

ICTR-99-50-T
8-12-2004
(19460 - 19455)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 8 December 2004

The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jérôme-Clément BICAMUMPAKA
Prosper MUGIRANEZA
Case No. ICTR-99-50-T

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2004 DEC -8 P 4: 29

**DECISION ON PROSPER MUGIRANEZA'S MOTION FOR LEAVE TO
APPEAL FROM THE TRIAL CHAMBER'S DECISION OF 4 OCTOBER 2004**

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukumolu Babajide
Mr. Justus Bwonwonga
Mr. Elvis Bazawule
Mr. Shyamlal Rajapaksa

Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for **Casimir Bizimungu**
Mr. Ben Gumpert for **Justin Mugenzi**
Mr. Pierre Gaudreau and Mr. Michel Croteau for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran and Mr. Christian Gauthier for **Prosper Mugiraneza**

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

19459

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 for Leave to Appeal from the Trial Chamber's Decision of 4 October 2004 on Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004" filed on 11 October 2004 (the "Motion").

CONSIDERING:

(i) The "Prosecutor's Response to Prosper Mugiraneza's Motion for Certification to Appeal from the Trial Chamber's Decision of 4 October 2004 on Reconsideration of the Trial Chamber's Decision of 15th February 2004 Pursuant to the Appeals Chamber Decision of 15 July 2004 [sic]" filed on 18 October 2004 (the "Response");

(ii) "Prosper Mugiraneza's Reply to the Prosecutor's Response for Certification to Appeal from the Trial Chamber's Decision of 4 October 2004 on Reconsideration of the Trial Chamber's Decision of 15th February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004 [sic]" filed on 25 October 2004 (the "Reply");

RECALLING the Trial Chamber's Decision of 4 October 2004 (the "Impugned Decision");¹

ARGUMENTS OF THE PARTIES

Defence Submissions

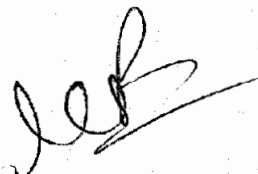
1. The Defence for Mugiraneza seeks certification to appeal the Impugned Decision pursuant to Rule 73(B) of the Rules of Procedure and Evidence (the "Rules"). It submits that the Trial Chamber (i) failed to comply with the Appeals Chamber's remand order of 15 July 2004; or alternatively, (ii) the Trial Chamber abused its discretion in granting the Accused lesser relief than it granted his co-accused Bizimungu on the same issues.

2. The Defence argues that the distinction given by the Trial Chamber in explaining the difference in treatment as between the Accused² and Bizimungu³ is artificial ("[...]")

¹ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision – Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004 (TC), 4 October 2004.

² *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony in View of the Trial Chamber's Decision of 23 January 2004 and For Other Appropriate Relief (TC), 5 February 2004

³ *The Prosecutor v. Casimir 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 (TC), 23 January 2004



19458

the Trial Chamber's holding in paragraph 21 of the impugned decision is factually incorrect and simply creates a distinction without a legal difference")⁴ and does not comply with the Appeals Chamber's mandate.⁵

3. The Defence submits that the Trial Chamber's assertion that it made wrong findings in the *Bizimungu* Decisions is in itself wrong, since when the Appeals Chamber affirmed the *Bizimungu* Decisions on Appeal, it "infallibly" held that the Trial Chamber exercised its discretion properly.⁶ Furthermore, according to the Defence, the distinction drawn by the Trial Chamber between the Impugned Decision and the *Bizimungu* Decisions is inadequate. The Trial Chamber stated that upon further reflection on the *Bizimungu* Decisions it might have exercised its discretion differently, and this does not satisfy the Trial Chamber's obligation pursuant to the Appeals Chamber's Order to explain the difference in treatment between the two Accused.⁷

4. The Defence argues that the Impugned Decision contains findings based upon the factual proposition that the Prosecution did not argue conspiracy and/or complicity in the *Bizimungu* motions, and that this factual proposition is incorrect. It accepts that there is a legitimate argument that the Prosecution did not raise the issue of conspiracy in any great detail, nevertheless asserts that the issue was still before the Trial Chamber, evidenced by the fact that the Presiding Judge questioned both the Prosecution and the Defence on the issue of Conspiracy.⁸

5. In relation to the Trial Chamber's given reasons for denying the requested Rule 5(B) relief to the Defence in the Impugned Decision, the Defence states that although superficially plausible, they are actually wrong, and without merit and basis in law.⁹ The Defence further submits that the Chamber has "attempted to create distinctions" which are unsupported by the record.¹⁰ In the Defence's reasoning, it follows that the Trial Chamber abused its discretion.

