



ICR-97-21-T
18-03-2004
(1601 — 1595)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

1601 - 1602

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 18 March 2004

The PROSECUTOR

V.

**Arsène Shalom NTAHOBALI and
Pauline NYIRAMASUHU**

Case No. ICTR-97-21-T

2004 MAR 18 7.10 AM

**DECISION ON NTAHOBALI'S AND NYIRAMASUHUKO'S MOTIONS
FOR CERTIFICATION TO APPEAL THE "DECISION ON DEFENCE
URGENT MOTION TO DECLARE PARTS OF THE EVIDENCE OF
WITNESSES RV AND QBZ INADMISSIBLE"**

Office of the Prosecutor

Silvana Arbia
Adelaide Whest
Jonathan Moses
Adesola Adeboyejo
Manuel Bouwknacht, Case Manager

Defence Counsel

Duncan Mwanyumba and Normand Marquis for Ntahobali
Nicole Bergevin and Guy Poupart for Nyiramasuhuko

A handwritten signature in black ink, appearing to be "KMS".

1600

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

RECALLING the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible" of 16 February 2004 (the "Impugned Decision");

BEING SEISED of the "Defence Motion for Certification to Appeal the Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible" filed by Ntahobali on 19 February 2004 (the "Ntahobali Motion");¹

BEING ALSO SEISED of the "Defence Motion for Certification to Appeal the Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible" filed by Nyiramasuhuko on 23 February 2004 (the "Nyiramasuhuko Motion");²

CONSIDERING the "Prosecutor's Response to Nyiramasuhuko and Ntahobali's Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible and for Certification to Appeal the Decision" (the "Response"), filed on 25 February 2004;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter, pursuant to Rule 73 (B), on the basis of the written submissions of the Parties.

SUBMISSIONS OF THE PARTIES

Defence

1. The Defence for Nyiramasuhuko and Ntahobali apply for certification to appeal the Impugned Decision. The Defence mainly challenges the Impugned Decision for receiving the testimonies of Witnesses RV and QBZ before the court when the material facts they alleged against the Accused were not specifically pleaded in the Indictment.
2. The Defence for Nyiramasuhuko and Ntahobali rely on the *Kupreskic* Case³ to submit that an indictment has to set out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against an Accused, so that he may prepare the Defence.

¹ The Motion was filed in French and originally entitled: «*Demande de certification par Arsène Shalom Ntahobali de la 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible'* ».

² The Motion was filed in French and originally entitled: «*Requête de Pauline Nyiramasuhuko aux Fins de Certification d'Appel de la 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible'* ».

³ ICTY, *The Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgment (AC), 23 October 2001.



1599

3. The Defence for Nyiramasuhuko also relies on three Decisions recently rendered in the *Bizimungu* Case⁴ in which the Trial Chamber considered that the specificity of the Indictment formed the essence of a fair Trial as guaranteed by the provisions of Article 20 of the Statute and that the failure to include the facts in the Indictment could not be cured by references in the Pre-Trial Brief or evidence adduced at Trial.

4. In the light of this jurisprudence, the Defence for Nyiramasuhuko and Ntahobali submit that the facts contained in Witness RV and QBZ statements and concerning the Accused are specific and should have been pleaded in the Indictment. Even the particular paragraphs cited in the Decision do not refer to the specific facts contained in the Witnesses statements. The Defence alleges that the Chamber erred in its interpretation of the applicable law:

- In relying on general sections of the Indictment whereas QBZ's allegations are specific;
- In relying on sections of the Indictment which are general and could bolster the conclusion that the accused could be indicted for crimes committed on the whole territory of Rwanda because part of the Indictment makes reference to this;
- In ignoring, or in playing down the fact, that the Indictment should allow the Accused to know ahead of time the nature, the place and the timeframes of the crimes alleged against the accused;
- In ignoring, or in playing down the fact that counts of the Indictment refer to sections of the Indictment and that none of the counts refer to the parts of the Indictment in which the crimes committed in Muganza Commune would be attributed to the Accused. In so deciding, the Chamber has opened up every possible allegation against the Accused in the Butare Prefecture so long as the Accused is warned soon enough;
- In ignoring, or in playing down the fact that in the Prosecution pre-trial brief QBZ was not to testify against the Accused;
- In referring to paragraph 6.39 which stipulates that the Accused had participated in massacres throughout Butare Prefecture, which section precedes the section detailing the events in Kabuye Commune and in which the name of the Accused was not mentioned;
- In referring to paragraphs 6.52 to 6.56 which are part of a section called "responsibility" and which relate to allegations of crimes committed throughout Rwanda, even outside Butare Prefecture, which does not meet the minimum requirement of specificity of the nature of the charges against the Accused.

