

ICTR-99-54-T
02-12-2009
(4377-4371)

4377
Mwamp



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 2 December 2009

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL
2009 DEC -21 P 3 47

DECISION ON DEFENCE MOTION FOR CERTIFICATION OF THE
CHAMBER'S ORAL RULINGS OF 29 AND 30 SEPTEMBER 2009

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri

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

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

BEING SEIZED of the "Defence Motion for Certification to Appeal Oral Rulings of 29 and 30 September 2009" (the "Motion") and the "Corrigendum to the Defence Motion for Certification to Appeal Oral Rulings of 29 and 30 September 2009";

CONSIDERING the "Prosecutor's Response to the Defence Motion to Appeal Oral Rulings of 29 and 30 September 2009", filed 12 October 2009 (the "Response");¹

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 of the Rules, on the basis of the written briefs filed by the Parties.

INTRODUCTION

1. On 29 September 2009, the Trial Chamber issued an oral ruling determining the scope of Defence cross-examination of the Prosecution investigator and related to evidence collected during the Prosecution's assessment of Witness ANAI. In that ruling, the Chamber concluded that the questions the Defence sought to ask the investigator related to the assessment of evidence and so to internal Prosecution deliberations privileged under Rule 70(A) of the Rules.²

2. On 30 September 2009, the Chamber denied a Defence oral motion requesting disclosure of the Prosecution's internal notes from meetings with eleven protected Prosecution witnesses³ on the basis that "the assessment of a witness, as was discussed in the witness testimony, would be a matter that falls under Rule 70 (A) of the rules of Procedure and Evidence (...) Learned counsel for the Defence raised issues which are really not based on information but what could be, perhaps, more of possibility or speculation, but there has been no demonstration that additional statements were made arising from this session".⁴ The Chamber recalled and applied the principle enunciated in its 29 September decision, according to which "there ha[d] been no demonstration that at that session (...) notes were taken or questions and answers were given, (...) no basis has (...) established so far that it will (...) come within the scope and parameter of the Niyitegeka decision of the Appeals Chamber".⁵

¹ The Defence has not filed a Reply. The mandated period for filing expired on 19 October 2009.

² T. 29 September 2009 p. 22-23.

³ Witnesses ANAK, ANAN, ANAL, ANAF, ANAS, ANAG, ANAP, ANAO, ANAE, ANAM, ANAA, and ANAD.

⁴ T. 30 September 2009 p. 22-23.

⁵ T. 30 September 2009 p. 22-23, referring to T. 29 September 2009, p. 22.

3. On 5 October 2009, the Defence filed the Motion seeking certification of the 29 and 30 September decisions (collectively the "Impugned Decisions").

SUBMISSIONS OF THE PARTIES

Defence Motion

4. The Defence submits that while a certification is exceptional, it is appropriate where, *inter alia*, "the Trial Chamber... was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."⁶ The Defence maintains that in making this determination, the Chamber should consider the effect on the proceedings of any modification of the Impugned Decisions, but also the correctness of the legal principles relied upon in those decisions.⁷ The Defence further avers that the Impugned Decisions were based in part on an erroneous factual evaluation.⁸

5. Specifically, the Defence avers that certain portions of the Prosecution's assessments of the witnesses in question fell outside the scope of Rule 70(A) of the Rules, pursuant to the decision of the Appeals Chamber in the *Niyitegeka* case.⁹

6. The Defence maintains that according to the investigator's testimony, ANAI met with members of the Prosecution team on two occasions. At the first meeting, on 23 October 2007, the Prosecution team member assessing the witness took notes on his computer.¹⁰ Moreover, the Defence submits that the investigator testified that at assessment meetings for the other witnesses concerned the witnesses answered questions, and members of the Prosecution staff took notes.¹¹ The Defence further notes that the investigator answered a question from the bench by noting "There may be additional questions... but if that is the case, you would have to go redo the entire statements of the witness... If he talked about something and then he adds something, maybe it is written down, but, as a general rule, if there are any additional questions, a new statement should be taken."¹²

7. The Defence submits that questions were put to witnesses in these meetings and their answers provided new facts to the Prosecution which were not disclosed to the Defence.¹³

8. The Defence next maintains that this issue would affect the fair and expeditious conduct of the proceedings and the outcome of the trial. The Defence submits that the Chamber erroneously distinguished between a possible Prosecution witness, as to whom the investigator specifically recalled questions being asked, and other witnesses as to

⁶ Motion, para. 11 (citing *The Prosecutor v. Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeals, 16 February 2006, para. 4).

