



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-99-50-T
30-05-2007

(24141-24137)

OR: ENG

TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 30 May 2007

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

Case No. ICTR-99-50-T

JUDICIAL RECORDS/ARCHIVES
RECEIVED

2007 MAY 30 A 11: 28

DECISION ON JÉRÔME-CLÉMENT BICAMUMPAKA'S MOTION FOR THE
STATEMENT OF THE DECEASED WITNESS, FAUSTIN NYAGAHIMA, TO BE
ACCEPTED AS EVIDENCE

Rule 92 bis 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. Shyamlal Rajapaksa
Mr. Olivier de Schutter
Mr. William Mubiru

Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for Casimir Bizimungu
Mr. Ben Gumpert and Mr. Jonathan Kirk for Justin Mugenzi
Mr. Pierre Gaudreau and Mr. Michel Croteau for Jérôme-Clément Bicamumpaka
Mr. Tom Moran and Ms. Marie-Pierre Poulain for Prosper Mugiraneza

24140

INTRODUCTION

1. The Defence for Bicomumpaka moves the Chamber to admit into evidence a statement of deceased witness, Faustin Nyagahima, in lieu of oral testimony, pursuant to Rule 92 *bis* of the Rules. The witness died on 22 May 2003 and his statement was made before a notary in Aderlecht, Belgium, on 28 May 2001.¹ The Prosecutor responded to this Motion objecting to the admission of the statement on the basis that the contents of the statement clearly go to the acts and conduct of the Accused.²
2. The Defence replied, arguing primarily that the specific events alleged by Witness GHU to have occurred in 1992 and 1993 are not charged anywhere in the Indictment. The Defence contend that contradictions abound from the testimony of other Prosecution witnesses as to the testimony of Witness GHU as a whole. This statement serves to further undermine the testimony of Witness GHU and the fact that it was recorded years before the testimony of GHU must militate in favour of its admission.³

DISCUSSION

2. Rule 89 (C) affords the Chamber with the broad discretion to "admit any relevant evidence which it deems to have probative value". Rule 90 (A) stipulates the preferred mode of receiving evidence in stating that "[w]itnesses shall, in principle, be heard directly by the Chambers".
3. Rule 92 *bis* allows for the admission of a written statement *in lieu* of oral testimony provided that the contents of the statement go to "proof of a matter other than the acts and conduct of the accused as charged in the indictment". Once that threshold requirement is satisfied, the Chamber must exercise its discretion in assessing the nature and contents of the statement based on the criteria set out in Rule 92 *bis* (A)(i) and (ii) in determining whether the statement should be admitted.⁴
4. Factors which favour admission include the fact that oral evidence has been heard on similar facts; provides an historical, political or military background; or relates to the character of the accused. Factors weighing against admission include whether there is an overriding public interest to hear the evidence orally; its nature and source render it

¹ Jérôme-Clément Bicomumpaka's Motion for The Statement of the Deceased Witness, Faustin Nyagahima, To Be Accepted as Evidence, Rule 92 *bis* Of The Rules Of Procedure And Evidence", 22 February 2007 (the "Motion").

² Prosecutor's Urgent Response to Jerome Bicomumpaka's Motion for the Statement of the Deceased Witness, Faustin Nyagahima, to be Accepted as Evidence", 28 February 2007 (the "Response").

³ Bicomumpaka's Reply to the Prosecutor's Urgent Response to Jerome Bicomumpaka's Motion for the Statement of the Deceased Witness, Faustin Nyagahima, to be Accepted as Evidence, filed confidentially on 5 March 2007 (the "Reply").

