



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
21-07-2005
(25223-25219)

25223

S. Mutsaers

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 21 July 2005

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

JUDICIAL RECORDS/ARCHIVES
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CERTIFICATION OF APPEAL CONCERNING PROSECUTION INVESTIGATION
OF PROTECTED DEFENCE WITNESSES

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

Raphaël Constant
Paul Skolnik
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershon Otachi Bw'Omanwa

6h

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

25222

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF Requests for certification of appeal filed by the Ntabakuze and Nsengiyumva Defence on 8 June 2005; and by the Kabiligi and Bagosora Defence on 10 June 2005;

CONSIDERING the three Responses filed by the Prosecution on 13 and 14 June 2005; and the Reply filed by the Ntabakuze Defence on 16 June 2005;

HEREBY DECIDES the request.

INTRODUCTION

1. The Defence seeks leave to appeal the Chamber's decision dated 1 June 2005, to the extent that it denied Defence objections to tendering a document in court on the basis that the document must have been obtained in violation of witness protection orders.¹ The context and timing of the objection are important to understand the scope of the Chamber's decision.
2. During the testimony of Defence Witness LT-1 on 26 April 2005, the Prosecution asked the witness whether she had ever given a statement to a national immigration authority.² The Defence objected, arguing that the question was laying a foundation to impeach the witness's credibility by improperly introducing a prior statement given by the witness to a national immigration authority. A document in neither of the official languages of the Tribunal had been disclosed by the Prosecution just before the start of the cross-examination, and the Defence anticipated that it was about to be shown to the witness. The Defence argued that any questions concerning statements to national immigration authorities must be disallowed because the Prosecution must have obtained the document in violation of the witness protection orders. Those orders direct that the Prosecution "shall not, directly or indirectly, disclose, discuss or reveal any ... information" identifying a protected witness.³
3. The Prosecution responded that it was permitted to make inquiries to third parties about protected witnesses as long as their status as witnesses before this Tribunal was not revealed. Any inquiries by the Prosecution to obtain the document had complied with this requirement. However, the Prosecution refrained from making specific submissions as to the source or nature of the document concerning Witness LT-1.⁴ Furthermore, no such submissions were made in court, as the Defence objection had intervened before the document was shown to the witness.

¹ *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 3 June 2005 ("Modification Decision").

² T. 26 April 2005 p. 63.

³ Three of the Defence witness protection orders are, in substance, identical: *Bagosora et al.*, Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004; *Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003. The Nsengiyumva witness protection decision was rendered long before the joinder of the four accused in a single trial: *Nsengiyumva*, Decision on Protective Measures for Defence Witnesses and Their Families and Relatives (TC), 5 November 1997.

⁴ *Bagosora et al.*, Prosecution Submissions (TC), 28 April 2005, para. 9 ("any material that the Prosecution may have in its possession regarding defence witnesses' statements to immigration authorities has been retrieved without revealing the status of the person as a defence witness").

6/11

DELIBERATIONS

25221

(i) *Scope of the Present Decision*

4. In relevant part, the Chamber's decision "den[ied] the Defence objection to the tendering in court of a prior statement of Witness LT-1 on the ground that, by making inquiries to national immigration authorities, the Prosecution obtained the document in violation of the witness protection orders".⁵ The decision did not, contrary to the submission of the Kabiligi Defence, determine that the document was admissible.⁶ In the absence of any submissions on the record concerning the manner in which the document was obtained, the Chamber specifically deferred consideration of whether the document, or questions arising therefrom, should be excluded under Rule 95 as having been obtained in violation of national law:

The claims of confidentiality asserted by the Defence are speculative. At the moment, the Chamber has no knowledge of the manner in which the document was obtained, or its content ... Violation of national law might be a consideration in determining whether evidence should be excluded under Rule 95, as having been "obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings". The Chamber cannot consider whether evidence should be excluded under Rule 95 without more concrete information about the content of the document; the means by which it was obtained; and the law which was allegedly broken.⁷

5. Certification cannot be granted in respect of an issue which the Trial Chamber has not yet decided. Once information concerning the origin of the document has been given by the Prosecution, then the Defence will be in a position to raise objections concerning violations of national or international law.⁸ The only ground of objection which was properly before, and decided by, the Chamber was whether the Prosecution had violated the witness protection orders by making inquiries in the manner it had described.

(ii) *Standard for Granting Certification of an Interlocutory Appeal*

6. Leave to appeal may be certified under Rule 73 (B) of the Rules of Procedure and Evidence ("the Rules") where a 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". Interlocutory appeals under Rule 73 (B) have been described as exceptional; on the other hand, certification has been granted where a decision may concern the admissibility of broad categories of evidence, or where it determines particularly crucial matters of procedure or evidence.⁹

⁵ Modification Decision, p. 9.

⁶ Kabiligi Application, para. 6.

⁷ Modification Decision, para. 15.

⁸ The Nsengiyumva application suggests that the decision "erroneously places the burden of showing that the documents were irregularly obtained, on the defence". This mischaracterizes the decision, which found only that the issue was premature. The Prosecution will be called upon to describe the origin of the document when it seeks to use the document in court. Once its provenance has been established, the Defence will be in a position to make an application under Rule 95.

