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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Or: ENG

TRIAL CHAMBER II

Before: Judge Khalida Rachid Khan, Presiding
Judge Lee Gacuiga Muthoga
Judge Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 30 September 2004

The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jérôme-Clément BICAMUMPAKA
Prosper MUGIRANEZA

Case No. ICTR-99-50-T

DECISION ON PROSPER MUGIRANEZA'S MOTION PURSUANT TO RULE 73(B) FOR LEAVE TO APPEAL THE TRIAL CHAMBER'S ORAL RULINGS OF 17 JUNE 2004

Office of the Prosecutor:
Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Elvis Bazawule
Mr. Justus Bwonwonga
Mr. Shyamlal Rajapaksa

Counsel for the Defence:
Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for Casimir Bizimungu
Mr. Howard Morrison, Q.C. and Mr. Ben Gumpert for Justin Mugenzi
Mr. Pierre Gaudreau and Mr. Michel Croteau for Jérôme-Clément Bicamumpaka
Mr. Tom Moran for Prosper Mugiraneza

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion Pursuant to Rule 73(B) for Leave to Appeal the Trial Chamber's Oral Rulings of 17 June 2004" filed on 24 June 2004, (the "Motion");

NOTING the "Prosecutor's Response to Prosper Mugiraneza's Motion Pursuant to Rule 73(B) for Leave to Appeal the Trial Chamber's Oral Rulings of 17 June 2004" filed on 29 June 2004, (the "Response");

NOTING "Prosper Mugiraneza's Reply to the Prosecutor's Response to Prosper Mugiraneza's Motion Pursuant to Rule 73(B) for Leave to Appeal the Trial Chamber's Oral Rulings of 17 June 2004" filed on 2 July 2004, (the "Reply");

ARGUMENTS OF THE PARTIES

Defence Submission

1. The Defence for Prosper Mugiraneza seeks certification of an interlocutory appeal pursuant to Rule 73(B). The Defence seeks to appeal the Trial Chamber's Oral Ruling prohibiting the Defence from impeaching an out-of-court statement purportedly made by Jean Kambanda to Witness D with other statements made by Jean Kambanda to the Office of the Prosecutor (the "OTP"). The Defence sought to introduce these statements through the witness to demonstrate the possibility that Jean Kambanda, who has not yet testified in this case, had made inconsistent and contradictory statements.

2. The Defence for Prosper Mugiraneza submits that evidence admitted indirectly through hearsay statements must be open to a similarly indirect attack. Cross-examination of a witness alone is insufficient because a witness may be truthfully and accurately relating the declarant's statement. The Defence for Prosper Mugiraneza argues, therefore, that if cross-examination is limited to the testifying witness the Trial Chamber will not have the necessary information to weigh the evidentiary value of the hearsay statements themselves.

3. According to the Defence, it is irrelevant that Jean Kambanda himself is scheduled to appear before the Trial Chamber considering that a party challenging the credibility of a declarant should be allowed to do so as soon as the hearsay statement is offered and accepted.

4. The Defence further notes its scepticism that Jean Kambanda will ever testify for the Prosecutor. Thus, it submits that its ability to challenge statements attributed to Jean Kambanda should not be subject to Jean Kambanda's "whims" regarding his appearance before this Tribunal.

5. The Defence for Prosper Mugiraneza seeks to appeal the Trial Chamber's subsequent oral decision to refuse to include the proffered evidence, after the Trial Chamber denied its admission.

6. The Defence argues that there must be a mechanism allowing the Appeals Chamber to perform its review functions when an objection has been sustained and evidence excluded. According to the Defence, the evidence must be included so that the Appeals Chamber may determine if the Trial Chamber erred in its decision to refuse to admit Jean Kambanda's allegedly inconsistent statements, and/or whether any error was harmful.

5. The Defence for Prosper Mugiraneza asserts that the Prosecutor's argument that Rule 115 is the vehicle through which such review functions should be performed is without merit. Rule 115(B) requires that additional evidence admitted before the Appeals Chamber must have been unavailable at trial, credible, and relevant. By definition, evidence offered at trial and excluded by the Trial Chamber was available at trial. Further, the Defence submits, that impeachment evidence does not meet the criteria for credibility. According to the Defence, "the proponent of such evidence offers it only to shed doubt on the statement admitted for the truth. It creates doubt simply by showing that the declarant told more than one story".

7. The Defence for Prosper Mugiraneza also argues that including the excluded evidence ensures that the Trial Chamber has been given all necessary information and legal argument, and that the Appeal Chamber cannot find that the proponent of the excluded evidence failed to present the evidence properly and thereby waived any error committed by the Trial Chamber.

8. In conclusion, the Defence argues that this issue is likely to recur in this trial and other trials before the Tribunal and therefore is important to the jurisprudence of the Tribunal and an interlocutory appeal should be granted.

Prosecutor's Response

9. The Prosecutor argues that the Defence has failed to make a case warranting certification under Rule 73(B). The Prosecutor asserts that the situations that warrant interlocutory appeal must be very exceptional.

