

1 International Criminal Court
2 Appeals Chamber
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd Al Rahman
5 (Ali Kushayb) - ICC 02/05 01/20
6 Presiding Judge Piotr Hofmański
7 Appeals Judgment - Courtroom 1/Webex
8 Wednesday, 2 June 2021
9 (The hearing starts in open session at 4.49 p.m.)
10 THE COURT USHER: [16:49:44] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE HOFMAŃSKI: [16:50:19] Good afternoon.
14 Would the court officer please call the case.
15 THE COURT OFFICER: [16:50:26] Thank you, Mr President.
16 The situation in Darfur, Sudan, in the case of The Prosecutor versus Ali Muhammad
17 Ali Abd-Al-Rahman ("Ali Kushayb"), case reference ICC-02/05-01/20.
18 For the record, we are in open session.
19 PRESIDING JUDGE HOFMAŃSKI: [16:50:45] Thank you very much.
20 I am Judge Piotr Hofmański, presiding in this appeal arising from the case of
21 the Prosecutor against Ali Muhammad Ali Abd-Al-Rahman.
22 My fellow judges in this appeal are Judge Luz del Carmen Ibáñez Carranza,
23 Judge Perrin de Brichambaut, Judge Solomy Balungi Bossa and
24 Judge Gocha Lordkipanidze.
25 May I ask the parties to introduce themselves for the record, please, starting with

1 the Defence team.

2 Mr Laucci.

3 MR LAUCCI: [16:51:24](Interpretation) Good afternoon, Mr President.

4 On the Defence bench today we have Vanessa Grée, Ahmad Issa, case manager.

5 And myself, Cyril Laucci, lead counsel. Thank you very much.

6 PRESIDING JUDGE HOFMAŃSKI: [16:51:47] Thank you, Mr Laucci.

7 From the Office of the Prosecutor, Mrs Brady please.

8 MS BRADY: [16:51:51] Good afternoon, your Honour. My name is Helen Brady,

9 senior appeals counsel, and I'm here today with Mr Matteo Costi, appeals counsel,

10 and Ms Nivedha Thiru, associate appeals counsel. Thank you.

11 PRESIDING JUDGE HOFMAŃSKI: [16:52:01] Thank you, Mrs Brady.

12 And for the OPCV, Madam Massidda, please.

13 MS MASSIDDA: [16:52:11] Good afternoon, Mr President. The Office of Public

14 Counsel for Victims appear in this appeal having requested to appear and having

15 been granted leave. Meanwhile, the office has also been appointed as legal

16 representative of a number of victims. Representing the victims today, myself,

17 Paolina Massidda, principal counsel.

18 PRESIDING JUDGE HOFMAŃSKI: [16:52:32] Thank you very much.

19 And remotely I see a Legal Representative of Victims team. Mr Nasser attends

20 remotely.

21 Please, you have the floor. We cannot hear you.

22 MR NASSER: [16:52:53] Thank you. Thank you, Mr President. (Inaudible)

23 THE INTERPRETER: [16:53:05] The interpretation booth does not hear the speaker

24 at all.

25 PRESIDING JUDGE HOFMAŃSKI: [16:53:12] Yes, we have a technical problem.

1 Could you try again.

2 MR NASSER: [16:53:18] Yes. Thank you, Mr Chamber. Team (inaudible) will be
3 Ayoub Eyissa, as source counsel -- source person, and me (inaudible).

4 PRESIDING JUDGE HOFMAŃSKI: [16:53:36] Thank you. I think it was sufficient
5 for the record, but I understand the issue of the translation, but everything
6 can -- noticed.

7 I also notice that the second team is not going to attend the hearing today.

8 Well, thank you very much.

9 For the record, I note that Mr Abd-Al-Rahman participates from a remote location.

10 Today, the Appeals Chamber will deliver its judgment in the appeal of

11 Mr Abd-Al-Rahman against the decision of the Pre-Trial Chamber II entitled

12 "Decision on the review of the detention".

13 This is a non-authoritative summary of the Appeals Chamber's written judgment in
14 the appeal. The latter will be notified after this hearing, as usual.

