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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER II

ICTR-00-55A-T
13-06-2006
(3471 - 3466)

Before: Judge Asoka de Silva, Presiding
Judge Flavia Lattanzi
Sitting under Rule 15 bis

Registrar: Mr Adama Dieng

Date: 13 June 2006

JUDICIAL ARCHIVES
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THE PROSECUTOR

v.

THARCISSE MUVUNYI

ICTR-2000-55A-T

DECISION ON MUVUNYI'S MOTION TO EXCLUDE PROSECUTION EXHIBIT 33

Office of the Prosecutor

Mr Charles Adeogun-Phillips, Senior Trial Attorney
Ms Adesola Adebeyejo, Trial Attorney
Ms Renifa Madenga, Trial Attorney
Ms Memory Maposa, Assistant Trial Attorney
Mr Dennis Mabura, Case Manager

Counsel for the Accused Person

Mr William E. Taylor, Lead Counsel
Ms Cynthia Cline, Legal Assistant

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, and Judge Flavia Lattanzi sitting under Rule 15 *bis*;

BEING SEIZED of the “Accused’s Motion to Exclude Prosecutor’s Exhibit 33 (41), Alternatively Motion to Reconsider the Decision of February 15, 2006 Concerning Exhibit 33 and Supplemental Objections to the Court’s Decision”, filed on 20 February 2006 (the “Motion”);

HAVING RECEIVED and considered the

- i “Prosecutor’s Response to Tharcisse Muvunyi’s Defence Motion to Exclude Prosecution Exhibit 33, Alternatively Motion to Reconsider the Decision of February 15, 2006 Concerning Exhibit 33 and Supplemental Objections to the Court’s Decision”, filed on 24 February 2006 (the “Response”);¹ and the
- ii “Accused’s Reply to the Prosecutor’s Response to the Accused’s Motion to Exclude Prosecutor’s Exhibit 33 (41), Alternatively Motion to Reconsider the Decision of February 15, 2006 Concerning Exhibit 33 and Supplemental Objections to the Court’s Decision”, filed on 1 March 2006;

RECALLING its Oral Decision of 15 February 2006 on the admissibility of Prosecution Exhibit 33 (the “Oral Decision”);²

NOW DECIDES the Motion pursuant to Rule 73(A) of the Rules on the basis of written submissions filed by the Parties.


SUBMISSIONS OF THE PARTIES

The Defence Motion

1. The Defence requests the Chamber to reconsider its Oral Decision of 15 February 2006 in which it admitted into evidence, as Prosecution Exhibit 33, certain documents tendered during the cross-examination of Defence Witness MO80. The Defence specifically requests the Chamber to exclude the said Exhibit, alleging that it was admitted in error.
2. The Defence submits that the documents comprising Prosecution Exhibit 33 are “copies of collected statements of a witness” drawn from the Prosecutor’s databank and tendered for the purpose of impeaching Witness MO80’s credibility, but “not properly authenticated and/or proven up as reliable.” According to the Defence, the person making those declarations is someone other than Witness MO80, requiring that “a credibility choice be made between the witness and the Declarant.” In the view of the Defence, such a credibility choice by the Chamber “violates the Accused’s right to cross-examination

¹ Note that the Prosecution’s Response, to which is annexed a 20-page excerpt of the closed-session transcripts of the proceedings of 15 February 2006, is marked “Confidential”.

² During the proceedings on 15 February 2006, the Exhibit in question was erroneously recorded as Prosecution Exhibit 41. (See pp. 22-23 of the English transcript, in closed session.) The error was corrected on 16 February 2006 and the same Exhibit was properly recorded as Prosecution Exhibit 33. (See p. 1 of the English transcript of the proceedings.)



and his due process rights as guaranteed under Article 20(4)(e) of the Statute and under Rule 90(A).”

3. The Defence asserts that these out-of-court statements by a third party lack relevance with regard to the truthfulness of Witness MO80’s testimony, as this is not a situation where the witness is confronted with a contradiction between his own prior inconsistent statements and his current testimony, one of which must be untruthful or incorrect. The Defence further asserts that no proof has been offered as to the truthfulness of the statements contained in the Exhibit, and that the reliability of the evidence offered is questionable. In the view of the Defence, before evidence can be admitted, it needs to be credible and there must be sufficient indicia of its reliability.
4. According to the Defence, the Prosecution made an erroneous submission when it claimed in open court that it was reading from a decision by the Appeals Chamber, rather than from a decision by the Trial Chamber, in the *Delalic* case. The Defence also submits that the Prosecution claimed there was no test to guide the Chamber in determining if there are sufficient indicia of reliability for the admission of an exhibit, whereas a test does in fact exist and has been applied before by Trial Chambers in the *Celebici* and *Tadic* cases.³ The Defence alleges that “the Chamber fundamentally erred in allowing the exhibit to be admitted for the purposes of making a credibility choice rather than allowing the witness to be examined on the differences of the statements.”