⁹ *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5; *Nyiramasuhuko et al.*, 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' (TC), 18 March 2004, para. 15 ("It should be emphasized that the situations which

6h

(iii) *Effect on Conduct of Proceedings or Outcome of the Trial*

25220

7. The Defence argues that “many potential defence witnesses will decline to present themselves for testimony” as a result of the decision.¹⁰ Most defence witnesses are said to be asylum-seekers who fear being returned to Rwanda. Inquiries by the Prosecution to the immigration authorities of the countries in which they have sought refuge will have an intimidating effect on those witnesses and make them reluctant to testify before the Tribunal. This will interfere with the fair trial rights of the Accused, and cause delays and interruptions in the proceedings while measures to compel the appearance of witnesses are obtained and executed.

8. The Prosecution responds that inquiries conducted within the parameters set forth in the decision will not jeopardize the position of any asylum-seeker. The national immigration authorities will not know that the person about whom they have inquired is a witness, much less whether testimony given under a pseudonym corresponds to any particular person. This being the case, there is little or no danger that discrepancies between statements to national immigration authorities and testimony before the Tribunal would ever be discovered by national authorities.

9. The consequences predicted by the Defence would undoubtedly have a significant effect on the fairness and expeditiousness of proceedings. The point of contention is whether those consequences will actually ensue. In its decision, the Chamber considered the dangers raised by the Defence to be remote in light of the secrecy of the role of the asylum-seeker in proceedings, and the confidentiality of any testimony which might reveal their identity. Nevertheless, the Chamber recognizes that this is a question which may affect a considerable number of Defence witnesses. If the Chamber’s interpretation of the witness protection orders is incorrect, then the effect on the Defence would be profound. In these circumstances, the Chamber finds that its decision involves an issue that “would significantly affect the fair and expeditious conduct of the proceedings”.

(iii) *Materially Advance the Proceedings*

10. The Chamber must next consider whether “immediate resolution by the Appeals Chamber may materially advance the proceedings”. The Defence submits that the Chamber’s decision is in “flagrant contradiction” with a decision in the case of *Karemera et al.*, which should be resolved by the Appeals Chamber.¹¹ The Prosecution argues that there is no contradiction with the *Karemera* decision which, unlike the present case, involved an inquiry

may warrant interlocutory appeals under Rule 73(B) must be exceptional indeed”); *Nyiramasuhuko et al.*, Decision on Nyiramasuhuko’s Motion for Certification to Appeal” etc., (TC), 20 May 2004, (“The Chamber recalls the jurisprudence that decisions rendered on Rule 73 motions are without interlocutory appeal, except on the Chamber’s discretion for the very limited circumstances stipulated in Rule 73 (B)”). *Bagosora et al.*, Decision on Prosecution Request for Certification of Appeal on Admission of Testimony of Witness DBY (TC), 2 October 2003, para. 4 (“Immediate resolution by the Appeals Chamber will ensure that a substantial category of potential evidence is being correctly evaluated under the Rules”); *Bagosora et al.*, Certification of Appeal on Admission of Testimony of Witness DP Concerning Pre-1994 Events (TC), 18 November 2003 (“The admissibility of pre-1994 events is a question which ... has a bearing on the nature of the case which the Defence must confront; the range of evidence which the Chamber should hear; and the scope of evidence relevant to the crimes charged. Further, the Chamber’s authority to ensure focused proceedings in the context of criminal charges of broad scope will be materially advanced by an immediate ruling on this addition pre-1994 event”).

¹⁰ Ntabakuze Application, para. 4.

¹¹ Ntabakuze Application para 4; Kabiligi Application, para. 11. The conflicting decision is: *Karemera et al.*, Decision on the Prosecution Motion for Sanctions Against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction Against Further Violations (TC), 19 April 2005.

6h

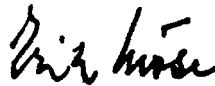
witness's real name was never revealed, and that a code name was used to mask the person's true identity from anyone who did not already know it. 25219

11. The Chamber need not determine whether the *Karemera* decision is distinguishable.¹² Whether that is the case or not, resolution of the present controversy by interlocutory appeal will avoid the serious consequences that could result from proceeding throughout the remainder of the Defence case on an incorrect legal footing. On this basis, the Chamber is of the view that immediate resolution of the present controversy may materially advance the proceedings.


FOR THE ABOVE REASONS, THE CHAMBER

GRANTS certification of an interlocutory appeal under Rule 73 (B) from that part of the Chamber's "Decision on Motion to Harmonize and Amend Witness Protection Orders", dated 1 June 2005, which denies the Defence objection to the tendering in court of a prior statement of Witness LT-1 on the ground that, by making inquiries to national immigration authorities, the Prosecution obtained the document in violation of the witness protection orders.

Arusha, 21 July 2005


Erik Møse
Presiding Judge


Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



¹² The Chamber notes, however, that the decision concerns the interpretation of a differently-worded witness protection order. The witness protection order in question in that case, according to the Trial Chamber, prohibited disclosure "relating to" the witness, which may be broader than "information identifying any witness". *Karemera et al.*, Decision on the Prosecution Motion for Sanctions Against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction Against Further Violations (TC), 19 April 2005, para. 8.