

1 International Criminal Court
2 Appeals Chamber
3 Situation: Central African Republic II
4 In the case of The Prosecutor v. Mahamat Said Abdel Kani - ICC-01/14-01/21
5 Presiding Judge Gocha Lordkipanidze
6 Appeals Judgment - Courtroom 3
7 Thursday, 19 May 2022
8 (The hearing starts in open session at 4.00 p.m.)
9 THE COURT USHER: [16:00:40] All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE LORDKIPANIDZE: [16:01:27] Good afternoon, *bon après-midi*.
13 Would the court officer please call the case.
14 THE COURT OFFICER: [16:01:45] Good afternoon, Mr President.
15 This is the situation in the Central African Republic II, in the case of The Prosecutor
16 versus Mahamat Said Abdel Kani, case reference ICC-01/14-01/21.
17 And for the record, we are in open session.
18 PRESIDING JUDGE LORDKIPANIDZE: [16:02:03] Thank you.
19 I am Judge Gocha Lordkipanidze, presiding in this appeal arising from the case of
20 The Prosecutor versus Mahamat Said Abdel Kani. My fellow judges in this
21 appeal are Judge Piotr Hofmański, Judge Luz del Carmen Ibáñez Carranza,
22 Judge Solomy Balungi Bossa and Judge Marc Perrin de Brichambaut.
23 (Interpretation) I would like to ask the parties to introduce themselves, starting with
24 the Defence, please.
25 MS NAOURI: [16:02:47] (Interpretation) Thank you, Mr President. For the Defence

1 today by my side we have Mr Dov Jacobs, co-counsel; next to him we have Léa Allix;
2 behind me, Camille Mallard, Simon Appriou, and Lucie Pourquery de Boisserin.

3 And I am Jennifer Naouri, lead counsel for Mr Said. Thank you.

4 PRESIDING JUDGE LORDKIPANIDZE: [16:03:17] Office of the Prosecutor.

5 MS BRADY: [16:03:19] Good afternoon, your Honour. My name is Helen Brady.

6 I'm the senior appeals counsel for the Prosecution, and I'm here today with

7 Mr George Mugwanya, appeals counsel. Thank you.

8 PRESIDING JUDGE LORDKIPANIDZE: [16:03:32] Thank you.

9 Legal Representatives of Victims.

10 MS PELLET: [16:03:37] (Interpretation) Thank you, Mr President. The interests of

11 the victims today are represented by myself, Sarah Pellet, counsel for the OPCV, and

12 Tars Van Litsenborgh, who also is from the OPCV. Thank you.

13 PRESIDING JUDGE LORDKIPANIDZE: [16:04:01] (Interpretation) Thank you.

14 (Speaks English) Today, the Appeals Chamber will deliver its judgment in the appeal

15 of Mr Said against the decision of Trial Chamber VI entitled "Decision on the

16 Application for Interim Release of Mahamat Said Abdel Kani and Contact

17 Restrictions."

18 At the outset, the Appeals Chamber notes that as the scheduling order for this matter

19 was notified on 17 May, it was determined that the summary of the judgment in this

20 appeal would be delivered today, 19 May, in order to provide appropriate notice to

21 the parties.

22 This is a non-authoritative summary of the Appeals Chamber's written judgment in

23 the appeal. The latter will be notified after this hearing.

24 I will first briefly outline the procedural history of this appeal.

25 On January 2022, following the written request of the Defence for the interim release

1 of Mr Said, the Trial Chamber held a hearing on detention pursuant to Rule 118(3) of
2 the Rules of Procedure and Evidence.

3 On March 3, 2022, the Trial Chamber issued its decision on Mr Said's interim release.

4 On 9 March 2022, the Defence for Mr Said filed a notice of appeal against the
5 impugned decision, pursuant to Article 82(1)(b) of the Statute.

6 On 21 March 2022, pursuant to the order of the Appeals Chamber, the Defence filed
7 its appeal brief, raising five grounds of appeal against the impugned decision.

8 On 31 March 2022, the Prosecutor and the Office of Public Counsel for Victims filed
9 their responses. In their respective filings, both the Prosecution and the OPCV
10 opposed the appeal.

11 I will now turn to the five grounds of appeal.

12 Under the first ground of appeal, the Defence submits that the Trial Chamber
13 assumed without any basis that Mr Said could still count on the support of former
14 comrades to assist him in absconding. According to the Defence, this amounted to a
15 reversal of the burden of proof and the resumption of liberty pending trial, which
16 constitutes an error of law. The Defence also submits that the Trial Chamber's
17 erroneous assumption, unsupported by evidence, constitutes a failure to give reasons,
18 which is another error of law.

