



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-99-50-T
07-07-2005
(21558-21552)

21558
PR

Or: ENG

TRIAL CHAMBER II

UNITED NATIONS
NATIONS UNIES

Before: Judge Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 7 July 2005

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

Case No. ICTR-99-50-T

2005 JUL -7 P 3:24
ICTR
SECRETARIES

DECISION ON PROSPER MUGIRANEZA'S MOTION FOR CERTIFICATION

Office of the Prosecutor:

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

Counsel for the Defence:

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

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

SITTING as Judge Emile Francis Short, designated by Trial Chamber II, in accordance with Rule 73 (A) of the Rules of Procedure and Evidence;

SEISED of “Prosper Mugiraneza’s Motion for Certification for Interlocutory Appeal of the Trial Chamber’s Decision of 4 February 2005 on Prosper Mugiraneza’s Motion for Appropriate Relief for Violation of Rule 66”, filed on 10 February 2005 (the “Motion”);

CONSIDERING the “Prosecutor’s Response to Prosper Mugiraneza’s Motion for Certification for Interlocutory Appeal of the Trial Chamber’s Decision of 4 February 2005 on Prosper Mugiraneza’s Motion for Appropriate Relief for Violation of Rule 66”, filed on 17 February 2005 (the “Response”);

NOTING the Chamber’s “Decision on Prosper Mugiraneza’s Motion for Appropriate Relief for Violation of Rule 66”, filed on 4 February 2005 (the “Impugned Decision”);

HEREBY DECIDES the Motion.

SUBMISSIONS

Defence Motion

1. The Mugiraneza Defence seeks certification to appeal the Impugned Decision of 4 February 2005, in which the Chamber denied relief for future violations of the Prosecution’s disclosure obligations, and found the underlying Defence Motion to be frivolous. The Defence submits that timely disclosure is necessary for a fair trial and that the Prosecution’s repeated failures to meet its disclosure obligations interfere with the expeditious conduct of proceedings. The Defence further submits that its Motion for relief was not frivolous insofar as its purpose was to call the Chamber’s attention to the Prosecution’s repeated breaches of disclosure obligations and to request the Chamber to take equitable measures to prevent further violations.

Prosecution’s Response

2. According to the Prosecution, the Defence has failed to demonstrate any material prejudice that it has suffered, and the issue is now moot, in light of the delayed filing of the Defence Motion. The Prosecution further asserts that, pursuant to Rule 73 (B) of the Rules, certification to appeal is to be granted only in exceptional circumstances, which do not exist in the present case.

DELIBERATIONS

(i) *Whether Certification to Appeal Should be Granted*

3. Rule 73 (B) of the Rules, which governs certification of appeal of Motions brought under Rule 73 (A) of the Rules, provides 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”.

4. The Chamber notes that, pursuant to Rule 73 (B) of the Rules, Decisions on Motions are without interlocutory appeal except at the Chamber’s discretion for the limited circumstances stipulated in this Rule.
5. The Chamber recalls with approval the reasoning of Trial Chamber II in *Nyiramasuhuko et al.*:

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, or allowed only in very limited circumstances. Rule 73(B) of the Rules provides, however, that in exceptional circumstances, the Trial Chamber may—not must—allow interlocutory appeals of such decisions.¹

6. The Chamber has the discretion to grant certification to appeal if both conditions of Rule 73 (B) are satisfied. Under the first condition of Rule 73 (B), the applicant must show that “the decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial”. This condition is not determined on the merits of the appeal. Under the second condition, the applicant has the burden of convincing the Chamber that “immediate resolution by the Appeals Chamber may materially advance the proceedings”. Both of these conditions require a specific demonstration, and are not met through a general reference to the submissions on which the Impugned Decision was rendered.²

¹ *Nyiramasuhuko et al.*, “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’ ”, 18 March 2004, para. 14.

² *Nyiramasuhuko et al.*, “Decision on Defence Motion for Certification to Appeal the ‘Decision on Defence Motion for a Stay of Proceedings and Abuse of Process’ ”, 19 March 2004, paras. 12-16; *Nyiramasuhuko et al.*, 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’ ”, 18 March 2004, paras. 14-17.

7. In this respect, the Chamber observes that the Defence, in its present Motion, has revisited the thrust of its previous arguments which led to the Impugned Decision, and has again failed to demonstrate the two conditions required for the Chamber to grant certification to appeal, pursuant to Rule 73 (B) of the Rules.
8. With respect to the Defence submissions that the Prosecution has repeatedly failed to comply with its disclosure obligations, under Rule 66 (A) (ii) of the Rules, the Chamber refers to Rule 5 of the Rules, which stipulates the conditions on which relief may be granted to a Party for non-compliance with the Rules:

Rule 5: Non-Compliance with Rules

(A) Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party.