⁴ *Bogosora et al.*, Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 15; *Muhimana*, Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89(C) and 92 *bis*) (TC), 20 May 2004, para. 26 ("Thus, the Chamber finds that although Rule 92 *bis* (C) provides for the specific situation where a witness has died or is untraceable, it remains part of Rule 92 *bis* as a whole, and the conditions laid down in Rule 92 *bis* (A) for admissibility remain valid as the umbrella section of the whole provision"); *Galic*, Case No. IT-98-29-A, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 24 ("Galic Decision") ("Rule 92 *bis* (C), however, does not provide a separate and self-contained method of producing evidence in written form in lieu of oral testimony").



unreliable; or its prejudicial effect outweighs its probative value. The general requirements of relevance and probative value, applicable to all types of evidence under Rule 89 (C), must also be satisfied.⁵

5. When a statement has been given by a person who is deceased, as in the instant application, Rule 92 *bis* (C) permits the admission of the statement provided that the Chamber finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability.⁶
6. Turning to the facts in the present application, the Prosecutor submits that as the statement is being offered to impugn the credibility of Witness GHU, whose testimony goes to the acts and conducts of Jerome Bicomumpaka as charged in the Indictment, the Defence has clearly failed to meet the threshold requirement of Rule 92*bis* (A). The Prosecutor further contends that portions of the statement are speculative and cannot be said to be within the deponent's knowledge.
7. The Defence argues in its Motion and Reply that the statement is being adduced to impeach the credibility of Witness GHU. The witness testified to two events and alleged the involvement of the Accused in those events – i) at the raising of the MDR/MRND flag in Gitarama in 1992 at which Callixte Nsabonimana allegedly introduced the Accused, and ii) that the Accused distributed weapons at the Tourist Hotel in Gitarama in November/December 1993 also in the presence of Nsabonimana. The statement of Faustin Nyagahimana, who, according to the statement and the Defence, was the Vice-President of the MDR in Gitarama and is the late brother of Callixte Nsabonimana, attests that the latter and the Accused never knew each other. The Defence argues that this raises doubt as to the credibility of Witness GHU. How could Nsabonimana have introduced the Accused at the ceremony if he does not know who he is? And secondly, although the statement itself says nothing about the distribution of any weapons, the Defence argues that it would be “absurd to assert that the two most prominent figures at the distribution of weapons at the Tourist Hotel [...] would not have known” each other.
8. The Defence further argues that these two events are not alleged anywhere in the Indictment and cannot therefore be said to go to the acts and conducts of the Accused. The purpose of the statement is to impeach the credibility of a Prosecution witness, whose testimony has already been contradicted by other Prosecution witnesses. The statement is therefore cumulative in nature.⁷ Finally, the Defence submits that the impeachment of a witness has nothing to do with the acts and conducts of the Accused.

⁵ *Bagosora et al.*, Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 15; *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under 92 *bis* (TC), 9 March 2004, para. 12.

⁶ *Bagosora et al.*, Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 15; *Galic* Decision, para. 24 (“Both in form and in substance, Rule 92 *bis* (C) merely excuses the necessary absence of the declaration required by Rule 92 *bis* (B) for written statements to become admissible under Rule 92 *bis* (A)"); *Muhimana*, Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89(C) and 92 *bis*) (TC), 20 May 2004, para. 26; *Nyiramasuhuko et al.*, Decision on the Prosecution's Motion to remove From Her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of the Said Witnesses (TC), 22 January 2003, para. 21.

⁷ The cumulative nature of the evidence in the statement is one of the factors mitigating in favour of its admission in written form, pursuant to Rule 92*bis* (A)(i).



