

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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Original: English

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Decision of: 22 April 2004

ICTR-97-29-T
22-04-04
(4692-4689)

THE PROSECUTOR
v.
Alphonse NTEZIRYAYO
Case No. ICTR-97-29-T

DECISION ON ALPHONSE NTEZIRYAYO'S MOTION REQUESTING THE
CHAMBER TO DETERMINE BY VOIR-DIRE THE ADMISSIBILITY OF THE
HEAR-SAY TESTIMONY OF PROSECUTION WITNESS QAJ

The Office of the Prosecutor:

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Counsel for the Defence:

Titinga Frédéric Pacere
Richard Perras

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

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

BEING SEIZED of the "*Requête afin que le témoignage du témoin QAJ débute par un voir-dire afin d'en déterminer l'admissibilité*," filed on 2 April 2004 (the "Motion;")

CONSIDERING the "Prosecutor's Response to Nteziryayo's '*Requête afin que le témoignage du témoin QAJ débute par un voir-dire afin d'en déterminer l'admissibilité*'" filed on 7 April 2000 (the "Prosecutor's Response"); **AND** "*Reponses de Sylvain Nsabimana, à la requête de l'Accusé Nteziryayo relative à l'admissibilité de la déposition du témoin à charge QAJ*," filed on 19 April 2004 ("Nsabimana's Response"); **AND** "*Réplique d'Alphonse Nteziryayo à la réponse du Procureur sur sa Requête afin que le témoignage de QAJ soit précédé d'un voir-dire*," filed on 19 April 2004 (the "Defence Reply");

CONSIDERING the provisions of the Statute of the Tribunal ("the Statute"), and the Rules of Procedure and Evidence of the Tribunal (the "Rules"), in particular Rules 72 and 89(C) of the Rules;

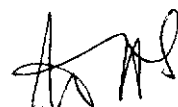
NOW DECIDES the Motion on the basis of the written briefs as filed by the Parties pursuant to Rule 73(A);

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence requests that the Chamber hold a "*voir-dire*" preliminary hearing so as to determine the admissibility of the testimony of Prosecution Witness QAJ because, on the basis of the written statement provided, Witness QAJ will give hear-say testimony which is the result of investigations made after the war in June 1994.
2. The Defence submits that according to the statement of Witness QAJ, there is no indication regarding; (i) when Witness QAJ made his investigations; (ii) from whom he obtained his information; and (iii) which methods were used to obtain the information. Furthermore, Witness QAJ has specified a deceased person as one of his informants. Said deceased person was a prospective Prosecution witness whose statement was denied admittance under Rule 92bis.¹
3. The Defence argues that through a "*voir-dire*" preliminary hearing, the Chamber may determine that Witness QAJ was able to conduct his investigations as a result of his functions.

¹ See paras. 19 – 24 in the Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit into Evidence the Witness Statements of Four Said Witnesses," of 22 January 2003 in Case No. ICTR-98-42-T in *Prosecutor v. Nyiramasuhuko et al.*



4. Considering that the written statement of Witness QAJ is not sufficient as to allow the Chamber to determine the admissibility of the witness' testimony; considering the rights of the Accused to a fair and equitable trial, the Defence prays that the Chamber order a "*voir-dire*" preliminary hearing to determine how Witness QAJ obtained the information he is going to testify on and the admissibility or otherwise of said testimony.

Prosecution's Response

5. In its Response, the Prosecution objects to the Defence request for a "*voir-dire*" preliminary hearing regarding the testimony of QAJ because it is neither necessary nor appropriate. The Prosecution argues, relying on the consistent jurisprudence of the Tribunal, that hearsay evidence is admissible under Rule 89(C) whereby a Chamber is empowered to admit any relevant evidence which it deems to have probative value.² The Prosecution notes that the Defence does not indicate that the evidence of QAJ is irrelevant or that it does not have probative value.

6. The Prosecution finally argues that holding a preliminary hearing on the matter will unduly cause delay in the ongoing proceedings because the witness will be required to testify twice which would essentially be against judicial economy.

Nsabimana's Response

7. Noting that Accused Nsabimana is interested in QAJ's testimony, his defence requests that the Motion, which essentially seeks to test the credibility of the witness, be dismissed so that the testimony of QAJ could be heard without a "*voir-dire*" preliminary hearing. The Defence argues that it is not necessary to hold such a preliminary hearing because the results from such a hearing may equally be obtained through the cross-examination of the witness.

Defence Reply

8. The Defence reiterates its request to hold a "*voir-dire*" preliminary hearing with regard to the admissibility of QAJ's testimony. The Defence submits that from his statement of 28 November 1997, QAJ intends to testify that he had made investigations, which revealed that Nteziryayo killed a member of his family. The Defence advances various theories that would test the testimony of QAJ.

9. With regard to the "*voir-dire*" preliminary hearing itself, the Defence relies on the jurisprudence from two judgments from the Court of Appeal of Canada that a "*voir-dire*" preliminary hearing is obligatory each time a Defendant has confessed a crime, to evaluate the circumstances of the information obtained. In the instant case, since the information was collected by an authority figure, those circumstances should be clarified before testimony is allowed.

² The *Akayesu* (TC) Judgment of 2 September 1998 at para. 136; the *Musema* (TC) Judgment of 27 January 2000 at para. 51; the *Ntakirutimana* (TC) Judgment of 21 February 2003 at para. 33; the *Niyitegeka* (TC) Judgment of 16 May 2003 at para 43; and the *Kajelijeli* (TC) Judgment of 1 December 2003 at para. 45.



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10. Reiterating its submissions with regard to the Chamber's Decision of 22 January 2003, the Defence argues that QAJ should be prevented from relying on the information from deceased persons, allegedly witnesses QAA and QAK, whose statements were denied admittance under Rule 92*bis*.

HAVING DELIBERATED

11. Rule 89(C) of the Rules generally provides for the admission of evidence and it states that, "A Chamber may admit any relevant evidence which it deems to have probative value."

12. In the instant case, the Chamber notes that the Defence requests that before witness QAJ gives testimony, which is essentially hearsay, a "*voir-dire*" preliminary hearing should be held to determine; how QAJ made said investigations; whether he made them in the course of his functions; and what the exact results of his investigations were particularly as his informants are now deceased and the information given tends to be conflicting.

13. It is the Chamber's opinion that the main issue at stake is whether hearsay evidence is admissible at the Tribunal. Noting the Prosecution's and Nsabimana's submissions on the matter, the Chamber is of the opinion that hearsay evidence is admissible having due regard to its reliability, relevance and probative value as provided for under Rule 89(C). Once the Chamber has heard the testimony of a witness in examination and cross-examination, it will be up to it to determine what weight it will give to the said evidence when it considers it at the end of trial.

14. In this regard, it is the Chamber's opinion that it would not be necessary to hold any form of "*voir-dire*" preliminary hearing to determine the issues raised by the Defence in its Motion because the said issues may be raised during the cross-examination of the witness.

FOR ALL THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 22 April 2004



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

Seal of the Tribunal)