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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

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

Registrar: Mr. Adama Dieng

Date: 3 December 2008

**The PROSECUTOR**

v.

**Arsène Shalom NTAHOBALI**

Case No. ICTR-97-21-T

*Joint Case No. ICTR-98-42-T*

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**DECISION ON NTAHOBALI'S MOTION FOR EXCLUSION OF EVIDENCE OR  
FOR RECALL OF PROSECUTION WITNESSES QY, SJ AND OTHERS**

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

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

**BEING SEIZED** of the "*Requête en exclusion de preuve et en rappel de témoins*", filed confidentially on 8 October 2008 ("Ntahobali's Motion");

**CONSIDERING:**

- i. "Alphonse Nteziryayo's Response to the '*Requête de Arsène Shalom Ntahobali en exclusion de preuve testimoniale et en rappel de témoins*', filed on 10 October 2008 ("Nteziryayo's Response");
- ii. "Prosecutor's Response to the '*Requête de Arsène Shalom Ntahobali en exclusion de preuve testimoniale et en rappel de témoins*', filed on 13 October 2008 ("Prosecution Response");
- iii. "*Réponse de Sylvain Nsabimana à la 'Requête de Arsène Shalom Ntahobali en exclusion de preuve testimoniale et en rappel de témoins*", filed on 13 October 2008 ("Nsabimana's Response");
- iv. "*Réponse de Joseph Kanyabashi à la 'Requête de Arsène Shalom Ntahobali en exclusion de preuve testimoniale et en rappel de témoins*", filed on 13 October 2008 ("Kanyabashi's Response");

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

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

**INTRODUCTION**

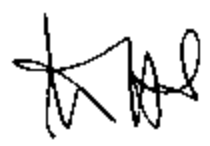
1. Prosecution Witnesses QY<sup>1</sup> and SJ<sup>2</sup> testified before this Chamber in 2003 and 2002 respectively. They also testified in the trial of Désiré Munyaneza held in Canada on 4 and 5 April 2007 (Witness QY) and 6 June 2007 (Witness SJ). On 10 April 2006, Prosecution Witness QY was recalled for further cross-examination in this trial following the Decision of 3 March 2006.<sup>3</sup>

**SUBMISSIONS OF THE PARTIES**

*Ntahobali's Motion*

2. The Defence moves the Chamber to exclude the testimony of Prosecution Witnesses QY and SJ or, alternatively, to recall these two witnesses for additional cross-examination because they lied in the Burare trial.

<sup>1</sup> Prosecution Witness QY testified on 19, 20, 24, 25 and 26 March 2003.  
<sup>2</sup> Prosecution Witness SJ testified on 28, 29 and 30 May 2002; 3, 4 and 5 June 2002.  
<sup>3</sup> *Prosecutor v. Pauline Nyiramasuhuko et al*, Case No. ICTR-98-42-T, Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ and QY, for Additional Cross-Examination, 3 March 2006.

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3. The Defence alleges that on 4 and 5 April 2007, Prosecution Witness QY admitted in the Munyaneza trial in Canada to knowing several Prosecution witnesses, including Witnesses QBQ and SJ, contrary to her testimony before this Tribunal.<sup>4</sup> Witness QY also admitted to having lied in the Butare trial after receiving instructions to do so from a member of the Office of the Prosecutor who allegedly told her to deny knowing other witnesses.<sup>5</sup>

4. The Defence recalls that Ms Adesola Adebeyejo, a Trial Attorney in the OTP, in an open letter dated 29 June 2007, denied having incited Witness QY to lie about not knowing certain Prosecution witnesses, including TK.<sup>6</sup> The Defence alleges that if Ms Adebeyejo's statement is correct, Prosecution Witness QY may have lied both before the ICTR and before the Canadian authorities; on the other hand, if Ms Adebeyejo's statement is incorrect, it may constitute an obstruction of justice.<sup>7</sup>

5. The Defence alleges that on 6 June 2007, Prosecution Witness SJ admitted in the Munyaneza trial to having lied during her testimony at the ICTR after receiving instructions to do so from an employee of the ICTR's Witness and Victim Support Services in Arusha.<sup>8</sup> Witness SJ's testimony before the Canadian Court differs from her testimony before the Chamber with respect to her knowledge of Prosecution Witness TK and Prosecution Witness QJ.<sup>9</sup>

6. The Defence therefore submits that Prosecution Witnesses QY and SJ have committed perjury and that, as a result, their evidence should be excluded<sup>10</sup> or, alternatively, that these witnesses should be recalled for cross-examination on their alleged lies and the circumstances that led to those lies.<sup>11</sup>

