

ICTR-97-20-A
05 April 2005
(5549/H-5545/H)

5549/H
RMM



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before:

Judge Theodor Meron, Presiding Judge
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar:

Mr. Adama Dieng

Order of:

5 April 2005

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05 April 2005

Concerned Judges

Parties, Judicial Archives,
LDs, LSS *[Signature]*

THE PROSECUTOR

v.

LAURENT SEMANZA

Case No. ICTR-97-20-A

**DECISION ON LAURENT SEMANZA'S MOTION FOR THE ADMISSION
OF ADDITIONAL EVIDENCE**

Counsel for the Prosecution

Mr. James Stewart

Counsel for the Appellant

Mr. Charles Acheleke Taku

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: ROSETTE MUZIGO-MORRISON
SIGNATURE: *[Signature]* DATE: 05/04/05

1. The Appeals Chamber is seized of a motion filed on 14 January 2005 ("Motion"), pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules") by Laurent Semanza ("Appellant") in which he seeks the admission of pages 6-28 of the testimony of FPK2¹, a protected witness in the case *Prosecutor v. Aloys Simba*, ("Simba case").² The Prosecution response was filed on 20 January 2005 ("Response")³ and the Appellant's reply on 24 January 2005 ("Reply").⁴

A. The Additional Evidence

2. The Appellant seeks to have admitted pages 6 to 28 of the transcripts of the testimony of Witness FPK2, who appeared in the *Simba* case on 16 December 2004. These are annexed to the Motion.⁵ The Appellant does not request that Witness FPK2 be called to testify before the Appeals Chamber.

3. The Appellant contends that the evidence of Witness FPK2 meets the requirements for admission as it is reliable and relevant. He submits that the evidence can be admitted by the Appeals Chamber without having to hear the witness, as the answers of Witness FPK2 were elicited under cross-examination by the Prosecution in the *Simba* case. He adds that the witness's credibility cannot be an issue in this case as it may undercut or prejudge elements of the defence in the *Simba* case.⁶

4. The Prosecution argues that were the Appeals Chamber to rule that the additional evidence is admissible, a hearing would be required to permit the credibility and reliability of the evidence to be tested.⁷

5. As the Appellant wishes to have admitted only the transcripts of Witness FPK2's testimony without the Appeals Chamber hearing the witness, the Appeals Chamber will decide the request of

¹ Defence Extremely Urgent Notice of Motion for the Admission of pages 6 to 28 of the Transcript of the Testimony on Oath of Protected Defence Witness FPK2 in Case No. ICTR-01-76-T, Prosecutor v. Aloys Simba dated 16 December 2004 pursuant to Rule 89 and R. 115 (B); 118 (A) of the Rules of Evidence and Procedure of the ICTR for Consideration During Deliberations in ICTR-97-20-A Reserved for Judgement on the 14 Dec. 2004.

² Case No. ICTR-01-76-T.

³ Prosecution Response to Defence Extremely Urgent Notice of Motion for the Admission of pages 6 to 28 of the Transcript of the Testimony on Oath of Protected Witness FPK2 in Case No. ICTR-01-76-T, Prosecutor v. Aloys Simba dated 16 December 2004 pursuant to Rule 89 and R. 115 (B); 118 (A) of the Rules of Evidence and Procedure of the ICTR for Consideration During the Deliberations in ICTR-97-20-A Reserved for Judgement on the 14 Dec. 2004.

⁴ Defence Reply to Prosecution Response to Defence Extremely Urgent Notice of Motion for the Admission of pages 6 to 28 of the Transcript of the Testimony on Oath of Protected Witness FPK2 in Case No. ICTR-01-76-T, Prosecutor v. Aloys Simba dated 16 December 2004 pursuant to Rule 89 and R. 115 (B); 118 (A) of the Rules of Evidence and Procedure of the ICTR for Consideration During the Deliberations in ICTR-97-20-A Reserved for Judgement on the 14 Dec. 2004.

⁵ Marked as Exhibit A.

⁶ Motion, pp. 5-8; Reply, p. 7.

admissibility of the transcripts as hearsay evidence alone.

B. Rule 115 Requirements

6. It is established that under Rule 115 of the Rules, the party presenting the additional evidence must show that (i) it was not available at trial in any form whatsoever, and (ii) it could not have been discovered through the exercise of due diligence. By implication, the requesting party must show that it sought to make use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence before the Trial Chamber.⁸

7. If it is shown that the evidence was not available at trial and could not have been discovered through the exercise of due diligence, it must be (i) related to a material issue, (ii) credible and (iii) such that it *could* have had an impact on the verdict, when considered together with the evidence admitted at trial and not in isolation. If the evidence was available at trial and could have been discovered through the exercise of due diligence, the moving party must establish that the exclusion of the additional evidence *would* amount to a miscarriage of justice, inasmuch as, had it been available at trial, it *would have had* an impact on the verdict when considered together with the Trial record.⁹

C. The Evidence

8. Pursuant to the requirements of Rule 115 of the Rules, the Appeals Chamber would normally first decide whether the evidence the Appellant seeks to have admitted was "available at trial". However, in the circumstances of this case, the Appeals Chamber considers it unnecessary to address this issue. For the reasons given below, even if pages 6 to 28 of the transcripts of Witness FPK2's testimony given on 16 December 2004 in the *Simba* case were deemed to have been unavailable at trial, the Appellant has not shown that the evidence could have had an impact on the verdict of the Trial Chamber in this case.

