearly cognisant of the need to take into account the passage of time.

8 The Appeals Chamber considers that the passage of time does not per se mean that
9 the risk in question no longer exists and/or that the restrictions have become
10 disproportionate. The Appeals Chamber considers that the passage of time is but
11 one factor that may influence either finding.

12 In this case, the Trial Chamber took into account several factors detailed in the
13 Appeals Chamber's written judgment and concluded that the risk still existed and
14 that the restrictions remained proportionate. In that, the Appeals Chamber can find
15 no error.

16 At the same time, however, the Appeals Chamber considers that the passage of time
17 is a factor that could become more significant as more time elapses and that the Trial
18 Chamber must continue to actively review the restrictions in place and carefully
19 balance the need for and proportionality of the restrictions against the important right
20 accorded to detained persons to have contact.

21 Finally, with respect to Mr Ntaganda's argument that the Trial Chamber failed to
22 assess the impact of his own efforts to avoid misconduct since the imposition of the
23 restrictions, the Appeals Chamber notes that in the Impugned Decision, the Trial
24 Chamber determined that not engaging in misconduct should be the norm and the
25 fact that restrictive measures have been effective does not necessarily lead to the

1 conclusion that the need to continue those measures has diminished or disappeared.

2 Thus, the Appeals Chamber finds no error.

3 Indeed, the fact that no personal misconduct has been identified since the imposition
4 of restrictions does not bear much weight, given the fact that the restrictions

5 themselves removed in large measure the possibility for such misconduct. In

6 addition, the Trial Chamber provided reasons as to why, despite the lack of personal

7 misconduct having been identified, the restrictions should remain in place. While

8 Mr Ntaganda's willingness to abide by the conditions of the restrictions is noteworthy,

9 Mr Ntaganda has not identified why the Trial Chamber's conclusion is erroneous.

10 The Appeals Chamber therefore rejects Mr Ntaganda's arguments under the fifth

11 ground of appeal.

12 In relation to the sixth ground of appeal, Mr Ntaganda argues generally that the Trial

13 Chamber erred in various aspects in the procedure adopted in its assessment of the

14 Prosecutor's allegations, and it further erred in the burden of proof applied.

15 The Prosecutor first argues that Mr Ntaganda's sixth ground of appeal is outside the

16 scope of the appeal and requests it be dismissed in limine.

17 For the reasons further detailed in the Appeals Chamber's written judgment, the

18 Appeals Chamber finds that the arguments raised by Mr Ntaganda in the sixth

19 ground of appeal are intrinsically linked to the issue certified by the Trial Chamber in

20 its decision granting leave to appeal and accordingly rejects the Prosecutor's request.

21 Turning to Mr Ntaganda's argument under this ground of appeal, for the purposes of

22 today's summary, I will divide them into two categories.

23 First, Mr Ntaganda refers to the Trial Chamber's acceptance of ex parte submissions

24 and ex parte witness statements and annexes, and states that because of their ex parte

25 nature he is not in a position to concretely address prejudice. Mr Ntaganda submits

1 that the degree of resort to this practice, given the potential importance of the ex parte
2 material received to the Trial Chamber's perception of Mr Ntaganda's character,
3 constitutes an error of law and a serious violation of the right to be heard under
4 Regulation 101(3) of the Regulations of the Court, and to a fair hearing under
5 Article 67 of the Statute.

6 In terms of the specific ex parte submissions referred to, the Appeals Chamber notes
7 that, as mentioned by the Prosecutor, many of the documents to which Mr Ntaganda
8 referred were also filed in redacted versions available to Mr Ntaganda, in some cases
9 the day of filing of the ex parte versions or the day after. Therefore, for those
10 documents, Mr Ntaganda did have an opportunity to address prejudice.

11 In relation to the ex parte witness statements and annexes to which Mr Ntaganda
12 refers, the Appeals Chamber can find no error in the Trial Chamber's approach. The
13 fact that information may be withheld from a detained person in such proceedings is
14 not per se unfair. The Trial Chamber must ensure the fairness of the proceedings in
15 compliance with Article 64(2) and Article 67 of the Statute and Regulation 101(3) of
16 the Regulations of the Court, which stipulates that, generally, the detained person
17 shall be informed of the Prosecutor's request to restrict contact and shall be given the
18 opportunity to be heard to submit his or her views.