15 I will now briefly explain the context of this appeal.

16 On 12 April 2021, after receiving observations from the Prosecutor and

17 Mr Abd-Al-Rahman, the Pre-Trial Chamber ordered Mr Abd-Al-Rahman's continued
18 detention. It found that there were no changed circumstances requiring
19 the Pre-Trial Chamber to modify its prior ruling.

20 On 23 April 2021, Mr Abd-Al-Rahman appealed this decision to maintain his
21 detention, raising five grounds of appeal.

22 Under the first ground of appeal, Mr Abd-Al-Rahman submits that

23 the Pre-Trial Chamber erred in law by establishing an irrefutable presumption of the
24 existence of sympathisers, by requiring the proof of a negative fact, and thereby

25 reversing the burden of proof. He also submits that the Pre-Trial Chamber erred in

1 law by refusing to release him on the basis of the presumption that he has
2 sympathisers, without satisfying itself as to the impact of his continued detention on
3 his presumed ability to mobilise them.

4 The Appeals Chamber notes that Mr Abd-Al-Rahman's submissions under this
5 ground of appeal start from an incorrect premise. He wrongly avers that
6 the Appeals Chamber changed the Court's jurisprudence, by introducing
7 a presumption, rebuttable with proof to the contrary, that a detained person still has
8 supporters who may have access to actual or potential witnesses.

9 Moreover, Mr Abd-Al-Rahman fails to explain how the Pre-Trial Chamber, by
10 considering and rejecting his submissions, reversed the burden of proof and created
11 an irrefutable presumption. His argument rather appears to be based on
12 a misunderstanding of the Pre-Trial Chamber's findings. In the Appeals Chamber's
13 view, the Pre-Trial Chamber did not create an irrefutable presumption in relation to
14 the existence of a network of supporters. What the Pre-Trial Chamber did was to
15 conclude that it was irrelevant to establish that Mr Abd-Al-Rahman has no assets
16 today, because even if confirmed, it would not eliminate the possibility that he never
17 had a leadership role before or that he could not still have supporters and
18 sympathisers today.

19 In this regard, the Appeals Chamber considers that Mr Abd-Al-Rahman seems to
20 disagree with the Pre-Trial Chamber's factual assessment that evidence of his current
21 monetary condition is irrelevant, and failed to show that the Pre-Trial Chamber erred
22 in law or was unreasonable in its assessment of the facts before it.

23 Mr Abd-Al-Rahman's first ground of appeal is, therefore, rejected.

24 Under the second ground of appeal, Mr Abd-Al-Rahman argues that
25 the Pre-Trial Chamber made an error of law by providing different reasons than those

1 contained in the decision granting the second postponement of the confirmation
2 hearing, when it stated that it was appropriate to give the Prosecutor a final
3 opportunity to attempt to put in place sufficient protective measures to allow
4 the confirmation hearing to take place without unduly endangering witnesses.

5 Mr Abd-Al-Rahman submits that the second postponement of the confirmation
6 hearing was based on promises made by the Prosecutor of an imminent agreement
7 with the Sudanese authorities resolving witness protection. In particular,

8 Mr Abd-Al-Rahman submits that the criterion of inexcusable delay by the Prosecutor
9 pursuant to Article 60(4) of the Statute was met and he should have been released.

10 The Appeals Chamber considers that Mr Abd-Al-Rahman has not met his burden of
11 substantiation with regard to errors of fact. He limited himself to repeat his
12 argument that the Prosecutor's request to postpone the confirmation hearing for
13 a second time resulted in an unreasonable delay of the proceedings, thereby justifying
14 his release, and to note what he believes to be an inconsistency between the reasoning
15 in the Pre-Trial Chamber's decision to grant such a request for postponement and the
16 Impugned Decision.

17 The Appeals Chamber recalls the party's failure to comply with its substantiation
18 requirements may entail dismissal *in limine* of any ground of appeal or underlying
19 argument that does not comply with these requirements. Having determined that
20 Mr Abd-Al-Rahman did not properly substantiate the error of facts he alleged,
21 the Appeals Chamber dismisses this ground of appeal *in limine*.

