



UNITED NATIONS
NATIONS UNIES

ICTR-00-61-T
21-01-2010
(3349-3344)

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Am

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 21 January 2010

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-T

JUDICIAL RECORDS ARCHIVES
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**DECISION ON DEFENCE APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON DEFENCE MOTION FOR EXCLUSION OF EVIDENCE**

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

Office of the Prosecutor:

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INTRODUCTION

1. The trial in this case commenced on 20 October 2009.¹ The Prosecution closed its case on 16 November 2009. The Defence case is scheduled to start on 1 March 2010.²
2. On 30 October 2009, the Defence filed a motion for the exclusion of a portion of Prosecution Witness AWF's evidence.³ On 24 November 2009, the Chamber issued a Decision denying the Defence Motion for Exclusion of Evidence ("Impugned Decision").⁴
3. On 1 December 2009, the Defence filed a Motion for certification to appeal the Impugned Decision.⁵ On 7 December 2009, the Prosecution filed its Response opposing the Defence Motion.⁶ The Defence filed its Reply on 14 December 2009.⁷

DISCUSSION

Applicable Law on Certification to Appeal

4. Pursuant to Rule 73 (B) of the Rules of Procedure and Evidence ("Rules"), leave to file an interlocutory appeal against a decision may be granted where: (i) the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial; and (ii) an immediate resolution by the Appeals Chamber may materially advance the proceedings. Even where these criteria are met, the decision to certify is discretionary and remains exceptional.⁸

¹ *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-PT, Scheduling Order, 30 September 2009.

² Scheduling Order regarding Commencement of Defence Case, 19 November 2009.

³ Motion for Exclusion of Evidence ("Defence Motion for Exclusion of Evidence"). The evidence at issue was Prosecution Witness AWF's testimony on 22 October 2009, that he first met the Accused in 1992 when the latter "had come to take the headmaster or director of [Gahini] school, who was Tutsi and who was considered an accomplice of the *Inyenzi*." He further testified: "Gatete came there accompanied by soldiers [...] he called to the director who responded to his call. Gatete spoke to the soldiers. He told them. 'He is an accomplice.' And immediately the soldiers took hold of the director and got him into the car and took him away and started beating him". See T. 22 October 2009, pp. 39-42 ("Impugned Evidence"). The Defence request for exclusion was based on the fact that the Defence had no notice of the Impugned Evidence and that it was outside the temporal jurisdiction of the Tribunal.

⁴ Decision on Defence Motion for Exclusion of Evidence, 24 November 2009.

⁵ Application for Certification to Appeal Decision on Defence Motion for Exclusion of Evidence ("Defence Motion").

⁶ Prosecutor's Response to Defence Application for Certification to Appeal Decision on Defence Motion for Exclusion of Evidence ("Prosecution Response").

⁷ Reply to Prosecution Response to Defence Application for Certification to Appeal Decision on Defence Motion for Exclusion of Evidence ("Defence Reply").

⁸ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-00-50-T, Decision on Casimir Bizimungu's Request for Certification to Appeal the Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision Dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government, 22 May 2007, para. 6; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing (TC), 14 March 2007, para. 4.



5. Arguments which were not advanced in the original motion cannot form the basis for certification to appeal.⁹ Nor is the burden of proving the criteria for certification discharged by merely repeating arguments advanced in the original motion.¹⁰

6. The correctness of the decision is a matter for the Appeals Chamber. Therefore, Trial Chambers do not need to consider the merits of an impugned decision; but rather, whether the moving party has demonstrated that the criteria set out in Rule 73 (B) have been met.¹¹ Even though a Trial Chamber may at the certification stage revisit the substance of a decision, it does so strictly to the extent of determining whether the Rule 73 (B) criteria are met.¹²

Preliminary Matters

7. The Chamber notes that the Defence makes a number of submissions concerning the merits of the Impugned Decision.¹³ The Chamber will not consider these in this Decision but will only address those arguments which are relevant to determining whether the criteria for certification are met.

8. In addition, the Defence refers to the decisions of other Trial Chambers which have found that the issue of exclusion of evidence affects the fair and expeditious conduct of proceedings.¹⁴ However, in the exercise of its discretion under Rule 73 (B), this Chamber is not bound to follow the approach taken by other Trial Chambers.¹⁵ Furthermore, the Chamber

⁹ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para. 3.

¹⁰ *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Request for Certification to Appeal the Chamber's Decision of 29 February 2008, 22 May 2008, para. 7.