The Prosecution Response

5. The Prosecution submits that there is “absolutely no legal basis to support the Defence Motion to exclude Prosecution Exhibit 33.” It argues that while neither the Statute nor the Rules specifically provides for a right to request reconsideration of a previous decision, the jurisprudence of the ICTR has tended to imply the existence of such a right.⁴ The Prosecution further argues that the Appeals Chamber has stated that interlocutory decisions may be reconsidered only in cases where a “clear error” has been exposed⁵ or where a “special circumstance” exists.⁶
6. In the view of the Prosecution, since the Defence has demonstrated neither a “clear error” nor the existence of any “special circumstances” to warrant reconsideration, the Motion is both “frivolous and vexatious.” Consequently, the Prosecution prays the Chamber to dismiss the Motion in its entirety and to deny fees to Counsel pursuant to Rules 46 and 73(F).

The Defence Reply

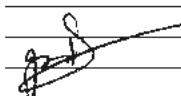
7. The Defence asserts in its Reply that the Prosecution’s Response is “at a minimum disingenuous and at most a blatant attempt to mislead the Trial Chamber as to the right of a party to move a Trial Chamber to reconsider an interlocutory decision”. The Defence

³ References omitted.

⁴ Citing *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, “Decision on the Prosecutor’s Request for Review or Reconsideration”, 31 March 2000, para. 18.

⁵ Citing *The Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-AR72, “Decision on Motion for Review or Reconsideration”, 20 September 2000.

⁶ Citing *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, “Decision on Motion for Review of the Decision by the President of the Appeals Chamber”, 6 February 2002, para. 8.



further asserts that a Chamber has an inherent power "to reconsider any decision when it is necessary to prevent an injustice."

8. Citing a recent decision in the case of *Bizimungu et al.*, the Defence submits that the Prosecution at this Tribunal has itself had occasion to resort to motions for reconsideration where it considered the Trial Chamber's ruling to be unjust.⁷ According to the Defence, all advocates appearing before the Tribunal "owe a duty of candor to the court" and the Prosecution owed a duty to inform the Chamber "that it had taken exactly the opposite position in another case" compared to this one.
9. The Defence submits that the Prosecution's request for sanctions is unjustified; that the Prosecution "is attempting to intimidate Muvunyi and his counsel"; and that the Chamber should consider taking appropriate action against the Prosecution "for its frivolous and misleading pleading." In the view of the Defence, it has met the test for reconsideration by outlining the argument as to the clear error and special circumstances involved in asking the Chamber to reconsider its prior ruling.

DELIBERATIONS

10. As preliminary matters, the Chamber reminds both Parties of the need to treat each other with the courtesy and respect expected from officers of the Court. The Chamber also reminds the Parties that it is quite capable of making an independent determination of the circumstances under which sanctions may be applied.
11. It is well settled in the jurisprudence of the *ad hoc* Tribunals that while the Rules do not specifically provide for the review or reconsideration of interlocutory decisions, a Trial Chamber may nonetheless reconsider and modify its prior decision if it is persuaded that the decision was made in error or has the potential to lead to a miscarriage of justice.⁸ The Chamber will consider the Motion in light of this jurisprudence.
12. The Chamber recalls its Oral Decision of 15 February 2006 admitting into evidence as Prosecution Exhibit 33 ("Exhibit P. 33"), the documents tendered by the Prosecution during the cross-examination of Defence Witness MO80. On that occasion the Prosecution indicated that the documents contained in the Exhibit were the signed statement and confession of one of MO80's former colleagues at a roadblock in 1994.⁹

⁷ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "Reconsideration of Decisions on Protective Measures for Defence Witnesses Pursuant to Appeals Chamber Ruling of 16 November 2005", 17 February 2006.

⁸ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, "Decision on the Prosecutor's Motion Requesting a Review of the Scheduling Order and for an Extension of Time to File Closing Briefs and Present Oral Arguments", 13 April 2006, paras. 8-9; *The Prosecutor v. Mucic et al.*, Case No. IT-96-2-A bis, "Judgement on Sentence Appeal", 8 April 2003, para. 49; *The Prosecutor v. Milosevic*, Case No. IT-02-54-T, "Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobro Aleksovski and Decision Prorio Motu Reconsidering Admission of Exhibits" 17 May 2005, paras. 6-8; *The Prosecutor v. Galic*, Case No. IT-98-29-A, "Decision on Defence's Request for Reconsideration", 16 July 2004; *The Prosecutor v. Galic*, Case No. IT-98-29-AR73, "Decision on Application by Prosecution for Leave to Appeal", 14 December 2001, para. 13; See also the "Separate Opinion of Judge Mohammed Shahabuddeen" in *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 3.