22 Under his third ground of appeal, Mr Abd-Al-Rahman submits that
23 the Pre-Trial Chamber erred in law by failing to consider that the Prosecutor ceased to
24 support the admissibility of the evidence on which it rested her showing of the
25 criteria of detention under Article 58(1)(a) of the Statute because she did not respond

1 to the admissibility request, challenging the admissibility of such evidence.

2 Contrary to Mr Abd-Al-Rahman's submissions, the Appeals Chamber does not
3 consider that the Pre-Trial Chamber failed to require the Prosecutor to meet her
4 burden of proof, nor does it consider that the failure of the Prosecutor to respond to
5 a motion on admissibility of her evidence amounts to a change in circumstances.

6 Contrary to Mr Abd-Al-Rahman's submissions, neither Regulation 34(b) of the
7 Regulations, nor the jurisprudence he cites, supports his view that a party's failure to
8 respond to a request to dismiss its evidence as inadmissible implies that it declines to
9 support the admissibility of such evidence.

10 Accordingly, Mr Abd-Al-Rahman's third ground of appeal is rejected.

11 Under his fourth ground of appeal, Mr Abd-Al-Rahman submits that
12 the Pre-Trial Chamber erred in fact and in law by misinterpreting his submissions
13 about the absence of rulings by the Pre-Trial Chamber on a number of pending
14 motions. He argues that the Pre-Trial Chamber failed to consider the impact of the
15 absence of such rulings on his rights, including, (i), on the time available for
16 the preparation of the confirmation hearing, (ii), on his right to appear within
17 a reasonable time at the confirmation hearing, and (iii), on his right not to be held in
18 detention for unreasonable period of time due to inexcusable delay by the Prosecutor.

19 First, as for the alleged error of fact, the Appeals Chamber notes that, contrary to
20 Mr Abd-Al-Rahman's allegation, his observations on detention show that he did
21 argue that the time taken by the Pre-Trial Chamber to deliberate on pending motions
22 was excessive, stressing the unreasonable nature of the delay.

23 Second, Mr Abd-Al-Rahman fails to demonstrate how, as a result of the alleged error
24 of fact, the Pre-Trial Chamber's alleged failure to consider his submissions would
25 amount to an error of law and, in any event, how considering any such submissions

1 would have led the Pre-Trial Chamber to issue a substantially different decision.

2 With regard to the alleged second error of law, the Appeals Chamber is not
3 persuaded by Mr Abd-Al-Rahman's allegation that the Pre-Trial Chamber failed to
4 take into account the impact of the outstanding decisions, on his rights to appear
5 within a reasonable time for the confirmation hearing and not to be detained for an
6 unreasonable time due to inexcusable delay by the Prosecutor.

7 Accordingly, the fourth ground of appeal is rejected.

8 Finally, under his fifth ground of appeal, Mr Abd-Al-Rahman submits that
9 the Pre-Trial Chamber erred in law by entrusting the Registry with the function of
10 seeking the release of detained persons, a function that, in his view, falls exclusively
11 within the prerogative of the parties under Rule 118 of the Rules. He further submits
12 that the Pre-Trial Chamber erred in law by dismissing *in limine* his detailed
13 submissions on this matter.

14 The Appeals Chamber considers that Mr Abd-Al-Rahman misinterprets, once again,
15 the Impugned Decision. The Pre-Trial Chamber did not consider, as
16 Mr Abd-Al-Rahman alleges, that it is for the Registry to seek release on medical
17 grounds of a detainee, in this case of Mr Abd-Al-Rahman. In the Appeals Chamber's
18 view, the Pre-Trial Chamber properly described the functions and responsibilities of
19 the Registry in relation to the physical and mental health of detainees, as set out in
20 the Regulations of the Court and the Regulations of the Registry.

21 Accordingly, Mr Abd-Al-Rahman's fifth ground of appeal is also rejected.

22 For these reasons, and for the reasons stated more fully in the written judgment,
23 the Appeals Chamber rejects the appeal and confirms the Impugned Decision.

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

25 I would like to thank the court reporters, interpreters, and other Registry staff for

- 1 their valuable assistance today in holding this hearing.
- 2 The hearing is now adjourned.
- 3 THE COURT USHER: [17:07:00] All rise.
- 4 (The hearing ends in open session at 5.07 p.m.)