⁷ Response, paras 3, 24, 25.

⁸ *The Prosecutor v. Ntagerura, et al.*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9.

⁹ Rule 115(B) of the Rules. See *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Decision on Request for Admission of Additional Evidence, 8 April 2004, para. 5; *Juvénal Kajelijeli v. The Prosecutor*, ICTR-98-44A-A, Decision on Defense Motion for the Admission of Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 28 October 2004, paras 9-11 and Order for the Defence to file Additional Evidence in Support of Defence Motion for the Admission of Additional Evidence pursuant to Rule

9. The Appellant makes a number of submissions in support of his request for the admission of the transcripts of Witness FPK2's testimony, including that the testimony of the witness corroborates the remainder of his alibi evidence, and that this casts doubt on the Trial Chamber's finding that he could have travelled to Musha Church from Gitarama on 13 April 1994 despite the ongoing hostilities.

10. During his cross-examination by the Prosecution in the *Simba* case on 16 December 2004, Witness FPK2 testified that he saw the Appellant on 13 April 1994 in Gitarama. The witness seemed to indicate that they met in the premises of the bank in which Witness FPK2 had been sheltering:

Q. Very well, Witness. And you do realise that you appear on that list with Colonel Aloys Simba?

A. Yes, I can see that.

Q. And it's also true that you appear on that list with Laurent Semanza?

A. Yes, I can see that too.

Q. And Semanza is alleged – alleges that he took refuge at your house in Gitarama in April 1994; is that correct?

A. Yes, he met me personally on the 13th and told me that he had left home and gone through Bugesera and had come right to my place.

Q. So it's your evidence that Semanza – you also met Semanza on the 13th of April 1994, same day you met Simba?

A. On the same day I met Simba, he – Semanza also came by. And if you may want to know, I was living within the premises of the bank. That is where I was living, and Semanza, when he came by, there were many people around, and I was outside, he saw me, and he came to greet me, and then he came to – he also informed me – he told me that he had found refuge at my home.

Q. And are you aware that the Tribunal disbelieved Semanza's alibi that he met you on the 13th of April 1994?¹⁰

Note: Defence objection ends line of questioning

11. While the testimony of Witness FPK2 relates to the Appellant's movements on 13 April 1994, the Appeals Chamber finds that it is vague, does not indicate with any precision the time he may have seen the Appellant, and is limited to only a few lines of cross-examination. Most of the alibi evidence referred to by the Appellant in support of his Motion concerns his movements between 9 and 12 April, and on 14 April. Only Witnesses CYS and PFM testified at trial to seeing

115 of the Rules of Procedure and Evidence, 27 February 2004, p. 2; *The Prosecutor v. Ntagerura, et al.*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, paras 9-11.

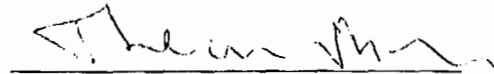
¹⁰ T. 16 December 2004, pp. 22, 23, *Simba* case.

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the Appellant on 13 April 1994. However, the evidence of these two witnesses was found to be inconsistent, and was ultimately rejected by the Trial Chamber.¹¹

12. Despite finding the evidence of Witnesses CYS and PFM unreliable as regards the whereabouts of the Appellant on 13 April, the Trial Chamber nonetheless considered the possibility that the Appellant was in Gitarama on 13 April. It considered the alibi of the Appellant that he was in Gitarama on that day and concluded, with reference to the evidence of Witness TDB, that the Appellant could have travelled to Musha from Gitarama.¹² It came to that conclusion even after considering the Appellant's argument that intensive military operations and activities of the RPF in the region would have made it impossible for him to have travelled to Musha Church to take part in the attacks at Musha on 13 April 1994.¹³ Witness FPK2's evidence in no way undermines the Trial Chamber's conclusion, and when considered together with the evidence admitted at trial, it could not have affected the Trial Chamber's verdict with regard to the crimes committed at Musha Church on 13 April 1994.

13. Consequently, the Appeals Chamber rejects the Appellant's Motion for the admission of the transcripts of Witness FPK2's testimony in the *Simba* case.



Judge Theodor Meron
Presiding



Dated this 5th day April of 2005,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

¹¹ Trial Judgement, paras 131-132.

¹² Trial Judgement, para. 204:

The Chamber has also carefully considered the Accused's alibi, discussed above in Chapter III, in the context of all the evidence submitted concerning the events at Musha church. In particular, the Chamber recalls that the Accused claimed to be in Gitarama town on 13 April 1994 when the massacre occurred, which was confirmed only by the testimony of Defence Witness PFM, whose testimony, in the opinion of the Chamber, is biased by her close personal relationship with the Accused. The Chamber further emphasises that even if the Accused had gone at some point to Gitarama, as his evidence indicates, the testimony of Defence Witness TDB, who travelled from Gikoro to Ruhango, Gitarama on 13 April 1994, confirms that the Accused could have travelled between the two places at that time.

¹³ Trial Judgement, paras 138-146, 193.