7. The Defence submits that Witnesses QY and SJ are amongst the six Prosecution witnesses who also testified in the Désiré Munyaneza trial.<sup>12</sup> The last set of copies of the statements that they made before the Royal Canadian Mounted Police and/or transcripts of their testimonies before the Canadian Court were received from the Office of the Prosecutor in 2008.<sup>13</sup> The Defence argues that these documents totalled 2,669 pages and required considerable time to compare with the testimonies given before the Chamber, which covered an even larger number of pages. The Defence also notes that while this comparative exercise was being conducted it had also to prepare for Kanyabashi's witnesses. The Defence asserts that these factors contributed to the delay in presenting the instant Motion.<sup>14</sup>

8. The Defence further requests the recall of the following Prosecution witnesses, each of whom has testified against the Accused Ntahobali, to determine whether they have been influenced by ICTR employees or by any other persons and whether they have lied about their knowledge of other Prosecution witnesses: Witnesses TA, QJ, QCB, TN, TK, SU, QBP, RE, SS, FAP, SD, SX, QBQ, TB, QI, TG, FA and TQ. The Defence prays for the Chamber to prohibit anyone from informing these witnesses about the reasons for their recall.

<sup>4</sup> Paragraph 22 of the Motion.

<sup>5</sup> Paragraph 24 of the Motion.

<sup>6</sup> Paragraph 25 of the Motion.

<sup>7</sup> Paragraph 26 of the Motion.

<sup>8</sup> Paragraph 27 of the Motion.

<sup>9</sup> Paragraph 29 of the Motion.

<sup>10</sup> Paragraph 34 of the Motion.

<sup>11</sup> Paragraph 35 of the Motion.

<sup>12</sup> The six witnesses are: TA, QCB, TK, SJ, FAI, QY and QBQ.

<sup>13</sup> Paragraph 20 of the Motion.

<sup>14</sup> Paragraphs 21 of the Motion.

**Nteziryayo's Response**

9. The Defence for Nteziryayo supports the Motion and submits that it will be in the interests of justice to have these witnesses recalled.

**Prosecution Response**

10. The Prosecution objects to the motion for exclusion of evidence. It submits that the material provided by the Defence for Ntahobali reveals that Witnesses QY and SJ may have told untruths, but that nothing establishes that either witness has admitted to perjury. The Prosecution further submits that the exclusion of the evidence sought has no legal basis. According to the *Bizimungu* Decision,<sup>15</sup> the appropriate remedy for a witness who has admitted to having lied before the Chamber in a subsequent proceeding is a recall and not the exclusion of all of his evidence.

11. The Prosecution argues that the evidence provided by Witnesses QY and SJ is relevant and admissible. It rests with the Chamber to assess the aforesaid evidence, as well as the credibility of those witnesses, in the final judgment.

12. The Prosecution submits that during her testimony before the Chamber, Prosecution Witness QY denied knowing several Prosecution witnesses including Witness QBQ.<sup>16</sup> However, Witness QY also indicated that "[m]any people can have these names. You could have five people with the same name as the names that are on the sheet of paper."<sup>17</sup> The Prosecution further submits that before the Canadian Court, Witness QY testified that she knew Witness QBQ and that they were together at the *préfecture* office during the war; that she saw Witness QBQ in the hospital, but that it was some time ago; and that she saw Witness QBQ maybe three times after the war and prior to going to Canada but did not discuss the events upon which she was testifying in Canada.

13. Nevertheless, the Prosecution concedes that there may be contradictions between Witness QY's respective testimonies before this Chamber and before the Canadian Court. It further concedes that good cause has been demonstrated for the recall of this Witness for cross-examination on the specific issues of which Prosecution witnesses she knows and why she stated that she did not know certain people during her testimony.

14. With regard to Prosecution Witness SJ, the Prosecution submits that she was asked before the Canadian Court whether she knew other Prosecution witnesses, namely Witnesses RE, TA, and QJ. Witness SJ testified that she knew Witness TK. She further testified that she knew Witness QJ's first name. Before this Trial Chamber, Witness SJ testified that she did not know Witnesses RE, QJ and TK. Witness SJ testified that she knew one individual named Espérance, but she did not remember her second or other name. The Prosecution points out that Witness SJ's testimony before the Chamber that she did not know any of the listed witnesses is not accurate.