¹¹ *Prosecutor v. Leonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 17 December 2008 on Defence Preliminary Challenges, 4 February 2009, para. 6; *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision on False Testimony, 23 March 2007, para. 4; *Bizimungu et al.*, Decision on Jerome Bicamumpaka's Application for Certification to Appeal the Trial Chamber's Decision on the Rule 92 bis Admission of Faustin Nyagahima's Written Statement, 22 August 2007, para. 4; *Bizimungu et al.*, Decision on Justin Mugenzi's Motion for Certification to Appeal the Decision on Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen His Defence, 23 July 2008 ("Bizimungu Decision"), para. 6 (citations omitted).

¹² *Nshogoza*, Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 17 December 2008 on Defence Preliminary Challenges, para. 6; *Bizimungu Decision*, para. 11; *Karemera et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Eleventh Rule 68 Motion, 10 November 2008, para. 9.

¹³ With regard to the merits of the Impugned Decision, the Defence submits: the Impugned Decision cannot be reconciled with the established jurisprudence on notice, and differs from the Chamber's approach with respect to the exclusion of evidence of other Prosecution witnesses in the present case (Defence Motion, paras 7, 10, 16, and 17); the Chamber erred in finding that the reason for the leading of evidence affects its admissibility (Defence Motion, para. 11); and the Chamber erred in reasoning that there is no need to exclude Witness AWF's additional allegation because it is able to properly weigh the evidence (Defence Motion, paras. 13-14).

¹⁴ Defence Motion, para. 8, referring to *Bagosora et al.*, Decision on Request for Certification of Decision on Exclusion of Evidence, 14 July 2006, para. 4, *Bizimungu et al.*, Decision on the Accused Mugiraneza's Motion for Certification to Appeal the Chamber's Decision of 5 February 2004, 24 March 2004, para. 6.

¹⁵ *Prosecutor v. Bagosora et al.*, Cases Nos. ICTR-98-41-AR73, ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decisions on Witness Protection Orders, 6 October 2005, para. 33; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-AR73.3 and AR73.4, Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on Exclusion of Evidence, 15 July 2004, para. 15; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgment, 24 March 2000, para. 114.



notes that the cases referred to by the Defence involved circumstances which are different from those currently before this Chamber.¹⁶ The Chamber also notes the Prosecution submission that the issue of admissibility of evidence is a responsibility of Trial Chambers as triers of fact and should not be assumed by the Appeals Chamber.¹⁷ In this regard, the Chamber recalls that according to the established jurisprudence, certification to appeal should be the absolute exception when deciding on the admissibility of evidence.¹⁸ Nonetheless, the Defence is not precluded from seeking appellate intervention where the criteria for certification are met.

9. The Chamber will now turn to consider the merits of the Defence Motion.

Should the Chamber Grant Certification to Appeal the Impugned Decision?

10. The Defence submits that the Impugned Evidence was admitted without limitations on its use and forms part of the case against the Accused. The Defence considers that the Prosecution is not prevented from later seeking to rely on this highly incriminating evidence for other purposes in its closing brief or closing arguments and there is no guarantee that it will be used solely for identification purposes.¹⁹ The Defence further submits that ascribing appropriate weight to the evidence at the deliberations stage does not provide a remedy for the prejudice caused to the Accused by the evidence having been heard without any notice, thereby depriving the Defence of the opportunity to investigate and challenge it on cross-examination.²⁰ The Defence asserts that it is now obligated to investigate, locate and call witnesses who can testify on the new allegation in the Impugned Evidence.²¹

11. The Prosecution submits that the Defence is confusing the requirement to plead the charges against an accused and the material facts supporting those charges in sufficient specificity in the indictment, with a non-existent requirement to plead all the evidence the Prosecution intends to lead.²² It states that the Impugned Evidence did not require notice as it neither amounts to "charges" nor to "material facts" but is relevant and probative to establishing how Witness AWF knew the Accused prior to 1994.²³ The Prosecution further submits that the Impugned Decision included an assurance that the weight to be attached to

¹⁶ Indeed, the Chamber notes that the cases cited in para. 8 of the Defence Motion refer to the issue of curing a defective indictment by providing proper notice of material facts.

¹⁷ Prosecution Response, para. 22.

¹⁸ *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004, para. 10, *Nyiramasuhuko v. Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on Admissibility of Evidence, 4 October 2004, para. 5; *Bagosora et al.*, Decision on Application for Certification to Appeal Decision on Exclusion of Testimony, 10 February 2006, para. 5, *Bizimungu et al.*, Decision on Bicamumpaka's Request for Certification to Appeal a Decision of 6 October 2004 on Bicamumpaka's Motion Opposing the Admissibility of the Testimony of Witnesses GFA, GKB and GAP, 17 November 2004, para. 13, *Karemera et al.*, Decision on Defence Motions for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE, 7 June 2006, para. 5.

¹⁹ Defence Motion, paras. 11-13, 15.

²⁰ Defence Motion, paras. 11, 13.

²¹ Defence Motion, paras. 18-19.