⁹ T. 15 February 2006, p. 9 (in closed session, during cross-examination).



who had previously testified for the Prosecution before this Chamber under the pseudonym of YAQ.¹⁰

13. The stated purpose of introducing the documents in Exhibit P. 33, according to the Prosecution, was to impeach Defence Witness MO80's credibility by comparing his version of the events at the roadblock to the version given by Witness YAQ.¹¹ Counsel for the Defence objected to the admission of the documents on the grounds that MO80 was not their author and had no knowledge of them, and Counsel also questioned the authenticity and reliability of the documents in the Exhibit.¹² The Prosecution, purportedly¹³ citing an Appeals Chamber decision in the *Delalić* case, responded that only the relevance and probative value of the documents, and not their authenticity or reliability, could be considered at this stage of the proceedings.¹⁴
14. The Chamber also recalls Rule 89(C) of the Rules, which provides that a Chamber may admit any relevant evidence which it deems to have probative value. This Rule has been construed to mean that before a Chamber can admit any particular document, it must be satisfied that the document fulfils two conditions, namely that it is relevant and has probative value.¹⁵ However, the Chamber is equally mindful of the requirement that for evidence to be admissible, it must possess "sufficient indicia of reliability."¹⁶
15. It is now the Chamber's belief that its Oral Decision admitting the documents contained in Exhibit P. 33 was based on the mistaken assumption that these were the statement and confession of Witness YAQ who has previously testified for the Prosecution in this case and whose demeanour and credibility the Chamber has had the opportunity to assess. In particular, the Chamber notes the following exchange between the Presiding Judge and the Prosecution Counsel:

MR. PRESIDENT:

Madam Prosecutor, could you kindly tell us -- one of these witnesses gave testimony in this court?

MS. ADEBOYEJO:

Yes, Your Honour. Yes, directly gave evidence before this Trial Chamber, Witness YAQ, Your Honours.¹⁷

16. Having carefully examined the English and French versions of the documents contained in Exhibit P. 33,¹⁸ the Chamber notes that the declarant in both the witness statement and

¹⁰ Witness YAQ testified for the Prosecution in this matter on 31 May 2005.

¹¹ During his testimony, YAQ stated that his brother, who had been with him at the roadblock, had testified in the *Butare* case under the pseudonym of QBV. (T. 31 May 2005, pp. 15-16 (cross-examination))

¹² T. 15 February 2006, pp. 7-17 (in closed session, during cross-examination).

¹³ It was actually from a Trial Chamber decision that the Prosecution Counsel was reading: *The Prosecutor v. Delalić*, Case No. IT-96-21-T (TC), "Decision on the Motion of the Prosecution for the Admissibility of Evidence", 19 January 1998, paras. 15-17.

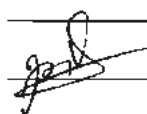
¹⁴ T. 15 February 2006, p. 12 (in closed session, during cross-examination).

¹⁵ *The Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14 (TC), "Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence", 30 January 1998, para. 10.

¹⁶ *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2 (AC), "Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence", 4 October 2004, para. 5.

¹⁷ T. 15 February 2006, p. 9, lines 21-25 (in closed session, during cross-examination).

¹⁸ The Exhibit tendered in court did not include the original Kinyarwanda version of either document.



the confession is not Witness YAQ. Rather, the declarant in both documents is YAQ's brother, who has not testified in the instant case.

17. In the Chamber's view, by pointing out that the declarant in the documents contained in Exhibit P. 33 was someone other than a witness who has previously testified in this case, the Defence has successfully demonstrated the existence of new information which was unknown to the Chamber at the time it rendered its Oral Decision. The Defence has also shown that the decision to admit the documents contained in Exhibit P. 33 could occasion a miscarriage of justice. The criteria for reconsideration have therefore been satisfied.

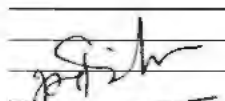
18. Finally, the Chamber has considered the Prosecution's request for sanctions and is not of the opinion that the Defence Motion is frivolous. Furthermore, the Chamber cautions the Prosecution to refrain from making erroneous and potentially misleading submissions.¹⁹

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Motion and

ORDERS that Prosecution Exhibit 33 be excluded from the record in this case.

Arusha, 13 June 2006


Asoka de Silva
Presiding Judge


Flavia Lattanzi
Judge

[Seal of the Tribunal]



¹⁹ See the comments associated with footnotes 13 and 17 above.