⁷ Motion, para. 12.

⁸ Motion, para. 13.

⁹ *Prosecutor v. Niyitegeka*, Judgement (AC), 9 July 2004.

¹⁰ Motion, para. 16.

¹¹ Motion, para. 17.

¹² Motion, para. 18.

¹³ Motion, para. 19.

whom the investigator had no such particular recollection. The Defence asserts this distinction was "spurious."¹⁴

9. The Defence asserts that in *Niyitegeka*, the Appeals Chamber determined that "A question once put to a witness is not an internal note any more; it does not fall within the ambit and thereby under the protection of Rule 70(A) of the Rules."¹⁵

10. The Defence maintains that denying disclosure of such questions and answers affects the Accused's right to prepare for cross-examination of Prosecution witnesses and to be tried without undue delay.¹⁶ Moreover, as such disclosure might allow the Defence to more effectively challenge the credibility of Prosecution witnesses, the Defence maintains the issue addressed in the Impugned Decisions might affect the outcome of the trial.¹⁷

11. Finally, the Defence submits that immediate resolution of this issue will advance the proceedings, as if the Defence prevails it will avoid the recall of witnesses and permit the Defence to properly prepare its cross-examination of witnesses. Thus, the Defence avers, the Motion satisfies the requirements for certification set forth in Rule 73(B).¹⁸

12. For the foregoing reasons, the Defence asks that the Chamber grant certification of the Impugned Decisions.¹⁹

Prosecution Response

13. The Prosecution submits that the Impugned Decisions were "supported by a substantial body of case law,²⁰" and further that immediate appellate review would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, as required by Rule 73(B).²¹

14. The Prosecution avers that members of its staff met with the relevant witnesses to confirm that the witnesses were available and determine whether to use them at trial. Thus, the staff members attempted to discover whether the witnesses were willing to testify and whether they remained consistent with their initial statements.²²

15. The Prosecutor submits that Rule 66 applies only to statements made by a witness, not evaluative material generated by the Prosecution and referring to that

¹⁴ Motion, paras. 22-24.

¹⁵ Motion, para. 25 (citing *Niyitegeka*, *supra*, para. 34).

¹⁶ Motion, paras. 27-28.

¹⁷ Motion, para. 29.

¹⁸ Motion, paras. 30-32.

¹⁹ Motion, para. 33.

²⁰ Response, para. 6.

²¹ Response, para. 7.

²² Response, para. 8.

witness. The Prosecution submits no such material came up and thus no disclosure was made.²³

16. The Prosecution further refers to a decision in the *Karemera* case, which held that an investigator's "recollection of his conversation with the witness" was not subject to disclosure under the relevant Rule. Rather, the *Karemera* Chamber held, the Defence can adduce information about the investigator's recollections by speaking to the investigator or calling him as a witness.²⁴ The Prosecution further submits, the Prosecution investigator testified and the Defence could adduce such evidence by cross-examination. The Prosecution further maintains that the Defence is "spurious" in asserting that questions were put, answers were given, and so new facts were revealed to the Prosecution during the course of the interviews.²⁵

17. The Prosecution further submits that it has disclosed all Rule 66 material, that the relevant notes fall under the protection of Rule 70(A), and that the Defence has not demonstrated grounds to appeal under Rule 73(B).²⁶ Thus, the Prosecution requests the Chamber deny the Motion in its entirety.²⁷

DELIBERATIONS

18. The Chamber notes that certification for interlocutory appeal is governed by Rule 73 (B), which directs that such certification is only appropriate where two factors are present: (a) the decision in question must involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.²⁸ As a general rule, "decisions rendered on such judgements are without interlocutory appeal."²⁹

19. In applying Rule 73(B), caselaw has emphasised the word "significantly," suggesting that an issue which can have only a small impact on the fair and expeditious conduct of the proceedings, or on the outcome of the trial, may not be appropriate for certification.³⁰ Moreover, where alternative remedies are available to protect the rights invoked by the Accused, the issue's impact on the proceedings is not "significant," and

²³ Response, para. 10.

