

ICTR-98-44-T
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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 27 September 2007

THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T**

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL
DECISION ON FALSE TESTIMONY**

Rule 73(B) of the Rules of Procedure and Evidence

Office of the Prosecutor:
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Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

INTRODUCTION

1. The trial in this case started on 19 September 2005 with the presentation of the first Prosecution witnesses. On 23 March 2007, before Judge Vagn Joensen had joined the bench,¹ Judges Dennis C. M. Byron, presiding, and Gberdao Gustave Kam denied the motion, by Nzirorera and Ngirumpatse, for certification to appeal the Decision on False Testimony of 29 December 2006.² They considered that the motion fell within the ambit of the routine matters they were authorised to conduct in the absence of Judge Joensen, under Rule 15 bis (F) of the Rules of Procedure and Evidence (the "Rules").³

2. On 31 May 2007, the Appeals Chamber laid down standards and principles defining what should be considered a "routine matter" under Rule 15 bis (F) of the Rules.⁴

3. On 17 July 2007, bearing in mind the Appeals Chamber principles, the Chamber, fully composed, then decided to vacate the prior Decision of 23 March 2007, rendering it necessary to rule afresh on Nzirorera and Ngirumpatse's motion for certification to appeal the Decision.⁵ The Chamber, now fully composed, is ready to reconsider the motion.

DISCUSSION

4. Whilst Rule 73(B) of the Rules precludes interlocutory appeal for Decisions rendered by a Trial Chamber on Motions filed under Rule 73, the same provision confers upon the Trial Chamber discretion to grant certification to appeal if: (i) the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (ii) an immediate resolution by the Appeals Chamber may materially advance the proceedings. Even when both of these requirements are

¹ On 8 June 2007, Judge Vagn Joensen joined the bench as substitute Judge in accordance to Rule 15 bis (D), *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera* ("Karemera et al."), Certification of the Familiarisation with the Record of the Proceedings (Judge Joensen), 8 June 2007. See *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings (TC), 6 March 2007; *Karemera et al.*, Case No. ICTR-98-44-R15bis.3, Decision on Appeals Pursuant to Rule 15 bis (D) (AC), 20 April 2007.

² *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony (TC), 29 December 2006 ("Impugned Decision").

³ *Karemera et al.*, Decision on Prosecutor's Motion for an Order to File Notice of Alibi (TC), 22 March 2007, para. 3. See: Interoffice Memorandum from the President to Judge Byron, filed on 13 March 2007; Rules of Procedure and Evidence, Rule 15 bis (F): "In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members."

⁴ *Karemera et al.*, Case No. ICTR-98-44-R73.9, Decision on "Joseph Nzirorera's Interlocutory Appeal of Decision on Obtaining prior Statements of Prosecution Witnesses after they have testified" (AC), 31 May 2007.

⁵ *Karemera et al.*, Decision on Motions to Vacate Decisions (TC), 17 July 2007, para. 18.

satisfied, certification to appeal remains exceptional.⁶ Certification is not determined on the merits of the appeal against the impugned decision.⁷

5. The Defence submits that the first criterion is satisfied since the fair conduct of the proceedings, and possibly the outcome of the trial, is significantly affected by the false testimony bearing on material issues.⁸ Citing a number of decisions in support,⁹ the Defence further claims that certification is appropriate in relation to the obtaining of evidence pertaining to witnesses' credibility.¹⁰

6. Addressing the second requirement, the Defence argues that a ruling on the issue from the Appeals Chamber would materially advance the proceedings by improving the quality of the evidence heard during the remainder of the trial.¹¹ Referring to decisions where this criterion was found to be met when an issue affected the testimony in the trial from multiple witnesses as well as problems that were likely to recur,¹² it is claimed that this would be achieved since a ruling on the issue would deter other witnesses from similarly giving false testimony.¹³

7. In the Chamber's opinion, the issue in the Impugned Decision is not false testimony, but rather the initiation of separate proceedings to prosecute a witness for the crime of perjury. The matter does not, therefore, affect the fairness, expediency or outcome of the trial but relates instead to additional, ancillary proceedings. The witnesses' credibility and probative value will be assessed during the judgement stage by the Chamber, which will not be bound by the findings of a differently constituted judicial authority.