²² Prosecution Response, para. 12.

²³ Prosecution Response, para. 13.

the evidence would be determined when assessing all the evidence as a whole and the Chamber would be able to properly weigh it while being mindful of the Accused's rights. The Prosecution argues that the fair conduct of proceedings is therefore not compromised by the Impugned Decision.²⁴ In addition, it states that since the Impugned Evidence does not go to proving the Accused's culpability, further Defence investigations are not required, and therefore, the expeditious conduct of the proceedings is unaffected.²⁵

12. In its Reply, the Defence mainly reiterates its original submissions and stresses that it has a right to seek to rebut all incriminating evidence against the Accused, regardless of the purpose for which the Prosecution contends it was adduced.²⁶

13. The Chamber will now turn to consider the Parties' submissions in light of the criteria for certification.

14. With regard to the Defence submission that the Impugned Evidence was admitted without limitations on its use, thereby affecting the fairness of the proceedings, the Chamber recalls that the Impugned Decision clearly held that:

- (i) Notice was not required because the Impugned Evidence was adduced to show that the Witness knew the Accused prior to 1994 and not to support any charge in the Indictment;²⁷
- (ii) The Impugned Evidence is relevant and probative with respect to proving the Witness' knowledge of the Accused prior to 1994;²⁸ and
- (iii) When assessing the evidence as a whole, the Chamber is at all times bound by the limitations on the use of pre-1994 evidence.²⁹

15. The Chamber considers that it is clear from the above that the Impugned Decision set out limitations on the use of the Impugned Evidence. Indeed, this evidence cannot form the basis of a conviction. Accordingly, the Chamber finds that the Defence has failed to demonstrate that the Impugned Evidence was admitted without limitations thereby affecting the fair conduct of proceedings.

16. The Chamber will next address the Defence submission that ascribing appropriate weight to the Impugned Evidence does not remedy the prejudice caused to the Accused by the inability to investigate and challenge it due to lack of notice. The Chamber is mindful that issues pertaining to due notice of the charges against the accused relate to the accused's fair trial rights, in particular, the right to be informed promptly of the nature and cause of the charges against him, as well as the right to have adequate time for the preparation of his

²⁴ Prosecution Response, para. 16.

²⁵ Prosecution Response, para. 19.

²⁶ Defence Reply, para. 14.

²⁷ Impugned Decision, para. 14.

²⁸ Impugned Decision, para. 16.

²⁹ Impugned Decision, para. 19.



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defence.³⁰ The Chamber recalls, as consistently held by the Appeals Chamber, that adequate notice must be given of all the charges against an accused and the material facts underpinning those charges.³¹ However, the Chamber notes that the Impugned Evidence does not fall within this category, as it is not a charge, nor a material fact.

17. Nonetheless, the Chamber notes that the Impugned Evidence concerns alleged crimes committed by the Accused prior to 1994.³² For these reasons, the Impugned Decision set limits on its use. It also noted that the Chamber is mindful of these limitations and the Accused's rights when determining its exact probative value with respect to establishing Witness AWF's pre-1994 knowledge of the Accused. Considering the limited purpose for which the Impugned Evidence can be relied upon, and that professional judges are able to adhere to the restrictions on the use of such evidence and the obligation to respect the rights of the Accused, the Chamber finds the Defence submission regarding prejudice to the Accused, and the time required to investigate and challenge the Impugned Evidence, to be without merit. Accordingly, the Chamber finds that the Defence has failed to demonstrate that the Impugned Decision affects the fair and expeditious conduct of the proceedings.

18. As the Defence has not met the first criterion for certification under Rule 73 (B), the Chamber need not proceed to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.

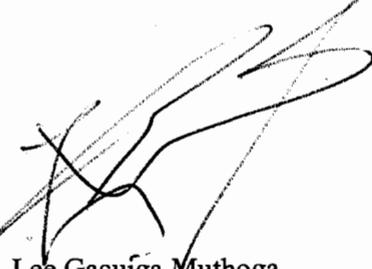
19. The Chamber therefore finds that the Defence has failed to meet the criteria for certification under Rule 73 (B) of the Rules.

FOR THESE REASONS the Chamber,

DENIES the Defence Motion

Arusha, 21 January 2010


Khalida Rachid Khan
Presiding Judge


Lee Gacuga Muthoga
Judge


Aydin Sefa Akay
Judge

[Seal of the Tribunal]



³⁰ Articles 19 and 20 of the Tribunal's Statute and in particular Article 20 (4)(a) and (b).

³¹ *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-00-55A-A, Appeal Judgment (AC), 29 August 2008, para. 18; *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66A, Appeal Judgment (AC), 12 March 2008, para. 27; *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Appeal Judgment (AC), 27 November 2007, para. 63.

³² See supra footnote 3.