²⁴ Response, para. 11 (citing *Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Disclosure or Inspection of Hand-Written Notes from OTP Investigator, 26 April 2006, p. 2).

²⁵ Response, para. 12.

²⁶ Response, paras. 13-15.

²⁷ Response, para. 16.

²⁸ See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para. 2.

²⁹ Rule 73(B).

³⁰ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motions to Render Parts of the Evidence of Witnesses RV and QBZ Inadmissible", filed 18 March 2004, para. 16.

where an allegation has not been substantiated, its certification will not “materially advance the proceedings.”³¹

20. Where both factors set forth by the Rule are present, certification is not automatic, but at the discretion of the Trial Chamber.³² Moreover, “even [when both factors are present], certification to appeal must remain exceptional.”³³

21. In the context of a motion for certification, the Chamber is not concerned with the legal merit of the underlying arguments raised by the Defence, except to the limited extent that permitting an interlocutory appeal based on frivolous arguments will not materially advance the proceedings.³⁴ Further, the party seeking certification must justify appeal on the basis of the arguments made in the original motion, as new submissions are inadmissible, but must recast those arguments in terms of the standards set forth in Rule 73(B).³⁵ The Chamber may conclude that those standards are satisfied for reasons not set forth by the Parties.³⁶

22. The Chamber further notes that the record reflects meetings between Prosecution witnesses and members of the Prosecution team, at which Prosecution attorneys asked at least some questions which the witnesses answered, and Prosecution attorneys took at least some notes, which the Prosecution and the Investigator assert were devoted solely to the assessment of the witnesses.³⁷ This is different from the situation addressed by paragraphs 33-35 of *Niyitigeka*, where the Appeals Chamber discussed “records of the questions that Prosecution investigators put to witnesses and of the answers given.”³⁸ Here, as in *Niyitigeka* itself, the Defence has not substantiated whether notes reflecting questions asked and answers given were, in fact, taken.³⁹ As the Appeals Chamber has observed, “something which is not in the possession of or accessible to the Prosecution

³¹ Decision on Defence Motion for Certification to Appeal the Trial Chamber’s Ruling of 17 September 2009, filed 5 October 2009, para. 21.

³² See *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4.

³³ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-NZ, Decision on Joseph Nizorera’s Application for Certification to Appeal Decision on the 24th Rule 66 Violation, 20 May 2009, para. 2; see also *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Motion for Certification of the Trial Chamber’s Decision on Defence Urgent Motion for a Subpoena to Ms. Loretta Lynch, 19 February 2009, para. 4 (citation omitted).

³⁴ See *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeals, 16 February 2006, para. 4.

³⁵ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal the “Decision on Defence Urgent Motions to Render Parts of the Evidence of Witnesses RV and QBZ Inadmissible”, filed 18 March 2004, para. 21.

³⁶ See *id.*, paras. 19, 26 (reasoning that although the moving parties had not demonstrated the conditions for certification were satisfied in their motions, the conditions were indeed satisfied, and consequently granting certification).

³⁷ See, e.g., T. 29 September 2009, p. 27.

³⁸ *Niyitigeka* Appeal Judgement, para. 24; *Niyitigeka* Trial Judgement, para. 41.

³⁹ See *Niyitigeka* Appeal Judgement, para. 37. The Chamber is, as noted *supra*, not concerned with the legal merit of the Defence’s underlying arguments. However, the Chamber is not obligated by that principle to proceed based on an imperfect statement of the facts.

cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to an impossibility)."⁴⁰

23. With respect to the Defence submission that, if it prevails on interlocutory appeal, it might be able to prepare more effectively for cross-examination, and that the possible recall of witnesses might be averted, the Chamber notes that these submissions are hypothetical, as the Defence has not explained how the recall of witnesses might be necessitated if interlocutory appeal is not granted.

24. Moreover, as the Defence has not demonstrated that any disclosable notes exist, and the Prosecution has represented for the record that interview notes were purely for assessment purposes, the Chamber is not of the view that certification of this issue for appeal would materially advance the proceedings.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

Arusha, 2 December 2009



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge



[Seal of the Tribunal]

⁴⁰ *Niyitigeka* Appeal Judgement, para. 35 (citation omitted).