24138

9. The Chamber must therefore first determine whether the statement contains information which goes to the acts and conduct of the Accused.
10. The phrase "acts and conduct of the accused" means the deeds and behaviour of the accused himself and does not encompass the acts and conduct of his co-perpetrators and/or subordinates.⁸ The "conduct" of an accused person may also include his omission to act.⁹ Regardless of how repetitive the evidence is, it cannot be admitted if it goes directly to the acts or conduct of the accused. For matters that do not go directly to the acts or conduct of the accused the fact that the evidence is of a cumulative nature is relevant to the exercise of the Trial Chamber's discretion.¹⁰
11. The wording of Rule 92 bis (A), which allows a Chamber to admit a statement, *in whole or in part*, implies that evidence which concerns the acts and conduct of the accused is inadmissible, but that other parts of a statement which do not concern the acts and conduct of an accused may be admitted. However, where a statement contains extensive references to the acts and conduct of the accused, the moving party shall identify which portions of the statements it considers admissible.¹¹
12. According to the Prosecutor, Bicamumpaka's presence at the flag raising ceremony, at which Nsabonimana is alleged to have made an inflammatory speech characterising all Tutsi as the enemy, forms a key part of their case against the Accused in respect of the charges of Conspiracy to Commit Genocide and Direct and Public Incitement. The Prosecutor also argues that the allegation of the Accused's involvement in the distribution of weapons at the Tourist Hotel must clearly constitute an "act" for the purposes of the charge of Conspiracy against the Accused.
13. Although not specifically pleaded in the Indictment, the testimony of Witness GHU on these two events was received by the Trial Chamber so that it is on the record as an "act and conduct" of the Accused relevant to the charges of Conspiracy and Direct and Public Incitement to Commit Genocide. The specificity of the pleadings on the charge is not a matter for the Chamber to consider in respect of this application. For present purposes, it suffices that the allegation is on the record and constitutes "acts and conduct" within the meaning described above.
14. The Chamber is also not persuaded by the Defence argument that the impeachment of Prosecution witnesses "has nothing to do with the acts and conducts of the Accused." Statements tending to contradict evidence that the Accused carried out certain acts

⁸ *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, fn. 28; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92 bis (D) – Foča Transcripts (TC), 30 June 2003, para. 11; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 bis (TC), 21 March 2002, para. 22.

⁹ *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, para. 11.

¹⁰ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 bis (TC), 21 March 2002, para. 8.

¹¹ *Prosecutor v. Bagosora et al.*, Decision on Admission of Statements of Deceased Witnesses, Case No. ICTR-98-41-T, T. Ch. I, 19 January 2005, para. 17.



24137


have been held to relate to "proof of the acts and conduct of the accused" for the purposes of 92 *bis* (A).¹²

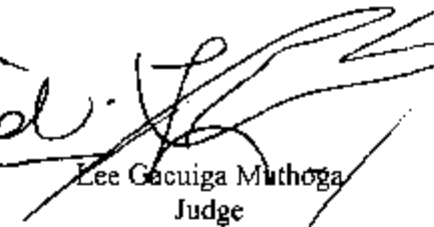
15. In addition to not having met the threshold requirement for admission, the Chamber also notes that the Defence submissions are silent as to the circumstances under which the statement was recorded. Other than that it was taken before a notary in Belgium, no further information surrounding its recording is provided. Without such information the Chamber is not in a position to satisfy itself that the statement possesses sufficient *indicia* of reliability. The Defence submissions as to the reliability of the statement does not go beyond the obvious fact that the statement was made under formal circumstances in that it was made under oath and "notarised by Claude Mondealers". The fact that a statement was made before a notary does not, in and of itself, make it reliable as to its contents for the purposes of these proceedings.


FOR THE ABOVE REASONS, THE CHAMBER


DENIES the Defence motion.

Arusha, 30 May 2007


Halida Raïchid Khan
Presiding Judge


Lee Gacunga Muthoga
Judge


Emile Francis Short
Judge



¹² *Kamuhanda*, Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89(C) and 92 *bis* of the Rules of Procedure and Evidence, 20 May 2002, para. 29 ("The Chamber notes that the statements of GER contradict the allegations made against the Accused as outlined in the Indictment against him. The Chamber considers that because of that contradiction, the said statements may be said to relate to the criminal acts and conduct of the accused"); *Simba*, Decision on the Admission of a Written Statement (TC), 25 January 2005, para. 5 (The statement of a witness that an accused was not present at a massacre in which he was alleged to have participated was held to go to the acts and conduct of the accused. "The Defence seeks to use it to support the Accused alibi that he was not present at Kaduha parish. This goes directly to proof of the acts and conduct of the Accused by corroborating to some extent his alibi"); *Bagosora et al.*, Decision on Prosecutor's Motion for Admission of Written Witness Statements (TC), 9 March 2004, para. 16 ("[The statement sought to be admitted must satisfy] Rule 92 *bis*, in that it goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment, that is, that it does not contain evidence that tends to prove or disprove the Accused's acts or conduct as charged").