

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

PRE-TRIAL CHAMBER

CASE NO. 001/18-07-2007-ECCC/PTC(01)

KAING GUEK EAV

WEDNESDAY, 21 NOVEMBER 2007
1305H
APPEAL HEARING (IN CAMERA)

Before the Judges:

PRAK Kimsan, Presiding
HUOT Vuthy
PEN Pichsaly
Rowan DOWNING
Katinka LAHUIS

For the Pre-Trial Chamber

CHUON Sokreasey
Anne-Marie BURNS

For the Office of the Co-Prosecutors:

CHEA Leang
Robert PETIT

For the Charged Person: KAING GUEK EAV

KAR Savuth
François ROUX

1 (Extracted from page 38 onwards of the transcript)

2 MR. PRESIDENT:

3 Please, sit down.

4

5 We would like to continue the hearing. We would like to invite Judge Downing --

6 JUDGE DOWNING:

7 I address this question to both counsel – or, all Counsel, if we look at Rule 21, "Fundamental
8 principles", in particular, 21.1(d), it is said that at every stage of the proceedings, in effect, the person
9 suspected or the charged person shall be informed of his or her right to remain silent. I would like to
10 hear from both the lawyers for Duch and from Co-Prosecutors, as to their views upon the apparent
11 failure of the charged person to be reminded of his right to remain silent at every stage of the
12 proceeding, noting that from our reading of the initial appearance, and all interviews, it appears as
13 though he has only been informed of his rights once, and that was on the 31st of July. Is this a matter
14 that we should be concerned with, or has the fact that he was represented by lawyers, to be implied
15 as a waiver of the need for him to be informed of his right to remain silent?

16 MR. ROUX:

17 Thank you for this question, Mr. Judge. Regarding the defence, as far as the defence is concerned
18 we are referring once more to the rules of Civil Law, and we consider that from the time the
19 proceedings start, the Judges have given this warning. This is then sufficient. It is not necessary
20 within Civil Law to remind this rule, neither in Cambodian law and neither in French law; and French
21 law has inspired it. We have mentioned this as the beginning of the proceedings, and we consider
22 that it's done for the whole proceedings.

23

24 On the other hand, it was necessary to be done at the stage of the Pre-Trial Chamber, as it was done
25 yesterday morning. It will be necessary to do it again each time the charged person will appear

1 before new Judges, including the Trial Chamber. I am confirming that when the Co-Investigating
2 Judges have given the warning, we consider that this warning is given for the whole proceedings.

3 JUDGE DOWNING:

4 What are we then to do with the rule that says "at every stage of the proceedings"?

5 MR. ROUX:

6 The first stage of proceedings of the procedure is the proceedings, investigation. The information
7 about this rule was to be given at this very moment. The second stage of proceedings is the appeal
8 of the order issuing from the Co-Investigating Judges. The third stage of proceedings is the
9 appearance before the Judges of the Trial Chamber. This is how I understand the term "stage of
10 proceedings". This is what we planned before the International Criminal Tribunal. We have the stage
11 before the trial, then the stage during the trial, and then the stage of the appeal. At the moment is the
12 stage of proceedings. And this rule has been recalled at the beginning of the proceedings stage. We
13 haven't gone into a new stage of proceedings.

14 JUDGE LAHUIS:

15 Does this answer mean that you waive rights of annulment when the Court decides in a later stage
16 that perhaps all stages of proceedings might mean something different?

17 MR. ROUX:

18 No, I intend that for each stage of the proceedings that this rule shall be applicable. The first stage of
19 procedure is proceedings. When we go into a new stage, we will have to remind the charged person
20 of these rights, like we did yesterday morning. As long as this will be done, I would not have anything
21 to say. If we do not do it, then I will express myself.

22 JUDGE DOWNING:

23 If we have a situation where we have an unrepresented person, and they have an interview, for
24 argument's sake, on the 31st of July and the warning; they are informed of their rights on that day.
25 Then, their next interview is a month later and no warning is given because it's at the same stage.

1 Then the next interview is another two weeks later, no warning or information is given. Are we in a
2 position where it can be said that the fundamental right to remain silent has been truly informed or
3 given to that person, because they may have forgotten what occurred two months ago.

4
5 Our concern is that it is a fundamental right, and being fundamental it may be that you have to be
6 reminded of it so that you do not forget.