19 Under the second ground of appeal, the Defence submits that the Trial Chamber erred
20 in law by relying on this Court's jurisprudence holding that the confirmation of
21 charges increases the risk that the accused may abscond. The Defence refers to a
22 number of previous decisions and one judgment of the Appeals Chamber and states
23 that this jurisprudence violates the presumption of liberty pending trial, which in turn
24 violates the presumption of innocence. The Defence also submits that the Trial
25 Chamber committed an error of fact by failing to take into account the limited number

1 of charged incidents and the lack of seriousness in the alleged misconduct of the
2 accused.

3 Under the third ground of appeal, the Defence submits that the decision to extend
4 Mr Said's detention was based on the Trial Chamber's analysis of the general security
5 situation for Prosecution witnesses. The Defence submits that the risk of interference
6 with witnesses must be particular to the accused, consistent with the language of
7 Article 58(1)(b)(ii) of the Statute, and as previously held in the Bemba case.

8 Under the fourth ground of appeal, the Defence submits that the Trial Chamber's
9 finding about potential witness interference was based upon an annex to the report of
10 the Registry that was not accessible to the Defence, which is inconsistent with an
11 adversarial proceeding. In any event, the Defence submits that this report is
12 contradicted by other information which demonstrates the importance that the
13 Defence be in a position to contest the information contained in the report.

14 Under the fifth ground of appeal, the Defence submits that the Trial Chamber
15 committed an error of law by putting the accused in the impossible position of having
16 to choose between two fundamental rights: The right to be informed of the charges
17 and the right to the enjoyment of liberty pending trial.

18 I will now address these grounds of appeal in sequence.

19 Regarding the first ground of appeal, the Appeals Chamber notes that the Trial
20 Chamber had before it evidence describing Mr Said as having a senior role in the
21 FPRC, and determined that Mr Said could still count on the support of former
22 comrades in the FPRC. The Trial Chamber also found that there is still a significant
23 risk that Mr Said might be able to abscond if he were to be allowed to return to
24 Central African Republic, with or without conditions.

25 Accordingly, the Appeals Chamber is not persuaded by the Defence's position that

1 the impugned decision was based on theoretical or abstract risks, nor that the decision
2 created the presumption of continued detention.

3 For these reasons, the first ground of appeal is rejected.

4 Regarding the second ground of appeal, the Appeals Chamber recalls that
5 considering the gravity of the charges in a specific case, among other case-specific
6 factors, does not violate the principle that the right to liberty must be respected.

7 The Defence's position directly challenges appellate precedent on interim release in
8 the Bemba case and indirectly challenges the precedent in the current and the recent
9 judgment in the Abd-Al-Rahman case. In this regard, the Appeals Chamber has

10 explained that, although not obliged to follow the previous interpretations of
11 principles and rules of law, the Appeals Chamber retains discretion as to whether or
12 not to do so. Absent convincing reasons, it will not depart from its previous
13 decisions, given the need to ensure predictability of the law and the fairness of the
14 adjudication to foster public reliance on its decisions. The Appeals Chamber finds
15 that the Defence has not provided convincing reasons in this appeal.

16 Turning to the Defence's submission that the Trial Chamber failed to explain why the
17 charges meet the standard of seriousness, the Appeals Chamber notes that the charges
18 confirmed by the Pre-Trial Chamber include charges of war crimes and crimes against
19 humanity involving torture and unlawful detention, and that if proved, these charges
20 would, in all likelihood, result in a lengthy prison sentence.

21 Based on the foregoing, the Appeals Chamber considers that the Trial Chamber did
22 not err in finding that the charges are serious in nature, and would, if proved, result
23 in a lengthy prison sentence. Even assuming that the Defence is correct that the
24 charges against Mr Said are more limited in nature than those in other cases, this does
25 not negate the seriousness of the charges against Mr Said.

1 The second ground of appeal is thus rejected.

2 Turning to the third ground of appeal, the Appeals Chamber observes that the
3 Trial Chamber specifically noted that it would be unjust to prolong Mr Said's
4 detention solely on the basis of the security situation inside the Central African
5 Republic. The Trial Chamber proceeded to consider "how easy it would be for the
6 detained person, once released, to interfere with the witnesses or otherwise obstruct
7 justice". The Chamber then considered the information before it in finding that there
8 are indications that Mr Said does still have support in the CAR and that, if released,
9 he would be in a favourable position to effectively interfere with ongoing
10 investigations or proceedings, either personally or through third persons.