6. Accordingly, the Defence submits that the issues it seeks to appeal are important and could determine the outcome of the proceedings. Furthermore, an immediate resolution by the Appeals Chamber would materially advance the proceedings.¹¹

7. The Defence states that a similar issue has in the finding of the Trial Chamber already satisfied the requirements of Rule 73(B) for certification to appeal,¹² thus the Trial Chamber should automatically grant certification in this instance.¹³

⁴ Motion, para.14.

⁵ Motion, para. 16.

⁶ Motion, para. 19.

⁷ Motion, para. 20.

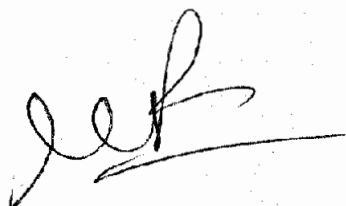
⁸ Motion, paras. 27-31.

⁹ Motion, para. 33.

¹⁰ Motion, para. 36.

¹¹ Motion, para.37.

¹² The Defence cites *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Accused Mugiraneza's Motion for Certification to Appeal the Trial Chamber's Decision of 5 February 2004 (TC), 24 March 2004.



Prosecution Submissions

19457

8. The Prosecution opposes the Motion, and requests the Trial Chamber not to grant certification to appeal the Impugned Decision.

9. The Prosecution submits that the jurisprudence of the Tribunal makes it clear that certification under Rule 73(B) is to be granted only sparingly. It cites a Decision at Trial level in the *Nyiramasukuku* case to support this contention.¹⁴ According to the Prosecution's interpretation of this Decision, the factors that tribunals have taken into account in determining whether to allow recourse to an interlocutory appeal are (i) the importance of the issue; (ii) whether or not the Appeals Chamber has provided any guidance on the issue; and (iii) whether there are conflicting approaches among Trial Chambers.¹⁵

10. It is submitted by the Prosecution that the Defence's first appeal issue is a procedural one, namely whether or not the Trial Chamber followed the instructions given to it by the Appeals Chamber. It submits that the Defence would be unlikely to prevail on that issue.

11. The Prosecution submits that the Defence has failed to show that the Trial Chamber committed an error of law or an abuse of discretion in the Impugned Decision. In such a case, the Prosecution submits that it is extremely unlikely that the Defence could meet the requirements of Rule 73(B) for certification to appeal.

12. The Prosecution argues that the sole directive given to the Trial Chamber by the Appeals Chamber was to reconsider Mugiraneza's request in light of the guidance given, and that there can be little doubt that the Trial Chamber complied with this straightforward direction. It argues that the Trial Chamber, in acknowledging the desire of the Appeals Chamber for a more detailed explanation for the distinction between Bizimungu and Mugiraneza, provided such explanation and subsequently adhered to its earlier decision. The Prosecution notes that whilst the original Decision of 5 February 2004 ran to only four pages, the Impugned Decision runs to fourteen pages.¹⁶

13. The Prosecution suggests that although the Defence is relying on the procedural aspects of its first appeals, its real grievance is its dissatisfaction with the Decision of the Trial Chamber. This reason is irrelevant to the determination by the Trial Chamber of whether or not certification to appeal should be granted.¹⁷

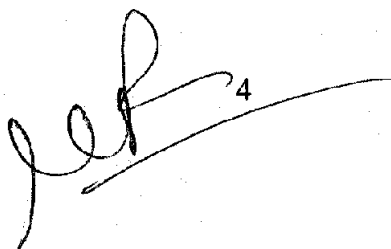
¹³ *Motion*, paras. 9, 38.

¹⁴ *Prosecutor v. Pauline Nyiramasukuku et al.*, Case No. ICTR-97-21-T, 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" (TC), 18 March 2004, paras. 14-15.

¹⁵ *Response*, para. 10.

¹⁶ *Response*, para. 14.

¹⁷ *Response*, paras. 15-16.

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19456

14. As to the Defence's contention that the Trial Chamber should automatically grant certification based upon its determination in a previous application by the Accused,¹⁸ the Prosecution submits that such an argument is unpersuasive. It draws a distinction between the two cases: On 24 March 2004 the Trial Chamber allowed certification to determine whether its Decision of 5 February 2004 was an abuse of discretion. In contrast the instant Motion seeks to determine whether the Trial Chamber implemented the guidelines of the Appeals Chamber in reaching its decision of 4 October 2004.