7 MR. ROUX:

8 As for me, I consider that when the text is mentioning "at every stage", for me, it means at the
9 beginning of each stage. But if the Chamber deems that the Judge has to remind the charged person
10 each time, I don't see any disadvantage or problem, on the contrary. But if I refer to the text, and if we
11 are talking about the different stages of the judicial investigation, it's at the beginning and not during
12 proceedings. And I remind you that the Investigating Judge cannot hear the charged person without
13 examination. And if we consider that proceedings are started, that is why the text is stating "at the
14 beginning of the proceedings in the presence of the defence lawyer". We inform the charged person
15 about their rights, and afterwards the Judge cannot question the charged person without the presence
16 of Defence lawyers.

17 MR. PRESIDENT:

18 Counsel?

19 MR. PETIT:

20 I have to say that it has also been a learning process when it comes to procedure as applicable before
21 this Court. But, it is my understanding – and this is what we have been advised – that Article 21(d)
22 means "stages of proceedings" as my colleague has pointed out.

23
24 I am not aware of the practice in other Civil Law jurisdictions. I am certainly aware of the practice in
25 the Common Law jurisdiction; and I am certainly aware of the practice in international law.

1 A word of caution: Obviously, if an accused would be unrepresented once charged, if the Prosecution
2 were to be present, we would certainly invite as positively as possible to err on the side of caution and
3 to make sure that any apparent waiver to the right to be represented and the right to be silent was
4 informed; that is, that these rights were made very clear to the person unrepresented. Because – and
5 I will close on this – it is also the practice in all jurisdiction to recognise that the judicial process must
6 be satisfied that whatever decision is made has been in an informed way and it is the right, certainly of
7 people charged even with the most serious crimes, to proceed according to what they believe are in
8 their best interests.

9 MR. ROUX:

10 Please refer to Rule 58 of the Internal Rules, point number 2, where it is mentioned the charged
11 person can only be questioned/interviewed in the presence of his or her Defence lawyer, unless she is
12 refusing these rights in a written document and added to the case file.

13
14 Point number 3 always shocked me, since it mentioned "in case of emergency and with the consent of
15 the charged person, the Co-Investigating Judges can interview the charged person without the
16 presence of his Defence lawyer being necessary." I am regretting the insertion of such an article.

17 And I think it would be advisable that all the Judges here review these two articles, number 2 and
18 number 3. They will also need to decide that if the defence counsel is not here, then the Co-Judges
19 will have to read to the charged person the Article (d). This would be a very important reform,
20 Article 22(d).

21 MS. CHEA LEANG:

22 I would like to participate and would like to respond to the question of Judge Downing: one, relating to
23 "must inform at every stage". I think that this point is related to the Article 57 of the Internal Rules,
24 and also 143 of the Criminal Code that we have applied: In case of necessary from one stage to
25 another the Co-Investigating Judges will inform the charged person when he first appears. So I think

1 it is the same, like it is raised by the international lawyer. So this problem is still under the stage of
2 investigation. So the role of the Investigating Judge who has to point out this time the charged person
3 of his right.

4
5 I believe that I do not oppose the Judge if he thinks a request for sure to inform the charged person of
6 this information at every stage.

7
8 Number two related to the lawyer François Roux's (unintelligible) under Rule 58 in the Internal Rules,
9 and also in Article 145 of the Criminal Code of Procedure. It is exactly the same regarding the three
10 stages: First, the interview has to have the presence of the lawyer; number two, can question in case
11 of the absence of the lawyer; in that case, can be applied only on the consent of the charged person.
12 And point number three, it's in case of emergency, for example, like when the charged person has a
13 problem that we cannot avoid and it is necessary, but we need answer. But we just do it, and we
14 apply according to the Civil Law system. That is the way we apply it according to the Civil Law
15 system. This is my opinion and I would like the Pre-Trial Chamber to please consider on this point,
16 and also on the Internal Rules that stipulated and prescribed all of these problems and also described
17 in the Criminal Code of Procedure of Cambodia.

18 JUDGE LAHUIS:

19 I have another question, but I first want a clarification from Mr. Roux. You mentioned that, also for the
20 Pre-Trial Chamber, only once -- one reminder of his right to remain silent is necessary. Does this
21 mean, also, when the Pre-Trial Chamber is dealing with different appeals from the same charged
22 person?

23 MR. ROUX:

24 We can ask ourselves the question, since we are not dealing with the same subject as the Co-
25 Investigating Judge. "Proceedings" is of course, only one stage of proceedings. The Pre-Trial

1 Chamber examines appeals on different issues, and we could agree that it would be preferable that
2 for each appeal the Pre-Trial Chamber takes the precaution to remind the charged person of his
3 rights. On the other hand, regarding the appeal that we are dealing with today, if next week there
4 would be a new hearing, then it wouldn't be necessary if it has already been done.

