



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 25 February 2005

ICTR-99-50-T
25th Feb. 2005
(20424 -20420)

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

JUDICIAL RECORDS/ARCHIVES
ICTR
2005 FEB 25 A 11: 27

DECISION ON BICAMUMPAKA'S REQUEST PURSUANT TO RULE 73 FOR
CERTIFICATION TO APPEAL THE 24 NOVEMBER 2004 DECISION ON
BICAMUMPAKA'S URGENT MOTION TO DECLARE PARTS OF THE
TESTIMONY OF WITNESSES GTA AND DCH INADMISSIBLE
Rule 73 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Mr Paul Ng'arua
Mr Ibukunolu Babajide
Mr Justus Bwonwonga
Mr Elvis Bazawule
Mr George William Mugwanya
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 for *Prosper Mugiraneza*

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20423

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

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

BEING SEIZED of “Bicamumpaka’s Request Pursuant to Rule 73 for Certification to Appeal the 24 November 2004 ‘Decision on Bicamumpaka’s Urgent Motion to Declare Parts of the Testimony of Witnesses GTA and DCH Inadmissible’”, filed on 2 December 2004 (the “Motion”);

CONSIDERING the “Prosecutor Response to Bicamumpaka’s Request Pursuant to Rule 73 for Certification to Appeal the 24 November 2004 ‘Decision on Bicamumpaka’s Urgent Motion to Declare Parts of the Testimony of Witnesses GTA and DCH Inadmissible,’” filed on 10 December 2004 (the “Response”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”) particularly Rule 73 of the Rules;

NOW DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES

The Defence Motion

1. The Defence moves the Chamber to certify an interlocutory appeal pursuant to Rule 73 on the Chamber’s Decision of 24 November 2004 in which it held that the testimony of Witnesses DCH and GTA with regard to the killing of John Vuningoma would be disregarded only in respect of murder as a crime against humanity (Count 6). The Defence notes that the instant request pertains only to the latter issue and not the remainder of the Chamber’s Decision.
2. The Defence submits that the Chamber’s Decision to disregard the testimony of Witnesses GTA and DCH in respect of the killing of John Vuningoma only as regards the charge of murder, is inconsistent with the Chamber’s finding that the Indictment does not sufficiently particularise the allegations regarding the killing of the latter. It is further submitted that the evidence relating to the killing of John Vuningoma must therefore be disregarded in respect of *all* Counts which it is alleged to support.
3. The Defence contends that certification of an interlocutory appeal on the single issue raised in the instant motion meets the cumulative requirements of Rule 73(b). It is argued that the specific question of the admissibility of evidence being raised for appellate resolution significantly affects the conduct of the proceedings and the outcome of the trial and that the resolution of that question will materially advance the proceedings.



20422

The Prosecution's Response

4. The Prosecution opposes the Motion. The Prosecution recalls that the jurisprudence of this Tribunal states that certification under Rule 73(B) should only be granted in exceptional circumstances as stated in the 18 March 2004 Decision in *Prosecutor v. Nyiramasuhuko*.¹
5. The Prosecutor points out that the impugned Decision does not definitively state that the evidence with regard to the killing of John Vuningoma will be considered in respect of all other Counts, rather that it is not yet time for the Chamber to determine whether the evidence supports other allegations in the Indictment but that this will be done when the Chamber comes to assess all the evidence and arguments as put forward by the respective Parties.
6. In addition to the fact that the instant request does not meet the requirements of Rule 73(B), the Prosecutor submits that the appeal being sought is also unlikely to prevail in persuading the Appeals Chamber to overturn the Trial Chamber's Decision "based merely on [the] bare assertion that the impugned decision is based on the erroneous application of the jurisprudence."

DELIBERATIONS

7. Rule 73(B) governing the certification of interlocutory appeals provides as follows:

(B) 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.
8. The Rule is clear with regard to the exceptional nature of the procedure. The Trial Chamber in the *Nyiramasuhuko* case stated²:

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,³ or allowed only in very limited circumstances.⁴ Rule 73(B) of the Rules provides, however, that in

¹ *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ inadmissible', 18 March 2004, at para. 14.

² *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ inadmissible', 18 March 2004, at para. 14.

³ 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].

⁴ 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].



20421

exceptional circumstances, the Trial Chamber may—not must—allow interlocutory appeals of such decisions.

9. The Chamber will consider the submissions relating to the first condition for certification and decide if the “decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.” If this condition is met, the Chamber will then consider whether “an immediate resolution by the Appeals Chamber may materially advance the proceedings”.
10. The impugned Paragraphs of the Decision of 24 November 2004 reads as follows:

28. Based on the jurisprudence of the Appeals Chamber quoted above, the Trial Chamber finds that the Indictment does not plead with sufficient particularity the allegations regarding the alleged killing of John Vuningoma. Consequently, the Trial Chamber will disregard the testimony as evidence in support of Count Six of the Indictment. However, for the reasons stated in paragraphs 22 and 23, the evidence of both GTA and DCH is admissible and may be relevant to other charges in the Indictment.

29. However, it is not yet the time for the Trial Chamber to determine whether the evidence in relation to the killing of John Vuningoma supports other allegations in the Indictment. This will be done after all the evidence has been received, after the Trial Chamber has had the opportunity to consider the arguments of the Parties, and after it has reviewed the evidence as a whole, with a view to making its findings thereon.

11. As to the first limb of the test, the Chamber further recalls the Appeals Chamber Decision in *Nyiramasuhuko v. The Prosecutor* on the issue of admissibility of evidence where it stated:

It 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.⁵

12. Even assuming that the Defence has met the first limb of the test and demonstrated that the “decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial,” it would still have to satisfy the second limb, namely that an immediate resolution by the Appeals Chamber may materially advance the proceedings. This, the Defence has failed to show.
13. With regard to the second limb of the test stipulated in Rule 73(B), the Chamber wishes to reiterate that the present Motion relates to witnesses who have already been heard by the Chamber. The consideration of their testimony as a whole, and in relation to the murder of John Vuningoma in particular, will be determined when the Chamber comes to deliberate on the totality of the evidence presented to it by the Parties. In doing so, the Chamber is bound to apply the relevant legal principles on the admissibility of evidence vis-à-vis factors such as specificity of the Indictment and

⁵ *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, par.5. footnote omitted.



20420

notice and prejudice to the Accused. The Chamber will also be guided by the jurisprudence of the Appeals Chamber in this regard. The Chamber therefore does not find that “an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

14. Having considered the submissions of the Parties, the Chamber does not find that the conditions for certification under Rule 73 (B) have been met in the instant case.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

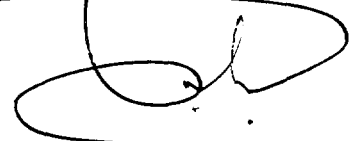
Arusha, 25 February 2004



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Emile Francis Short
Judge

[Seal of the Tribunal]