10. The Prosecutor further submits that the Trial Chamber's ruling was appropriate. The Prosecutor asserts that the Defence may not be allowed to impeach Kambanda by putting his statement to Witness D since Witness D is not the author of the statement. Moreover, as Kambanda is listed to testify later, he is the proper witness who should be confronted with his own statement. The Prosecutor argues that the Defence is limited to asking the witness leading questions or impeach the witness's own credibility.

Defence Reply

11. The Defence re-asserts that since Jean Kambanda's statement was admitted, an inconsistent prior statement is admissible to impeach the credibility of the statement previously admitted for the truth of the matters asserted. The Defence further argues that unless the declarant himself takes the stand, the Trial Chamber will have an unimpeached hearsay statement as the basis for its fact findings, even though if the Chamber had all of the facts it might be less likely to accept the credibility of the statement.

12. According to the Defence, the admissibility of Jean Kambanda's statement for the limited purpose of impeachment is proper under Federal Rule of Evidence 806, adopted by the United States Supreme Court. F.R. 806 provides that the credibility of the declarant of a hearsay statement may be attacked by any evidence which would be admissible if the declarant had testified as a witness.

13. The Defence contends that the Prosecutor's assertion that Jean Kambanda will testify himself is both irrelevant and disingenuous. First, the Defence argues that the Accused should have the right to impeach any out-of-court statements contemporaneously with their admission, just as they have the right to impeach the testifying witness. Second, the Defence submits that the Prosecutor has made inconsistent statements regarding the existence of any agreement with Kambanda that he will testify. Moreover, the Defence argues that even if Jean Kambanda did testify the Prosecutor might object to cross-examination on the statement under Rule 90(G).

14. Finally, the Defence argues that the denial of the right to impeach out-of-court declarants is a deprivation of the right to a fair trial, and thus is important to the jurisprudence of the Tribunal and is worthy of an interlocutory appeal.

DELIBERATIONS

15. Rule 73(B) of the Rules reads 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.

16. The Trial Chamber recalls the reasoning held by Trial Chamber II in a different composition in the case of *The Prosecutor v. Pauline Nyiramasuhuko et al.*:

> 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.

17. The Trial Chamber considers that Rule 73(B) deals with matters of an exceptional nature, and cannot be used for purposes of gaining access to the Appeals Chamber to resolve issues of a general nature namely, in this particular case, seizing the Appeals Chamber for an opinion on a point of law. The Trial Chamber is of the view that the Defence has failed to adequately demonstrate the existence of the conditions allowing for certification. The Trial Chamber therefore denies the Defence an interlocutory appeal on this issue.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion.

Judge Short appends an Individual Opinion.

Arusha, 30 September 2004

Khalida Rachid Khan Presiding Judge	Lee Gacuiga Muthoga Judge	Emile Francis Short Judge

INDIVIDUAL OPINION OF JUDGE EMILE FRANCIS SHORT

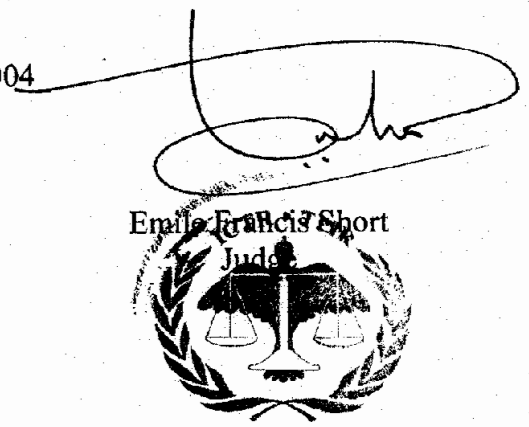
I am in agreement with the Decision of the Trial Chamber inasmuch as the criteria for certification are not met in this case. The Trial Chamber rightly decided that it was not the appropriate time to introduce the allegedly contrary or inconsistent statements made by Jean Kambanda in the past. Put differently, the statements cannot be introduced through the witness who cannot say whether in fact Jean Kambanda made those contrary statements or not. The attempt to impeach the credibility of a declarant who has been listed as a prosecution witness but has not yet testified is premature and raises serious concerns about the usefulness of such a procedure.

Moreover, the admission of the allegedly contradictory statements would not assist the court in determining the reliability of the witness's evidence as to what Jean Kambanda told him. Their admission, therefore, through this particular witness, would have served no useful purpose.

On the second submission of Defence Counsel, however, I am of the view that the Trial Chamber should have placed on the record the excluded evidence for the consideration of the Appeals Chamber, in the event that the matter is taken up on appeal. It is only through this method that the Appeals Chamber would have an opportunity to determine whether the Trial Chamber erred in rejecting the statements and, if so, whether the error was prejudicial to the accused. I share the Defence Counsel's submission that Rule 115(b) is not the appropriate method for bringing to the attention of the Appeals Chamber documentary evidence rejected during the trial. That Rule deals specifically with additional evidence that was not available at the trial. That is not the case here.

Another compelling reason for the Trial Chamber to place and mark the rejected document at the time it is offered for admission is the possibility that the document or its contents may be tampered with between the time it is offered for admission and the time the Appeals Chambers becomes seized of the matter. Therefore, in my view, the documents should have been accepted for record purposes and marked differently from the regular exhibits as, for example, as Reject Exhibit D/4-X or given an Identification Number.

Arusha, 30 September 2004



Emile Francis Short
Judge