(B) Where such an objection is raised otherwise than at the earliest opportunity, the Trial Chamber may in its discretion grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to the objecting party.

(C) The relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with fundamental principles of fairness.

9. The Chamber observes that, pursuant to Rule 5 (A) of the Rules, a showing of “material prejudice” is a precondition to the grant of relief to an objecting Party. In the instant case, the Defence has not satisfied this precondition. In its Decision of 4 February 2005, the Chamber specifically held that “the Defence in its Motion has not demonstrated any prejudice it has suffered”.³ Similarly, the Defence, in the present Motion, provides no indication of prejudice suffered as a consequence of the Prosecution’s alleged violation of disclosure violations.
10. The Chamber notes the substantial delay by the Defence in filing its Motion. According to Rule 5 (B) of the Rules, relief is to be granted at the Chamber’s discretion, where an objection on the ground of non-compliance with the Rules “is raised otherwise than at the earliest convenience”. On the basis of the late submission by the Defence of its Motion and its failure to show any material prejudice suffered as a result of the Prosecution’s alleged non-compliance with its disclosure obligations, as required under Rule 5 of the Rules, the Chamber was entitled to exercise its discretion to deny the request for certification for interlocutory appeal in its 4 February 2005 Decision.

³ *Bizimungu et al.*, “Decision on Propose Mugiraneza’s Motion for Appropriate Relief for Violation of Rule 66”, 4 February 2005, para. 10.

11. The Chamber also notes that the Mugiraneza Defence seeks prospective relief. Pursuant to Rule 5 of the Rules, relief is to be granted in response to prejudice that has occurred or would occur but for the Chamber's intervention. It is not the role of the Chamber to stipulate in advance the sanctions for a breach of the Rules that may or may not occur. Nor would it be possible to so stipulate, since the appropriate relief is to be proportionate to the breach and can be assessed only on a case-by-case basis.
12. The Chamber may grant such certification (1) if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, (2) and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. In the Chamber's view, neither of these conditions has been satisfied. Chamber does not consider that there is serious doubt, raised by the Defence Motion, about any question of law, resolution of which by the Appeals Chamber would materially advance the proceedings, as required by Rule 73 (B). In the Chamber's view, the impugned Decision involves an exercise of discretion based on an assessment of the factual significance of the evidence, within the framework of clear legal guidelines. Resolution of the issue of sanctions for disclosure violations, under Rule 66 (A) (ii), by the Appeals Chamber would not materially advance the present stage of the proceedings.

(ii) Whether the Underlying Motion Constituted an Abuse of Process

13. The Chamber next addresses the Defence request for certification to appeal the finding, in the 4 February 2005 Decision, that its underlying Motion was frivolous and amounted to an abuse of process. In this respect, the Chamber refers to Rule 73 (F) of the Rules, which reads as follows:

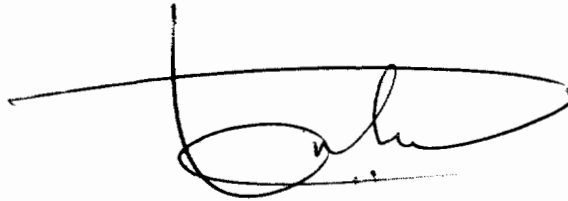
In addition to the sanctions envisaged by Rule 46, a Chamber may impose sanctions against Counsel if Counsel brings a motion, including a preliminary motion that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof.

14. Rule 73 (F) of the Rules affords wide discretion to a Chamber in assessing whether conduct amounts to an abuse of process. This Chamber was and remains of the view that the Defence Motion was so unmeritorious as to be frivolous and amount to an abuse of process. Indeed the underlying Motion failed to show any material prejudice suffered by the Defence as a consequence of the Prosecution's alleged disclosure violations, as required under Rule 5 of the Rules. Nor did the Motion satisfy the requisite conditions for certification to appeal, under Rule 73 (B) of the Rules. Moreover, certification is not to be granted merely for the purpose of an appellate determination of what constitutes a frivolous motion.

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**FOR THE FOREGOING REASONS, THE TRIAL CHAMBER
DENIES the Motion.**

Arusha, 7 July 2005

A handwritten signature in black ink, appearing to read 'E. Short', with a long horizontal stroke extending to the left.

Emile Francis Short

Judge

[Seal of the Tribunal]