



UNITED NATIONS
NATIONS UNIES

ICTR-00-58-T
16-11-2005
(21937-21934)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 16 November 2005

The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-00-56-T

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**DECISION ON BIZIMUNGU'S MOTION FOR CERTIFICATION OF APPEAL
AGAINST THE TRIAL CHAMBER'S DECISIONS OF 28 OCTOBER 2005 ON THE
ADMISSIBILITY OF THE TESTIMONIES OF WITNESSES AP AND TN**

Prosecution Counsel

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Mr Christopher Black
For A. Bizimungu
Mr Gilles St-Laurent & Mr Ronnie MacDonald
For F-X. Nzuwonemeye
Mr Charles Taku
For I. Sagahutu
Mr Fabien Segatwa & Mr Seydou Doumbia

[Signature]

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the “Chamber”);

BEING SEIZED OF Augustin Bizimungu’s « *Requête de la Défense aux fins d’obtenir l’autorisation de la Chambre de première instance d’interjeter appel contre ses décisions du 26 octobre 2005 (sic) portant sur l’exclusion des témoignages TN et AP* »,¹ filed on 7 November 2005 (“the Motion”);

HAVING RECEIVED the « *Observations du Procureur sur la requête de la défense d’Augustin Bizimungu en certification, datée du 4 novembre 2005 (sic) (témoins AP et TN)* »² filed on 8 November 2005 (“the Response”);

RECALLING its Decisions filed on 28 October 2005 on the admissibility of the testimonies of Witnesses AP³ and TN⁴ (the “Impugned Decisions”);

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

HEREBY DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73(B) of the Rules.

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence for Augustin Bizimungu requests the Trial Chamber to certify an appeal against its written Decisions rendered on 28 October 2005 on the admissibility of the testimonies of Prosecution Witnesses AP and TN.
2. The Defence submits that pursuant to Rule 73(B) of the Rules, a Trial Chamber may grant certification for appeal if 1) the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and 2) the intervention of the Appeals Chamber may materially advance the proceedings.⁵
3. The Defence asserts that the Impugned Decisions involve an issue that would significantly affect the fair and expeditious conduct of the proceedings as well as the outcome of the trial. The Defence further asserts that the testimonies of Witnesses AP and TN should not have been admitted into evidence because, contrary to the “best evidence rule”, those witnesses related facts which were not to their personal knowledge.


¹ “Defence Motion for the Trial Chamber to Certify an Appeal against its Decisions of 26 October 2005 (*sic*) on the Exclusion of the Testimonies of TN and AP.” (Unofficial Translation)

² “The Prosecutor’s Observations Regarding Augustin Bizimungu’s Motion for Certification, dated 4 November 2005 (*sic*) (Witnesses AP and TN).” (Unofficial translation.)

³ *The Prosecutor v. Nindiliyimana et al.*, Case No. ICTR-00-56-T, “Decision on Bizimungu’s Motion to Exclude the Testimony of Witness AP”, 28 October 2005.

⁴ *The Prosecutor v. Nindiliyimana et al.*, Case No. ICTR-00-56-T, “Decision on Bizimungu’s Motion to Exclude the Testimony of Witness TN”, 28 October 2005.

⁵ Note here that the formulation of the second criterion as presented in para. 4 of the Motion is different from what appears in the Rules of Procedure and Evidence.

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According to the Defence, the testimonies of Witnesses AP and TN were based on what others told them or on their own deductions, and the Prosecution failed to show that it was unable to produce witnesses who had personal knowledge of those facts.

4. The Defence argues that the intervention of the Appeals Chamber would materially advance the proceedings on the question of the admissibility of evidence as that would affect the debates before the Trial Chamber. The Defence further argues that a definitive resolution of these issues would definitely advance the proceedings and would ensure that the Accused Bizimungu can fully exercise his rights.
5. Finally, the Defence submits that it is important to have these issues resolved once and for all in order to have clear and concise guidelines on admissibility.

The Prosecution

6. The Prosecution submits that the assertion contained in paragraph 6 of the Defence Motion⁶ is erroneous and that the Defence has failed to prove that Witnesses AP and TN testified about facts which were not to their personal knowledge.
7. The Prosecution also argues that in the Impugned Decisions, the Trial Chamber conducted a content analysis of the witnesses' testimonies and determined that they tended to support the allegations contained in the Indictment of 23 August 2004, but that the Chamber postponed any assessment of their credibility until the judgement stage.

HAVING DELIBERATED

8. The Chamber recalls Rule 73(B) of the Rules, which stipulates the criteria for the certification of interlocutory appeals. The first part of the test is satisfied "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" while the second criterion is met if, "in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings." It is worth recalling that both criteria have to be satisfied in order for certification to be granted.
9. With respect to the first part of this two-pronged test, the Chamber notes that the main argument advanced by the Defence is that the testimonies of Witnesses AP and TN were based not on their personal knowledge but on hearsay and deductions.⁷ The Chamber draws the Defence's attention to the fact that even if the testimonies of Witnesses AP and TN could properly be characterised as hearsay, they would not be inadmissible *per se*. This is because Rule 89(C) empowers a Trial Chamber to admit any relevant evidence which it deems to have probative value, including hearsay evidence. In fact, as the Appeals Chamber has established in the *Aleksovski* case:

It is well settled in the practice of the Tribunal that hearsay evidence is admissible. Thus relevant out of court statements which a Trial Chamber considers probative are

⁶ That is the paragraph where the Defence asserts that the testimonies of Witnesses AP and TN are based on hearsay and deductions.

⁷ See para. 6 of the Motion.

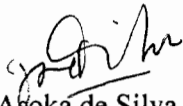
admissible under Rule 89(C) [...] Accordingly, Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence.⁸

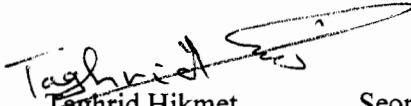
10. In the Chamber's view, the Defence has failed to demonstrate that any ruling by the Appeals Chamber on this issue can affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Thus the Defence has not satisfied the first criterion for certification. Having determined that the Defence has failed to meet the first part of the test, the Chamber need not consider the second part.
11. Finally, the Chamber reminds the Defence that, absent abuse, the exercise of discretion by a Trial Chamber in determining the admissibility of evidence is not amenable to review by the Appeals Chamber.⁹ Here, the Chamber notes that the Defence has not alleged any abuse of discretion by the Chamber in admitting the testimonies of Prosecution Witnesses AP and TN into evidence.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 16 November 2005


Asoka de Silva
Presiding Judge


Taghrid Hikmet
Judge


Seon Ki Park
Judge



⁸ *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1 (AC), "Decision on Prosecutor's Appeal on Admissibility of Evidence", 16 February 1999, para. 15.

⁹ *The Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, "Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO", 11 December 2003, para. 8.