15. However, the Prosecution concedes that it is apparent that there are contradictions between Witness SJ's respective testimonies before this Trial Chamber and before the Canadian Court. It further concedes that good cause has been demonstrated for the recall of Witness SJ on the specific issue of her knowledge of Prosecution witnesses about whom she

<sup>15</sup> *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Jérôme Clément Bicamumpaka's Motion Requesting Recall of Prosecution Witness GFA, Disclosure of Exculpatory Material and to Meet With Witness GFA, 21 April 2008.

<sup>16</sup> Prosecution Witnesses RE, TK, SJ, FAP and SS.

<sup>17</sup> T. 25 March 2003, p.10 (Eng) (ICS).



was questioned in cross-examination and on why she stated that she did not know certain people during her testimony. The Prosecution submits that both Witnesses QY and SJ are victims of horrendous crimes and, as a result, that any recall should be very limited to avoid any further trauma.

16. Finally, the Prosecution submits that there is no basis for recalling all of the Prosecution witnesses who have testified directly or indirectly against Ntahobali to determine whether they were influenced by anyone in giving their testimonies or whether they told untruths. Jurisprudence indicates that a witness's recall should be granted if good cause has been shown. Good cause has been defined as a substantial reason amounting in law to a legal excuse for failing to perform a required act. This specific Defence request does not meet the requirements for recalling witnesses and should be denied.

#### *Nsabimana's Response*

17. The Defence for Nsabimana does not oppose the Motion. It submits that the testimonies of Witnesses SJ and QY should be excluded; in the alternative, it submits that they should be recalled and that it should be allowed to cross-examine them on all issues for which they are recalled.

#### *Kanyabashi's Reply*

18. The Defence for Kanyabashi does not object to the Motion. It argues that Prosecution Witnesses QY and SJ should be recalled specifically to address the alleged false testimony they made before the Chamber. The Defence asserts that recall is necessary under the circumstances and that, in the alternative, their testimony before the Chamber should be excluded. However, given the advanced stage of the trial, the two witnesses should not give new evidence that might incriminate Kanyabashi or cause prejudice to his case.

### DELIBERATIONS

19. As a preliminary matter, the Chamber notes the reasons put forward by the Defence for the late filing of this Motion. The Chamber considers that no specific deadline applies to the filing of such motions but that it is in the interests of judicial economy not to wait until the end of the case for their filing if the documents relied upon have been available to the Defence for a substantial amount of time.

#### *Exclusion of Evidence*

20. Exclusion of evidence is a remedy which is at the extreme end of a scale of measures available to the Chamber in addressing the prejudice caused to an accused.<sup>18</sup> An accused must demonstrate that he has suffered a degree of prejudice that would justify the extreme remedy of excluding the witness's testimony.<sup>19</sup> In the Chamber's view, the alleged contradictions, even if established, do not warrant the exclusion of the Witnesses' testimonies under the circumstances of this Motion. The Chamber therefore denies the request for exclusion of evidence and shall now address the alternative request for recall of witnesses.

<sup>18</sup> *Prosecutor v. Karemera, et al.*, Case No ICTR-98-44-T, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor Andre Guichaoua, Defence Motion to Exclude the Witness' Testimony; Decision on Defence Motions to Exclude Testimony of Professor Andre Guichaoua, 20 April 2006, para.8.

<sup>19</sup> *Prosecutor v. Karemera et al.*, Case No ICTR-98-44-T, Decision on Joseph Nzirurera's Second Motion to Exclude the Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness, 4 March 2008, para. 19.

**Recall of Witnesses**

21. A Chamber may recall a witness where good cause is demonstrated by the moving party. Factors to be taken into account are the purpose for which the witness will testify and the party's justification for not offering such evidence when the witness originally testified.<sup>20</sup> The recall of a witness should be granted only in the most compelling of circumstances where further evidence is of significant probative value and not of a cumulative nature, such as to explore inconsistencies between a witness's testimony and a declaration obtained subsequently. In case of inconsistencies, the Defence may request the recall of a witness if prejudice can be shown from its inability to put these inconsistencies to that witness. If there is no need for the witness's explanation of the inconsistency, because it is minor or its nature is self-evident, then the witness will not be recalled.<sup>21</sup>

22. The Chamber notes that Prosecution Witness SJ testified before the Chamber in May 2002 and Prosecution Witness QY testified in March 2003, and April 2006 upon recall. Witness SJ testified before the Canadian Court in June 2007 and Witness QY gave a statement before the Canadian Rogatory Commission in April 2007, both of which were after Witnesses QY's and SJ's respective testimonies.

