UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
10-02-2006
(26486-26483)

26486
S. Mussa

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 10 February 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

2006 FEB 10 P 12:49

DECISION ON APPLICATION FOR CERTIFICATION TO APPEAL DECISION ON EXCLUSION OF TESTIMONY

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence
Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 26485

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

BEING SEIZED OF the "Application for Certification for Appeal Pursuant to Rule 73 (B) of Part of the Trial Chamber's 'Decision on Exclusion of Testimony Outside the Scope of the Indictment' filed 27 September 2005", filed by the Kabiligi Defence on 4 October 2005 ("the Application");

CONSIDERING the Prosecution Response, filed on 11 October 2005; the Reply thereto, filed on 14 October 2005; the Prosecution's Further Response, filed on 17 October 2005; and the Reply to the Further Response, filed on 19 October 2005;

HEREBY DECIDES the Application.

INTRODUCTION

1. The Kabiligi Defence requests leave to appeal the Chamber's Decision on Exclusion of Testimony Outside the Scope of the Indictment, filed on 27 September 2005.[1] The Decision declared that portions of the testimony of two witnesses were inadmissible as not relevant to the Indictment against the Accused, but denied all other such requests in respect of a total of eight witnesses.[2]

DELIBERATIONS

2. Leave to appeal may be certified under Rule 73 (B) of 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".

3. The first criterion is undoubtedly met. More than a dozen events, some of which may be characterized as highly incriminating of the Accused, are at issue in the Decision. The case against the Accused – and the need for a Defence case to rebut this evidence – would be substantially reduced if this evidence were to be excluded at this stage.

4. The second requirement for granting leave to appeal is that it be "the opinion of the Trial Chamber" that immediate resolution by the Appeals Chamber "may materially advance the proceedings". The issue addressed by the Decision is whether various items of testimony should be declared inadmissible as not relevant to the Indictment. This depends, in turn, on whether general allegations in the Indictment have been clarified by virtue of subsequent disclosure, in particular, through the Pre-trial Brief. The Decision makes very clear the inter-relationship between these two questions:

> Rule 89 (C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". To be admissible, the "evidence must be in some way relevant to an element of a crime with which the Accused is charged." The present motion complains that the evidence has no relevance to anything in the Indictment, or that some paragraphs of the Indictment to which it might be relevant are too vague to be taken into account. Some recent Appeals Chamber judgements thoroughly discuss the specificity with which an indictment must be pleaded, and the significance of other forms of Prosecution disclosure of its case. Although the

[1] *Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment (TC), 27 September 2005 ("the Decision").

[2] Witness XAI's testimony about the killing of three civilians, allegedly on the orders of the Accused, and Witness DCH's testimony about killings at Mburabuturo School, allegedly in the presence of the Accused, were ruled inadmissible.

> question addressed in those cases was whether a conviction should be quashed because of insufficient notice of a charge in the indictment, the analysis is equally relevant to the present question, namely, whether evidence is sufficiently related to some charge in the Indictment to be admissible.[3]

In short, the Decision is a ruling on the admissibility of evidence.

5. The Appeals Chamber has held that certification should not ordinarily be granted on questions of admissibility of evidence, reasoning that "as the matters in the Appeal are clearly for the Trial Chamber, as trier of fact, to determine in the exercise of its discretion, in the view of the Appeals Chamber, it … should not have been certified".[4] Although such rulings are not immune from interlocutory review, the Appeals Chamber has stated that certification must be the "the absolute exception".[5] The applicant must raise some ground for certification other than that an error has been made in evaluating a fact on which the Chamber's discretion was exercised.[6]

6. The Defence acknowledges that the scope of the material facts encompassed by an indictment may be supplemented by additional disclosure, but argues that the Trial Chamber "erred in its exercise of discretion to admit such material facts, given the specific methods and timing of disclosure adopted by the Prosecution in this case in relation to the above-mentioned witness".[7] The Defence asserts that, cumulatively, the evidence admitted by the Chamber is "tantamount to a radical transformation of the Amended Indictment and the case".[8] Such a "radical transformation" is, according to the Appeals Chamber, impermissible.[9]

7. The characterization of the cumulative effect of the Decision as constituting a legal error is not convincing. No argument has been made that an incorrect legal standard was applied to any particular evidence, or even that the Chamber made any specific error of fact in applying that legal standard. The complaint of the Defence, in substance, is that the Chamber has exercised its discretion in a manner with which it disagrees and considers incorrect. This is just the type of factual determination which the Appeals Chamber has specifically described as not appropriate for certification. Nothing in the present request for certification takes it into the realm of the "absolute exception" contemplated by the Appeals Chamber.

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[3] Decision, para. 2 (references omitted).

[4] *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5 ("Indeed, the submissions regarding the chain of custody, ownership of the diary, and whether pages are missing are all matters which go to the authenticity, reliability and admissibility of the diary, the assessment of which falls within the discretion of the Trial Chamber. It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility"); *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10 ("certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence"). Trial scheduling, though often implicating the rights of the accused under Articles 19 and 20 of the Statute, has also been described as a matter within the discretion of a Trial Chamber, subject to reversal on interlocutory appeal "in limited circumstances only, for instance where the Trial Chamber has failed to exercise such discretion or to take into account a material considerations". *Bagosora et al.*, Decision (Appeal of the Trial Chamber I 'Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses' of 9 September 2003) (AC), 28 October 2003, p. 4.

[5] *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10 ("certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence").

[6] *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5

[7] Application, para. 5.

[8] Application, para. 13.

[9] Application, paras. 14-15.

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FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Application.

Arusha, 10 February 2006

Erik Møse
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]