19 Additionally, the Trial Chamber must continuously balance the detained person's
20 rights to be informed with, in this case, the protection of victims and witnesses under
21 Article 68(5) of the Statute and Rule 81 of the Rules and, at the request of the
22 Prosecutor, the confidentiality of further or ongoing investigations under Rule 81(2)
23 of the Rules. The result is that the Trial Chamber may sometimes review evidence
24 which the detained person has not seen.

25 In doing so, the Trial Chamber must be cognisant that the accused person has not had

1 the opportunity to challenge the evidence and it should, therefore, consider such
2 evidence with that in mind.

3 For the reasons detailed in the Appeals Chamber's written judgment, the Appeals
4 Chamber finds that the Trial Chamber was cognisant of the issues associated with the
5 ex parte evidence and it assessed such evidence with the necessary caution.

6 As to the second category under the sixth ground of appeal, Mr Ntaganda argues that
7 the Trial Chamber improperly applied a reversal of the burden of proof.

8 In particular, he submits that the Trial Chamber erred in relying upon uncertified
9 translations of Mr Ntaganda's phone calls, and that it erred in noting in the Impugned
10 Decision that certain ambiguous phrases used during those calls had not been
11 addressed by the Defence.

12 Mr Ntaganda further argues that the Trial Chamber erred in noting the absence of a
13 Defence response to allegations of witness coaching, and that it failed to consider his
14 explanations regarding the use of coded language.

15 For the reasons detailed in the Appeals Chamber's written judgment, the Appeals
16 Chamber finds that Mr Ntaganda has not established an error in the Trial Chamber's
17 approach in these respects and that the Trial Chamber did not err as alleged in the
18 reversing of the burden of proof.

19 The Appeals Chamber rejects Mr Ntaganda's argument under the sixth ground of
20 appeal.

21 Finally, as to the seventh ground of appeal, Mr Ntaganda argues that the Impugned
22 Decision fails to analyse the impact of the restrictions upon his family and private life.
23 The Appeals Chamber notes that the Trial Chamber did indeed make this assessment
24 at paragraphs 35 to 41 of the Impugned Decision.

25 Whilst the Appeals Chamber accepts that the restrictions on Mr Ntaganda's contact

1 with other persons are significant and are likely to lead to hardship on his part, not
2 least because of their length, the Appeals Chamber may intervene only if an error in
3 the Trial Chamber's assessment has been established.

4 In the case at hand, Mr Ntaganda has failed to show that the exercise of the Trial
5 Chamber's discretion was abusive or otherwise erroneous. Accordingly, his
6 arguments under the seventh and final ground of appeal are also dismissed.

7 In conclusion, having reviewed the Impugned Decision on the basis of Mr Ntaganda's
8 grounds of appeal, the Appeals Chamber is satisfied, in light of its standard of review,
9 that the Trial Chamber correctly balanced Mr Ntaganda's right to respect for his
10 private and family life against the objectives of ensuring the safety of witnesses,
11 preventing breaches of confidentiality and ensuring the integrity of the trial
12 proceedings.

13 For these reasons, having dismissed the grounds of appeal raised by Mr Ntaganda,
14 the Appeals Chamber finds that it is appropriate to confirm the Impugned Decision.

15 Finally, as stated earlier, Mr Ntaganda requested that the Impugned Decision be
16 reversed and remanded to the Trial Chamber for further consideration and that the
17 Appeals Chamber order "as an interim measure that Mr Ntaganda be permitted two
18 hours of actively monitored telephone calls to his existing list of contacts."

19 The Appeals Chamber understands this to be a request for the Appeals Chamber,
20 having found an error and having remanded the matter to the Trial Chamber, to
21 order this interim measure with a view to it being put in place pending the Trial
22 Chamber's reconsideration of the matter.

23 Having found no errors, the Appeals Chamber finds it unnecessary to address that
24 request.

25 This concludes my summary of the judgment. I thank the interpreters and court

- 1 reporters and all present, and this session is now closed.
- 2 THE COURT USHER: [16:54:47] All rise.
- 3 (The hearing ends in open session at 4.55 p.m.)