11 Accordingly, the Appeals Chamber is not persuaded by the Defence's position that
12 the impugned decision was based on factors unconnected to Mr Said.

13 On this basis, the third ground of appeal is dismissed.

14 As to the fourth ground of appeal, the Appeals Chamber recalls that the right to
15 disclosure is not absolute, and withholding information may in some cases be
16 permissible so as to preserve the fundamental rights of another person.

17 The Appeals Chamber has previously held that where a Chamber relies on redacted
18 or *ex parte* material, the detained person must be able to understand, to the extent
19 possible, the basis for the decision from the reasons discerned from the material *in toto*
20 available to him or her.

21 The Appeals Chamber notes that the specific part of the Registry Report Annex relied
22 upon the Trial Chamber was not available to the Defence. Notwithstanding, the
23 Appeals Chamber finds that the Defence had sufficient notice of the Prosecution's
24 submissions about Mr Said's access to support and potential for interfering with the
25 proceedings. Thus, the Appeals Chamber is not persuaded that the Defence suffered

1 undue prejudice in not having access to the Registry Report Annex. However, the
2 Appeals Chamber stresses that the Trial Chamber must remain diligent as it balances,
3 on a case-by-case basis, the rights of the detained person to be informed against the
4 possible need to withhold information.

5 For these reasons, the Appeals Chamber rejects the fourth ground of appeal.

6 While agreeing with the outcome reached under the fourth ground of appeal,

7 Judge Ibáñez considers that the information in the Registry Report Annex appears to
8 have been central to the Chamber's conclusion under Article 58(1)(b)(ii) of the Statute,
9 notwithstanding that the Chamber referred to other submissions and evidence
10 available to the Chamber in its analysis.

11 On this basis, Judge Ibáñez considers that the Trial Chamber erred. In her view, the

12 Trial Chamber must, in principle, make its assessment only after affording the

13 Defence an opportunity to make submissions about the evidence - including

14 information provided by the Registry - in a manner that would preserve the fairness

15 of the proceedings. However, Judge Ibáñez notes that the risk factors in

16 Article 58(1)(b) of the Statute are not cumulative, and that any of the risks listed, if

17 present, would justify detention. Judge Ibáñez further notes that the Defence has not

18 indicated how an error of the Trial Chamber in its finding under Article 58(1)(b)(ii) of

19 the Statute would be material to the ultimate decision to detain, given that the Trial

20 Chamber also found grounds to detain under Article 58(1)(b)(i) of the Statute.

21 Therefore, Judge Ibáñez finds that, notwithstanding the error, it would not be

22 appropriate to interfere with the impugned decision.

23 Concerning the fifth ground of appeal, the Appeals Chamber recalls that

24 disclosure may be a factor for consideration in making an assessment pursuant to

25 Article 58(1)(b)(ii) of the Statute. However, the Appeals Chamber has emphasised

1 that the fact that evidence has been disclosed to an accused person does not mean that
2 a detainee may not be released. Rather, disclosure is but one factor that a Chamber
3 may consider, amongst others, in reaching a determination as to whether continued
4 detention appears necessary.

5 The Appeals Chamber notes that in finding that the conditions of Article 58(1)(b)(ii) of
6 the Statute continue to be met, the Trial Chamber correctly considered a number of
7 relevant factors. As part of this assessment, the Trial Chamber found that Mr Said
8 may have a strong motive to influence Prosecution witnesses and noted the advanced
9 stage of disclosure and the volume of confidential information in Mr Said's possession,
10 including the identities of a large number of witnesses. The fact that the
11 Trial Chamber considered disclosure as one factor among several does not place
12 Mr Said in a position of choosing between the rights afforded to him under the
13 Statute.

14 Thus, the fifth ground of appeal is dismissed.

15 At this stage, I hereby acknowledge the presence of Mr Said in the Chamber.

16 This brings us to the end of the summary of the Appeals Chamber's judgment.

17 I would like to thank the large audience that are observing today's proceedings
18 because it is very -- your keen interests are very important for the strengthening
19 legitimacy of this Court.

20 I would also like to thank our dedicated team, including interns and visiting
21 professionals, that worked on this appeal. And I welcome the presence of other
22 interns and visiting professionals in this Chamber.

23 I would like to thank the court reporters, interpreters and other Registry staff for their
24 valuable assistance today in holding this hearing.

25 The hearing is hereby adjourned.

- 1 THE COURT USHER: [16:23:00] All rise.
- 2 (The hearing ends in open session at 4.23 p.m.)