5. The Defence for Ntahobali also reminds the Chamber that it did not have any investigator for the period between July 2001 and February 2003, so its investigation work had been stalled and the Defence has not benefited from adequate time and facilities to prepare.

⁴ *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA, 23 January 2004; Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF, and GKI, 3 February 2004; Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and For Other Appropriate Relief, 5 February 2004.

1598

6. Nyiramasuhuko's Defence addresses the criteria for certification by submitting that:
- The issues raised in the Decision may substantially jeopardize the fairness and expeditiousness of the proceedings, or the outcome of the trial;
 - Should the allegations of Witnesses RV and QBZ be admitted, the Indictment should be modified and the Defence should be given time to make inquiries and add new witnesses to challenge those new material facts;
 - The current issue of admissibility is about to be at stake for other witnesses to come, among which Prosecution Witnesses FAS, QAH and RO;
 - The Decision ruled in a way that is opposite to three other decisions rendered in the *Bizimungu* case and that it makes a need for clarification by the Appeals Chamber, which could materially advance the proceedings.
7. The Defence therefore prays the Chamber to certify the Appeal.

Prosecution

8. In its single response to both the Nyiramasuhuko and the Ntahobali Motions for Certification, the Prosecution submits that contrary to the assertion of the Defence, the Prosecution has shown from the Indictment both the general and specific incidents to which witnesses RV and QBZ will, and have, testified.
9. The Prosecution submits that the fact that Witnesses RV and QBZ were to testify on these general and specific allegations was made known to the Defence from the Indictment itself, from the pre-trial brief, as well as the will-say statement of the witnesses which were served well in time for the defence to prepare its case.
10. The Prosecution relies on the *Kamuhanda* Judgment⁵ to submit that the mention of the accused in the Indictment in a Commune located within Butare Prefecture places the Defence on notice of the culpability of the accused for such an act.
11. The Prosecution further states that the Defence has failed to demonstrate any prejudice and to show that the grant of the application by the Appeals Chamber will allow for a fair and expeditious conduct of the Trial pursuant to Rule 73(B).
12. The Prosecution therefore prays the Chamber to dismiss the Motion.

DELIBERATION

13. In order to determine the Motion, the Chamber first recalls that it is Rule 73(B) that controls interlocutory appeals of Decisions rendered by the Trial Chamber on motions brought under Rule 73(A). Rule 73(B) provides as follows:

Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

⁵ *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Judgment and Sentence, 22 January 2004.



1597

14. As a general observation, it must be noted that the general rule in Rule 73(B) remains this: 'Decisions rendered on such motions are without interlocutory appeal.' This general rule is consistent with some important national jurisdictions around the world in which interlocutory appeals are not allowed in criminal cases,⁶ or allowed only in very limited circumstances.⁷ Rule 73(B) of the Rules provides, however, that in exceptional circumstances, the Trial Chamber may—not must—allow interlocutory appeals of such decisions.

15. It should be emphasized that the situations which may warrant interlocutory appeals under Rule 73(B) must be exceptional indeed. This point is made clear by the conditions which must be satisfied before the Trial Chamber may consider granting certification. These conditions are reviewed next.

16. The first condition is that the decision against which the appeal is being sought must be one that involves an issue which 'would significantly affect the fair and expeditious conduct of the proceedings', or '[the decision involves an issue that would significantly affect] the outcome of the trial'. The tests engaged by the emphasized words and phrases must be passed by every application for certification. In particular, the adjective 'significantly' has a value that must be considered in each case. In each of these tests, the applicant must show how significantly the decision in question affects (a) a fair and expeditious conduct of the proceedings, or (b) how significantly the decision would affect the outcome of the trial.

17. The second condition is that, 'in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings'. This condition naturally recommends that counsel seeking certification should do their *bona fide* best to sway the opinion of the Trial Chamber on how it is that an immediate resolution by the Appeals Chamber may materially advance the proceedings. Such submissions should ordinarily assist the Trial Chamber in forming its opinion on the matter. Ultimately, however, such a judgement remains that of the Trial Chamber who is conducting the trial.