• **Prosecution Witness QY**

23. The Chamber considers that Witness QY's testimony before this Chamber and her statements before the Rogatory Commission concerning her knowledge of other Prosecution witnesses appear to be inconsistent. Before this Chamber, the Witness testified that she did not know certain Prosecution witnesses, including Witnesses SJ, QBQ<sup>22</sup> and TK<sup>23</sup>. Before the Rogatory Commission, the Witness appears to have stated that she knew each of the three witnesses.<sup>24</sup> The Chamber further notes Witness QY's alleged admission in the Munyaneza trial that, on the instructions of an employee of OTP, she lied during her testimony before this Chamber about knowing other Prosecution witnesses.

24. The Chamber considers that these alleged discrepancies and the allegation that she lied warrant Witness QY's recall for further cross-examination about whether she knew Witnesses SJ, TK and QBQ; and about whether she lied in her previous testimony before this Chamber; and, if so, about the circumstances surrounding this lie.

• **Prosecution Witness SJ**

25. The Chamber considers that Witness SJ's testimony before this Chamber and her statements before the Canadian Court concerning her knowledge of other Prosecution witnesses appear to be inconsistent. Before this Chamber, the Witness testified that she did not know certain Prosecution witnesses, including Witnesses TK and QJ.<sup>25</sup> Before the Canadian Court, the Witness appears to have stated that she knew both witnesses.<sup>26</sup> The Chamber further notes Witness SJ's alleged admission in the Munyaneza trial that, on the

<sup>20</sup> *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ and QY For Additional Cross-examination, 3 March 2006, para. 32.

<sup>21</sup> *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's motion to re-open his case and to re-call Prosecution Witness QA, 2 July 2008, para. 33.

<sup>22</sup> T. 25 March 2003, pp. 9-10 (Eng) (ICS) regarding witnesses SJ, FAP, QBQ and SS.

<sup>23</sup> T. 20 March 2003, p. 22 (Eng) (ICS) regarding witnesses RE and TK.

<sup>24</sup> *R v. Désiré Munyaneza*, Rogatory Commission, T. 4 April 2007 (Montréal, Canada), (Closed Session), pp. 99-100 for SJ; p. 93 for QBQ; and 3 April 2007, p. 75 for TK.

<sup>25</sup> T. 30 May 2002, pp.46-47 (Eng) (ICS).

<sup>26</sup> *R. v. Désiré Munyaneza*, 6 June 2007, Montréal Canada, p. 868-870 (Closed Session).

instructions of an employee of WVSS, she lied during her testimony before this Chamber about knowing other Prosecution witnesses.

26. The Chamber considers that these alleged discrepancies and the allegation that she lied warrant Witness SJ's recall for further cross-examination about whether she knew Witnesses TK and QJ; and about whether she lied in her previous testimony before this Chamber; and, if so, about the circumstances surrounding this lie.

- *Prosecution Witnesses TA, QJ, QCB, TN, TK, SU, QBP, RE, SS, FAP, SD, SX, QBQ, TB, QI, TG, FA and TQ*

27. The Chamber considers that the Defence request to recall the witnesses listed has no legal basis and is entirely speculative in nature. The Chamber therefore dismisses this part of the Motion.

28. The Chamber considers that there is no basis for a specific request to prohibit anyone from informing Witnesses QY and SJ and any other witness about the reasons for their recall. Therefore this request is denied. Nevertheless, the Chamber expects that the normal procedure regarding recall of witnesses will be complied with.

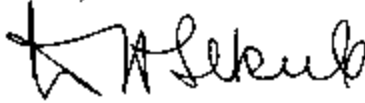
**FOR THE ABOVE REASONS, THE TRIBUNAL**

**GRANTS** the Motion in part;

**ORDERS** the recall of Prosecution Witnesses QY and SJ to be cross-examined by the Defence for Ntahobali and any of the Defence on the following specific issues: whether Witness QY knew Witnesses SJ, TK and QBQ; whether Witness SJ knew Witnesses TK and QJ; and, whether Witnesses QY and SJ lied in their previous testimonies before this Chamber regarding this knowledge and, if so, about the circumstances surrounding such lies. The Prosecution may re-examine Prosecution Witnesses QY and SJ on the same specific issues.

**DENIES** the Motion in all other respects.


Arusha, 3 December 2008



William H. Sekule  
Presiding Judge



Arlette Ramarison  
Judge



Solomy Balungi Bossa  
Judge

[Seal of the Tribunal]