⁶ *Prosecutor v. Arsène Shalom Ntahobali and Pauline 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' (TC), 18 March 2004, para. 15; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10.

⁷ *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE (TC), 7 June 2006, at para. 5.

⁸ *Ibid.*, at para. 9.

⁹ *Karemera et al.*, Oral Decision on Certification of the Oral Decision of 16 February 2006 for Stay of Proceedings (TC), 26 February 2006; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses (TC), 21 July 2005; *Ibid.*, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements (TC), 22 May 2005.

¹⁰ *Ibid.*, at para. 10.

¹¹ Nzirorera's Application, at para. 13.

¹² *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyibashi's Request to Cross-Examine Ntahobali's 1997 Custodial Interviews (TC), 1 June 2006, at para. 27; *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements, 22 May 2006, at para. 6.

¹³ Nzirorera's Application, at para. 12.

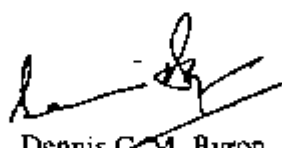
8. The Chamber distinguishes from the present case the decisions cited by the Defence in support of its claim that certification is appropriate when gaining evidence regarding the credibility of witnesses. Whilst the cited decisions raised issues of the admissibility of contradictory evidence and had to be dealt with in the course of proceedings, the initiation of ancillary proceedings from the present case serves a different purpose that is not relevant to the current trial proceedings. Moreover, the present motion is distinguishable since it does not relate to a broad category of documents¹⁴ or a large number of defence witnesses,¹⁵ as was the case in the cited decisions.

9. Accordingly, the Chamber does not find that the first requirement for granting certification is met in the present case.

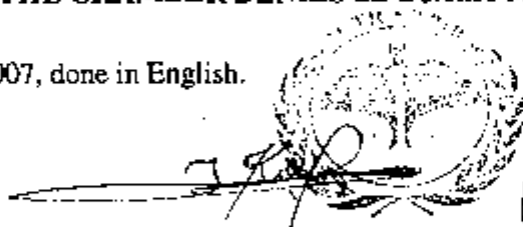
10. Furthermore, the Chamber is not satisfied that the Defence has shown that the Impugned Decision involves an issue for which an immediate resolution by the Appeals Chamber would materially advance the proceedings. The question whether perjury was committed might only gain relevance if the Chamber makes a finding in respect of the evidence in issue. Since this assessment can only take place at the end of the trial, after hearing the evidence as a whole,¹⁶ an appeal would more properly be made from the final judgement in this case.

FOR THOSE REASONS, THE CHAMBER DENIES the Defence Motion.

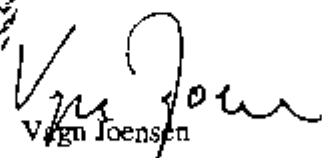
Amsha, 27 September 2007, done in English.



Dennis G.M. Byron
Presiding Judge



Gberdao Gustave Kam
Judge
[Seal of the Tribunal]



Vign Joensen
Judge

¹⁴ *Prosecutor v. Bagosora et al.*, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements (TC), 22 May 2005.

¹⁵ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses (TC), 21 July 2005.

¹⁶ *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Decision on the Request of the Defence for the Chamber to Direct the Prosecution to Investigate a Matter with a View to the Preparation and Submission of an Indictment for False Testimony (TC), 11 July 2000, at para. 7; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "R" (TC), 9 March 1998 ("Akayesu Decision"); *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO (TC), 3 October 2003, at para. 9; *Prosecutor v. Niyramasuhuko et al.*, Case No. ICTR-97-21-T and ICTR-98-42-T, Decision on Arsène Shalom Ntahobali's Motion to Have Perjury Committed by Prosecution Witness QY Investigated (TC), 23 September 2005.