18. However, the Chamber further notes a substantial difference on this point between the English and French versions of Rule 73(B): when the English version gives place to the 'opinion of the Trial Chamber' on the second condition only, the French version seems to submit the fulfilment of both above criteria to the opinion of the Judges. As a matter of fact, the French version of Rule 73(B) reads: '*la Chambre de première instance [certifie] l'appel après avoir vérifié que*' the above criteria are fulfilled.

19. The Trial Chamber decides to settle this ambiguity between the two versions of Rule 73(B) in a sense that is most favorable to the moving party. Therefore, certification shall be granted if it is the view of the Trial Chamber that Rule 73(B) criteria are fulfilled in a specific case.

⁶ See *R. v. Mills* 1986 Carswell Ont 11652 CR (3d) 1, [1986] 1 SCR 863, 26 CCC (3d) 481 [Supreme Court of Canada]; *Cobbledick v. US*, 60 S Ct 540 (1940) [US Supreme Court]; *Firestone Tire & Rubber Co v. Risjord* 101 S Ct 669(1981) [US Supreme Court].

⁷ See, in England and Wales, ss 9(11), 9(3) and 7 of the Criminal Justice Act 1987; ss 35, 31 and 29 of the Criminal Procedure and Investigations Act 1996. See also *R. v. Gunawardena*, [1990] 91 Cr App R 55 [Court of Appeal of England and Wales].



1576

20. Before determining the merits of the Motion, the Trial Chamber first stresses that the submission of the grounds of appeal in the Motion is irrelevant and premature. The only matter before the Trial Chamber at this stage of the proceedings is to determine whether the conditions for certification as provided in Rule 73(B) are met or not. Therefore, the Trial Chamber will determine the Motion on the sole basis of the arguments related to the criteria of certification, without considering the other submissions.

21. Now considering the criteria for certification, the Trial Chamber finds no submission relating to this issue in the Ntahobali Motion. The Motion only deals with the grounds of appeal, without even considering the matter of certification. As stated above, the issues are irrelevant at this stage and the Trial Chamber therefore considers that Ntahobali's application for certification of appeal does not demonstrate the fulfilment of conditions for certification. Furthermore, the Trial Chamber notes that Ntahobali's motion contains an issue, related to investigator's availability to the Defence team, which had not been submitted in the motion on which the Impugned Decision was issued. The Chamber finds that this is a new submission that is not admissible at this stage of the proceedings.

22. Although Counsel for Nyiramasuhuko submits that the Decision may substantially jeopardize fairness and expeditiousness of the proceedings, or the outcome of the trial, the submissions supporting this contention relate only to the fairness aspect of the proceedings. The Trial Chamber observes that the Defence fails to demonstrate that the Decision involves an issue that would significantly affect the expeditious conduct of the proceedings. The submission that, should those witnesses be admitted, the Indictment would need to be amended does not address the question of expeditiousness of the proceedings. So, the Defence neither demonstrates that the fair and expeditious conduct of the procedure would be significantly affected, nor that the outcome of the Trial would be significantly affected.

23. Since the Defence for Nyiramasuhuko failed to demonstrate the first criterion for certification, there is no need to address its submissions relating to the second criterion.

24. Therefore, it is the view of the Trial Chamber that both Defence for Nyiramasuhuko and Ntahobali have failed to demonstrate, in their Motion, the fulfilment of the criteria for certification provided in Rule 73(B).

25. Nevertheless, it is the view of the Trial Chamber that the issue of admissibility of testimonies of Prosecution Witnesses could significantly affect the outcome of the trial against the Accused, insofar as the issue as to whether the Trial Chamber will take into account the testimony of these witnesses for its final deliberation or not could significantly affect this deliberation.

26. It is furthermore the view of the Trial Chamber that, as the Defence for Nyiramasuhuko indicated that the same issue of admissibility may recur with regard to several oncoming Prosecution Witnesses, an immediate resolution by the Appeals Chamber may materially advance the proceedings in the current case. This immediate submission to the Appeals Chamber will allow the Trial Chamber to keep on hearing Prosecution Witnesses, awaiting the Appeals Chamber decision to come.

27. Therefore, the Trial Chamber considers that the present requests for certification fall within the purview of Rule 73(B).



FOR THE ABOVE REASONS,

1595

THE TRIAL CHAMBER

GRANTS the certification of appeal for both Accused.

Arusha, 18 March 2004



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]