5 JUDGE LAHUIS:

6 Another question: The Court has read that, in the initial appearance, Mr. Duch was present and he
7 was not present during the adversarial hearing. It seems that the charged person indicated that he
8 wanted assistance from an international lawyer. And the Court has also read that one of the
9 Prosecutors mentioned that the proceedings for listing on the list of the bar association was not
10 finished yet. The Pre-Trial Chamber has done research in the case file and found no record,
11 according to Rule 58.2 in which the charged person waived his rights to an international lawyer. And
12 it was referred already that the right to a lawyer is one of the fundamental rights prescribed in Rule 21.
13 As my colleague did, I also want to hear opinions from counsel.

14 JUDGE DOWNING:

15 If I could just add to that question before counsel respond. Part of the response that I would like is a
16 consideration also of what does "lawyer" mean. Because, if we look at Rule 21 and Rule 57, it refers
17 to "a lawyer". If we then look at Rule 22, you could conclude that the expression "a lawyer" means a
18 national lawyer and a foreign lawyer. 22.1(a) or 22.1(b): "Shall have the right to freely choose from
19 amongst national lawyers and foreign lawyers." So a little bit depends on the definition that you apply
20 to the word "lawyer" as well.

21 MR. PETIT:

22 Can I just, perhaps for the sake of entertainment, point out that the French version of 21.1(a) says
23 "Cambodian lawyers or foreigners", not "and foreigners". 21.1 (a) says, in French, (*no interpretation*).

24 JUDGE DOWNING:

25 In the French, "either a national or a foreign lawyer," but not both. So this makes it embarrassing at

1 this stage if we applied the French? Is that right? Sorry, the word "or" should perhaps be interpreted
2 as conjunctive rather than disjunctive in the circumstances.

3 MR. PETIT:

4 Could I ask, just for the sake of confusion this time, what the Cambodian says?

5 MS. CHEA LEANG:

6 I just read the Cambodian language. We use "and" not "or", because the "or" means "in each case",
7 and when it says "and", we need both. So we would like to request to the committee of the Internal
8 Rules and also the Pre-Trial Chamber to please consider these words.

9 MR. ROUX:

10 If I may allow myself to give some precision to the Chamber on the way that we have dealt with. We
11 have worked *in concreto* and not in abstracto. I was there – I was present during the adversarial
12 hearing, but I was not entitled to take the floor officially as I was not agreed with the local bar, and I
13 didn't swear. I was only an international consultant for my learned friend Kar Savuth. We have
14 considered *in concreto* that the rights of the charged person were respected, since we had worked
15 together with Mr. Kar Savuth. We had worked on the adversarial hearing, and he was speaking on
16 behalf of the difference.

17
18 When I was a member of the Cambodian bar and I have sworn, then I could express my way in
19 officially.

20 MR. PETIT:

21 The notice that you see mentioned with relations to Mr. Roux made by me at the hearing was in line
22 with my stated position that there must be a substantive and the appearance of equality of arms, and
23 that, therefore, Maître Roux, not having been sworn in and therefore not having the right of audience
24 in front of the Co-Investigating Judges, I took the position that it was not appropriate for me to have or
25 to take that right of audience. I can't say that I miss the good old days.

1 However, I would like to point out, and for clarification, that it is our position that the right of the
2 accused is that of being represented by counsel of his choice within the framework set up, be it an
3 international one, a national lawyer, or both. What it is, it is a right and it can be exercised and should
4 be exercised in an educated manner as freely as the rules allow.

5 JUDGE LAHUIS:

6 Just for the record, then, Mr. Roux was present during the adversarial hearings, because I cannot see
7 that in the records?

8 MR. PETIT:

9 Yeah, he was present. I will refrain from commenting on that. I will refrain.

10 MR. PRESIDENT:

11 The hearing would like to take a break for 15 minutes, and then the charged person can stay. And,
12 after than, when we return from the break, we will announce the public hearing.

13 MR. PETIT:

14 Still a question (microphones overlapping).

15 JUDGE DOWNING:

16 Are there any issues that counsel would like to raise in camera which have not been previously
17 raised, and would have to be raised only in camera?

18 MR. ROUX:

19 Maybe the defence would like to preface that we have submitted to the *greffier* the address to which
20 the charged person would be living, if the Chamber would release him. Of course, this address would
21 have to remain confidential. Thank you. It is submitted to the process registry. The address would
22 be transmitted to the process registry.

23 MR. PRESIDENT:

24 Please, we would like to take 15 minutes' break.

25 *(Court recesses from 1345H to 1405H)*