15. The Prosecution further submits that when the Accused sought leave to appeal the 5 February Decision, the Trial Chamber lacked guidance from the Appeals Chamber as to whether and to what degree an explanation is required when an accused is treated differently from his co-accused.¹⁹ Now that such guidance has been provided by the Appeals Chamber, and subsequently implemented by the Trial Chamber, a second appeal reviewing the same issue would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Thus, the Prosecution submits that the Defence's second appeal issue does not meet the requirements of Rule 73(B).

HAVING DELIBERATED

16. The Trial Chamber recalls the Appeals Chamber's Decision in *Nyiramasuhuko*²⁰ restating the requirements of Rule 73(B) for the granting of certification for interlocutory appeal:

[i]t is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence.²¹

17. The Trial Chamber has considered the two issues the Defence raises. The first is largely procedural- whether or not the Trial Chamber has complied with the directions of the Appeals Chamber. The second is substantive- whether the Trial Chamber abused its discretion in granting (as the Defence maintains) different relief to identically situated accused persons.

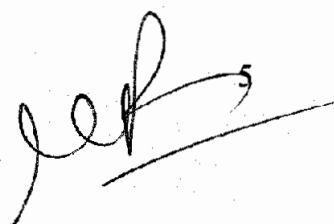
18. It is clear that the Trial Chamber is under no obligation to certify an interlocutory appeal simply because either Party is unhappy with a Decision of the Trial Chamber. Furthermore, all Decisions of the Trial Chamber potentially affect the fairness of the proceedings. It is the role of the Trial Chamber to determine matters affecting the admissibility of evidence and, as the jurisprudence of the Appeals Chamber

¹⁸ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Accused Mugiraneza's Motion for Certification to Appeal the Trial Chamber's Decision of 5 February 2004 (TC), 24 March 2004.

¹⁹ *Response*, para. 19.

²⁰ *Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on Admissibility of Evidence (AC), 4 October 2004.

²¹ *Idem*, para. 5, footnote omitted.



19453

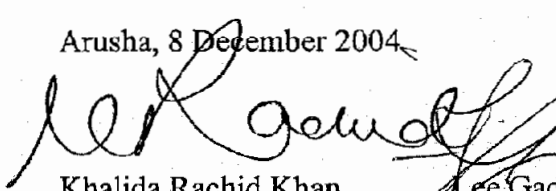
demonstrates, certification to appeal should be the absolute exception on matters relating to the admission of evidence. In this case, both the Appeals Chamber and the Trial Chamber have already dealt with the substance of this dispute, which relates to the admission of evidence. The question of whether and why two Accused have been treated differently in similar situations- the main concern of the Appeals Chamber- has already been answered by the Trial Chamber, and any further deliberation on this matter will serve no useful purpose.

19. Both the Parties and the Trial Chamber have spent considerable time and resources resolving this issue, and it is now resolved. Another interlocutory appeal would not materially advance the proceedings, and the Trial Chamber does not find that the conditions for certification under Rule 73 (B) have been met.

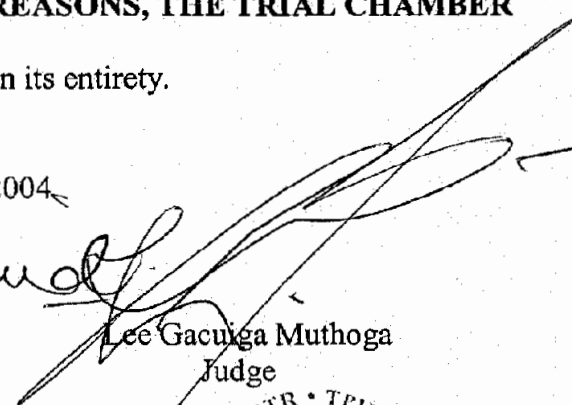
FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

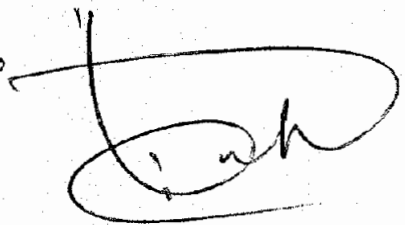
Arusha, 8 December 2004



Khalida Rachid Khan
Presiding Judge



Lee Gacuga Muthoga
Judge



Emile Francis Short
Judge

