



ICTR-98-42-T
14-01-2009
(13199 - 13196)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

13199
Mushap

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 14 January 2009

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 CERTIFICATION TO APPEAL
THE 9 DECEMBER 2008 DECISION CONCERNING PROSECUTION WITNESS
QCB**

Office of the Prosecutor

Ms. Holo Makwaia
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Counsel for Ntahobali

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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 de Arsène Shalom Ntahobali en certification d’appel de la décision du 9 décembre 2008 concernant le témoin QCB,*” filed on 11 December 2008 (“Ntahobali’s Motion”);

CONSIDERING the “Prosecutor’s Response to the Motion of Arsène Shalom Ntahobali for Certification to Appel (sic) the Trial Chamber’s Decision of 9 December 2008 concerning Witness QCB,” filed on 15 December 2008 (“Prosecution’s Response”);

RECALLING the “Decision on Ntahobali’s Motion for Reconsideration of the Decision concerning Prosecution Witness QCB of 20 November 2008” issued on 9 December 2008 (“Impugned Decision”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

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

INTRODUCTION

1. Prosecution Witness QCB testified before this Chamber from 20 March to 3 April 2002. On 20 November 2008, the Chamber denied the Defence for Ntahobali’s request to recall and further cross-examine Witness QCB.¹ On 9 December 2008 the Chamber denied the Defence motion for certification to appeal the Chamber’s Decision of 20 November 2008. On the same day the Chamber also denied the Defence motion for reconsideration of the 20 November 2008 Decision.² On 11 December 2009, the Defence filed the instant Motion for certification to appeal the Chamber’s Decision denying the reconsideration of the 20 November 2008 Decision (Impugned Decision).

SUBMISSIONS OF THE PARTIES

Ntahobali’s Motion

2. The Defence for Ntahobali submits that the Impugned Decision affects the fair and expeditious conduct of the proceedings and the outcome of the trial because the credibility of Witness QCB is at the heart of the current trial. Witness QCB has been detained in Rwanda for a long time without being convicted, yet he made several confessions of his participation in genocidal crimes. Therefore his testimony needs to be treated with caution.

¹ *The Prosecutor v. Nyiramasuhuko et al.*, Case No ICTR-98-42-T, Decision on Defence Motions for Recall and Further Cross-examination of Prosecution Witness QCB, 20 November 2008.

² *The Prosecutor v. Nyiramasuhuko et al.*, Case No ICTR-98-42-T, Decision on Ntahobali’s Motion for Certification to Appeal the 20 November 2008 Decision concerning the Recall of Prosecution Witness QCB, 9 December 2008; *The Prosecutor v. Nyiramasuhuko et al.*, Case No ICTR-98-42-T, Decision on Ntahobali’s Motion for Reconsideration of the Decision concerning Prosecution Witness QCB of 20 November 2008, 9 December 2008 (Impugned Decision).

3. According to the Defence, it is unfair to prevent the Defence from cross-examining Witness QCB on elements contained in his prior statements which affect his credibility or which relate to a specific charge against Ntahobali and which were unknown at the time Witness QCB testified before the Chamber. In particular the issue relating to the place where Ruvurajabo was killed might lead to the conviction of Ntahobali and therefore could affect the outcome of the trial.

4. The Defence submits that contrary to the Chamber's view in the Impugned Decision, the Defence did demonstrate errors constituting an abuse of power on the part of the Chamber justifying a reconsideration of the 20 November Decision: it demonstrated that the Chamber committed an error of law by deciding *proprio motu* about a question which was not contested by any of the Parties; the Chamber also erred by denying the Witness's further cross-examination on the circumstances of Ruvurajabo's death despite the fact that the Chamber admitted that, on first glance, the statement before the RCMP and the Witness's testimony before this Chamber contain a contradiction. Finally, the Chamber erred by not taking into consideration the audio recording of Witness QCB's statements before the Canadian authorities.

5. The Defence submits that an immediate resolution by the Appeals Chamber may materially advance the proceedings; waiting for a resolution in the Appeal Judgement would hinder the expeditious trial against the Accused. Furthermore, because Witness QCB will be recalled to be cross-examined on issues relating to Kanyabashi, Witness QCB would be obliged to return to the ICTR for a third time, which would run contrary to the interest of justice and the rights of a witness.

6. The Defence argues that the appeal is legally founded and should convince the Appeals Chamber because the audio recording matches the transcripts of the oral statements made by Witness QCB before the Canadian authorities which are contradictory to his testimony before the Chamber.

Prosecution's Response

7. The Prosecution objects to the Motion and submits that it was within the Trial Chamber's discretion to deny the recall of Witness QCB for further cross-examination on the subjects put forward by Ntahobali.

8. According to the Prosecution, the Defence failed to demonstrate how an appellate review of the Impugned Decision denying the recall of Witness QCB as requested by Ntahobali would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

DELIBERATIONS

9. Decisions rendered under Rule 73 are without interlocutory appeal, except at the Chamber's discretion for the very limited circumstances stipulated in Rule 73(B). These conditions must be specifically demonstrated and are not met through a general reference to the submissions on which the impugned decision was rendered.³

³ *The Prosecutor v. Nyiramasuhuko et al.*, Case No ICTR-98-42-T, Decision on Ntahobali's Motion for Certification to Appeal the 20 November 2008 Decision concerning the Recall of Prosecution Witness QCB, 9

10. The Defence has not satisfied the criteria for grant of certification to appeal under Rule 73 (B). Its submissions are mainly a repetition of the submissions made in the Defence motions for certification to appeal and for reconsideration of the 20 November 2008 Decision.⁴ The Defence has not demonstrated how the Impugned Decision affects the fair and expeditious conduct of the proceedings or the outcome of the trial. The Motion is therefore denied.

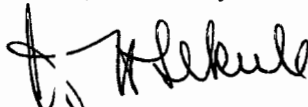
11. The Chamber notes that the Defence has not refrained from filing multiple motions concerning the recall of Witness QCB despite the Chamber's previous warning that the further filing of multiple motions relating to the same issue may attract sanctions stipulated under Rule 73 (F).⁵ The Chamber considers this multiple filing to be frivolous and to constitute an abuse of process under Rule 73 (F). Accordingly, the Chamber imposes as sanction under Rule 73 (F) the withholding of payment of fees associated with this Motion and of any costs thereof.


FOR THE ABOVE REASONS, THE TRIBUNAL


DENIES Ntahobali's Motion in its entirety;

DIRECTS the Registrar, pursuant to Rule 73 (F), not to pay the Defence any fees or costs in regard to this Motion.

Arusha, 14 January 2009


William H. Sekule
Residing Judge


(read and approved)
Arlette Ramarason
Judge
(absent at the time of


(read and approved)
Solomy Balungi Bossa
Judge
(absent at the time of
signature)



December 2008, para. 15; *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Arsène Ntahobali's motion for certification to appeal the decision of 29 June 2007, 20 August 2007, para. 12.

⁴ See *Requête de Arsène Shalom Ntahobali en reconsidération de la décision du 20 Novembre 2008 concernant le témoin QCB*, filed on 25 November 2008; *Requête de Arsène Shalom Ntahobali en certification d'appel de la décision du 20 Novembre 2008 concernant le témoin QCB*, filed on 27 November 2008.

⁵ See *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Certification to Appeal the 20 November 2008, para. 17.