



UNITED NATIONS
NATIONS UNIES

ICTR-99-50-T
28-09-2005
(22305-22302)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

22305
R

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 28 September 2005

2005 SEP 28 P 3:28
H. Mugwanya

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

Case No. ICTR-99-50-T

**DECISION ON THE PROSECUTOR'S MOTION FOR CERTIFICATION TO
APPEAL THE TRIAL CHAMBER'S DECISIONS ON PROTECTION OF DEFENCE
WITNESSES**

Rule 73(B) 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*

REF

22304

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

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

BEING SEIZED of the “Prosecutor’s Motion, Pursuant to Rule 73(B), for Certification to Appeal the Trial Chamber’s Decisions on Motions for Protection of Defence Witnesses Dated 27 June 2005”, filed on 4 July 2005 (the “Motion”);

CONSIDERING “Casimir Bizimungu’s Confidential Response to [the] Prosecutor’s Motion for Certification to Appeal the Trial Chamber’s Decisions for Protection of Defence Witnesses,” filed on 11 July 2005 (the “Response”);

RECALLING the

- i) “Decision on Casimir Bizimungu’s Motion for Protection of Defence Witnesses;”
- ii) “Decision on Jerome Bicamumpaka’s Motion for Protection of Defence Witnesses;”
- iii) “Decision on Justin Mugenzi’s Confidential Motion for Protection of Defence Witnesses,”

as filed on 27 June 2005 (the “Impugned Decisions”)

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

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 Motion

1. The Prosecutor seeks leave to appeal the Chamber’s ruling that disclosure of information pertaining to the identity of a protected witness must be restricted to members of the “immediate Prosecution team,” and cannot extend to anyone else within the Office of the Prosecutor. The Prosecution had applied for the Chamber to replace the words “Prosecution team” with “the Prosecution”, thus permitting dissemination of the identity, or information disclosing the identity, of protected Defence witnesses to any person working for the Office of the Prosecutor. The Prosecution submits that the issues raised by the present certification request are of such importance as to require immediate appellate resolution.

Casimir Bizimungu’s Response

2. The Defence for Casimir Bizimungu moves for the Prosecutor’s Motion to be dismissed. The Defence contends that the Prosecutor’s arguments of the merits of his appeal are premature. At this stage, the Defence submits, the Chamber need only be concerned with whether or not the conditions for the certification of an appeal, as stipulated in Rule 73 (B) have been met. The Defence submits that Prosecutor has failed to meet both of these conditions.



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DELIBERATIONS

3. The Chamber recalls its previous statements on the standard which must be met before certification of an interlocutory appeal is granted pursuant to Rule 73(B).¹ The Rule provides that leave may be granted only where it “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”. Albeit exceptionally, 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.²
4. Rule 73 (B) requires the Chamber to assess the significance of the decision in relation to “the proceedings” and “the trial”. The Chamber notes that the Prosecutor’s arguments concern the impact of the present decision on other trials and other accused persons – in particular, the Prosecution’s ability to disclose exculpatory information to other accused, in accordance with its obligations under Rule 68 of the Rules.
5. The Chamber takes the view that the effect of its decisions on other trials is relevant in determining whether the criteria in Rule 73 (B) are met. As stated by the Trial Chamber in *Bagosora*³:

[...] If such reciprocal effects were ignored, then this would lead to the unreasonable conclusion that important decisions would be immunized from interlocutory appeal as long as their immediate effect was felt only on other trials, even if all Trial Chambers had adopted precisely the same approach and were, therefore, mutually affected by the same approach.
6. 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”.
7. With regard to the first limb of the test, the Prosecutor argues that restricting access to witness identities to “the Prosecution team in this case” would prevent the trial team in this case from sharing information with other teams. This, the Prosecutor submits, is contrary to his disclosure obligations under Rule 68. The Impugned Decisions are further incompatible with Rule 75 (F), which, the Prosecutor contends, is designed

¹ See *inter alia*, *Bizimungu et al.*, Decision On Casimir Bizimungu Motion For Certification To Appeal From The Trial Chamber’s Decision Of 3 September 2004 Concerning Rule 73 Bis Of The Rules And For Other Appropriate Relief, 9 March 2005.

² *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence (AC), 4 October 2004; *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’ (TC), 18 March 2004, para. 15 (“It should be emphasized that the situations which 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, para. 16 (“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)”);

³ *Bagosora et al.*, Certification Of Appeal Concerning Access To Protected Defence Witness Information, 29 July 2005.



precisely to permit the Prosecution to comply with its disclosure obligations to Defence teams in other trials.

8. The Chamber notes that the greater portion of a protected witness' testimony is given in open session and is, therefore, accessible to anyone in the Office of the Prosecutor. Testimony which is received in closed session does not, by virtue of its sealed nature alone, prevent Counsel in other cases from being informed of material that may be exculpatory, provided that the identity of the witness is not revealed. The Chamber agrees with the Trial Chamber in *Bagosora* that

[...] denying automatic access to protected information by all employees of the Office of the Prosecutor may make compliance with Rule 68, and sharing of evidence relevant to other trials, somewhat more burdensome. Extra effort will be required by trial teams who wish to exchange salient information without disclosing protected witness identities. Though the Chamber does not believe that this burden conflicts with Rule 68 or the mandate of the Prosecutor, important interests are affected. The Appeals Chamber has stated that "[t]he disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal", and has described the obligation as equal in significance to the Prosecution's obligation to prosecute. [Footnote omitted]


The Chamber accordingly finds that the first limb of the test in Rule 73(B) has been satisfied.

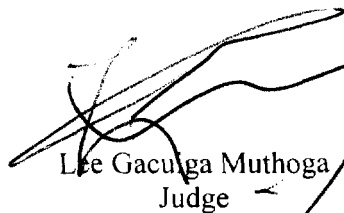
9. The Chamber now moves to consider the second limb of the test as to whether "immediate resolution by the Appeals Chamber may materially advance the proceedings".
10. The Chamber is concerned about the questions of principle and policy raised by the Prosecutor's Motion, particularly that pertaining to the need for effective and meaningful witness protection measures. The Chamber accepts that appellate resolution of these questions will affect the conduct of all proceedings before the Tribunal, and the relationship of proceedings to one another. In light of the view expressed in paragraph 5 above on reciprocal effect of one Chamber's decision on another, the Chamber accepts that an interlocutory resolution of this question "may materially advance the proceedings".

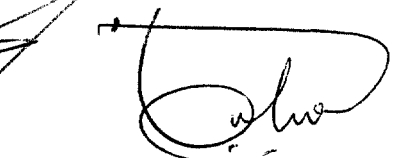
FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS certification of the interlocutory appeal under Rule 73 (B)

Arusha, 28 September 2005


Khalida Rachid Khan
Presiding Judge


Le Gacuga Muthoga
Judge


Emile Francis Short
Judge

[Seal of the Tribunal]



28 September 2005