



ICTR-98-42-T
20-08-2007
(12170 - 12167)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

12170
Mwamba

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 20 August 2007

2008.AUG.20.A.10.52

The PROSECUTOR v. Arsène Shalom NTAHOBALI
Case No. ICTR-97-21-T
Joint Case No. ICTR-98-42-T

**DECISION ON ARSÈNE NTAHOBALI'S MOTION FOR CERTIFICATION TO
APPEAL THE DECISION OF 29 JUNE 2007**

Office of the Prosecutor

Ms. Silvana Arbia
Ms. Adelaide Whest
Ms. Holo Makwaia
Ms. Madeleine Schwartz
Ms. Althea Alexis Windsor
Ms. Tolulope Olowoye, Case Manager
Ms. Astou Mbow, Case Manager

Defence Counsel for Ntahobali

Mr. Normand Marquis
Mr. Louis Huot

Defence Counsel for Kanyabashi

Mr. Michel Marchand
Ms. Simone Santerre

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Ariente Ramarason and Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "*Requête aux fins de certification d'appel de la 'Decision on Arsène Shalom Ntahobali's Motion to Exclude Certain Evidence From the Expected Testimony of Kanyabashi's Witness D-2-13-O,'*" filed on 5 July 2007 (the "Motion");

CONSIDERING the:

- i. "*Réponse de Joseph Kanyabashi à la requête de Arsène Shalom Ntahobali aux fins de certification d'appel de la 'Decision on Arsène Shalom Ntahobali's Motion to Exclude Certain Evidence From the Expected Testimony of Kanyabashi's Witness D-2-13-O,'*" filed on 9 July 2007 ("Kanyabashi's Response");
- ii. "Prosecutor's Response to Ntahobali's '*Requête aux fins de certification d'appel de la 'Decision on Arsène Shalom Ntahobali's Motion to Exclude Certain Evidence From the Expected Testimony of Kanyabashi's Witness D-2-13-O en vertu de l'article 73 (B),'*" filed on 9 July 2007 ("Prosecution's Response");
- iii. "Prosecutor's Corrigendum to His Response to Ntahobali's '*Requête aux fins de certification d'appel de la 'Decision on Arsène Shalom Ntahobali's Motion to Exclude Certain Evidence From the Expected Testimony of Kanyabashi's Witness D-2-13-O en vertu de l'article 73 (B),'*" filed on 9 July 2007 ("Prosecution's Corrigendum");
- iv. "*Réplique de Ntahobali à la réponse du Procureur à sa requête aux fins de certification d'appel de la 'Decision on Arsène Shalom Ntahobali's Motion to Exclude Certain Evidence From the Expected Testimony of Kanyabashi's Witness D-2-13-O,'*" filed on 12 July 2007.

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rule 73 (B) of the Rules;

NOW DECIDES the Motion pursuant to Rule 73 of the Rules, on the basis of the written briefs filed by the Parties.

INTRODUCTION

1. On 11 May 2007, the Defence for Kanyabashi filed the list of its first eight witnesses containing identification sheets and will say statements, including that of Witness D-2-13-O.
2. On 23 May 2007 the Defence for Ntahobali filed its Motion to exclude certain evidence from the expected testimony of Witness D-2-13-O.

3. On 29 June 2007, the Chamber denied the Motion and ordered that the anticipated evidence of Witness D-2-13-O may be relevant to Kanyabashi's case and did not appear to be a new matter (the "Impugned Decision").¹
4. On 5 July 2007, the Defence for Ntahobali filed this Motion for certification to appeal the Impugned Decision.

SUBMISSIONS OF THE PARTIES

The Defence for Ntahobali

5. The Defence submits that the expected evidence of Witness D-2-13-O constitutes new facts and that there is no link between these facts and the contentious roadblock. That indeed, no evidence has been produced proving the killing of a certain individual at this roadblock. It further argues that this expected evidence affects the outcome of the trial in the sense that Ntahobali might be held responsible for the death of that individual and his family.
6. The Defence submits that the Impugned Decision considerably affects the fairness of the proceedings by allowing the co-Accused Kanyabashi to perfect the Prosecution's evidence regarding the death of that individual and his family. Besides, bringing in counter evidence might considerably affect the expeditious conduct of the proceedings.
7. The Defence asserts that the immediate resolution by the Appeals Chamber of the issue may materially advance the proceedings in order to avoid lengthy cross-examination and potential counter evidence.
8. Finally, the Defence submits that the Impugned Decision violates the rights of the Accused provided for in Articles 19 and 20 of the Statute, notably, the right to be heard fairly, the right to a complete defence and to equality of arms.

The Defence for Kanyabashi

9. The Defence opposes the Motion and submits that Ntahobali's submissions are premature and constitute grounds for a future appeal. It further alleges that Ntahobali merely disagrees with the Chamber on the latter's assessment of a factual issue, a matter which falls within the full discretion of the Chamber.

The Prosecution

10. The Prosecution submits that it is within the Chamber's discretion to consider which evidence is relevant to the proceedings. It further indicates that the challenged evidence does not amount to new facts and does not raise new issues for the Defence to address.

¹ "Decision on Arsène Shalom Ntahobali's Motion to Exclude Certain Evidence from the Expected Testimony of Kanyabashi's Witness D-2-13-O". 29 June 2007.

Ntahobali's Reply

11. The Defence reiterates that the challenged evidence constitutes new facts and it is erroneous for the Chamber to establish a link between the death of members of a certain family and the contentious roadblock, or any other one, and simply justify the admission of such evidence on the ground that it is relevant to the proceedings.

HAVING DELIBERATED

12. The Chamber, recalling its jurisprudence² notes that decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B).³ These conditions require a specific demonstration, and are not met through a general reference to the submissions on which the Impugned Decision was rendered.

13. The Chamber is of the opinion that in its Motion, the Defence for Ntahobali has generally revisited the thrust of its previous arguments which led to the Impugned Decision rather than demonstrating the conditions required for the Chamber to grant certification to appeal the Impugned Decision.

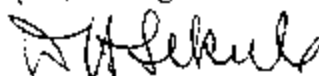
14. Moreover, the Chamber recalls the Appeals Chamber Decision underscoring that matters concerning admissibility of evidence are the responsibility of the Trial Chamber as trier of fact.⁴

15. The Chamber finds therefore that the Defence has failed to satisfy the criteria for the grant of certification to appeal under Rule 73(B).

FOR THE ABOVE REASONS, THE TRIBUNAL,

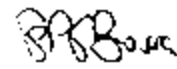
DENIES the motion

Arusha, 20 August 2007


William H. Sekule
Presiding Judge


Arlette Ramurison

[Seal of the Tribunal]


Solomy Balungi Bossa
Judge

² *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004 paragraphs 12 - 16; *Prosecutor v. Ntahobali and Nyiramasuhuko*, Case No. ICTR-97-21-T, "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" 18 March 2004, paragraphs 14 - 17.

³ Under the first limb of Rule 73(B), the applicant must show how an appellate review would significantly affect (a) fair and expeditious conduct of the proceeding, or (b) the outcome of the trial. This condition is not determined on the merits of the appeal. Second, the applicant has the burden of convincing the Chamber that an immediate resolution by the Appeals Chamber may materially advance the proceedings."

⁴ See Para. 5 of the Appeals Chamber Decision of 4 October 2004 in *Nyiramasuhuko*.