



UNITED NATIONS
NATIONS UNIES

ICTR-00-56-T
13-10-2010
(30298-30294)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

30298
Mwamp

OR: ENG

TRIAL CHAMBER II

Before Judges: Asoka de Silva, Presiding
Taghrid Hikmet
Seon Ki Park

Registrar: Adama Dieng

Date: 13 October 2010

JUDICIAL RECORDS/ARCHIVES
2010 OCT 13 AM 10:00
ICTR

The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU
Case No. ICTR-00-56-T

**DECISION ON DEFENCE FOR BIZIMUNGU'S MOTION FOR THE ADMISSION
INTO EVIDENCE OF PROSECUTION WITNESS GAP'S TRANSCRIPTS AND
EXHIBITS IN THE KAREMERA ET AL. CASE**

Office of the Prosecution:

Mr Alphonse Van
Mr Abubacarr Tambaou
Ms Faria Rekkas

Counsel for the Defence:

Mr. Gilles St-Laurent and Mr. Benoît Henry for **Augustin Bizimungu**
Mr. Christopher Black and Mr. Vincent Lurquin for **Augustin Ndindiliyimana**
Mr. Charles Taku and Ms. Beth Lyons for **François-Xavier Nzuwonemeye**
Mr. Fabien Segatwa and Mr. Seydou Doumbia for **Innocent Sagahutu**

INTRODUCTION

1. Prosecution Witness GAP testified before this Trial Chamber from 15 to 22 February 2005.¹
2. On 19 July 2010, the Defence for the Accused Bizimungu ("Defence") filed a Motion requesting the Chamber to admit into evidence the transcripts of the testimony of Prosecution Witness GAP given in the *Karemera et al.* case on 21, 25 and 26 January 2010 and exhibits related thereto ("Defence Motion").²
3. The materials sought to be admitted into evidence by the Defence are the open session transcripts of Witness GAP's testimony in *Karemera et al.* given on 21, 25 and 26 January 2010, in both French and English ("Transcripts"), and seven exhibits admitted during that testimony ("Exhibits"). Amongst these Exhibits is a transcript of a recorded audio interview held between the Witness GAP and Mr. Peter Robinson, the Lead Counsel for Nzirorera. The Defence contends that the above materials are relevant in evaluating the credibility of Witness GAP. The Defence further contends that the contradictions in the testimony of the witness before various Trial Chambers of this Tribunal impair his credibility and warrant the exclusion of the entirety of his evidence before this Trial Chamber.
4. On 23 July 2010, the Prosecution filed a Response to the Defence Motion ("Prosecution Response"). The Chamber notes that, in essence, the Prosecution is not opposed to the admission into evidence of the above Transcripts and Exhibits. However, the Prosecution opposes the Defence's attempt to use the testimony of Witness GAP in the *Karemera et al.* proceedings and record of his interview with Mr. Peter Robinson, Lead Counsel for Nzirorera, to impugn the credibility of other Prosecution witnesses whom he accused of fabricating evidence against the Accused Bizimungu. According to the Prosecution, the above statements by Witness GAP should be held only against him and should not be relied upon in determining the credibility of other Prosecution witnesses in this Trial. The Prosecution requests the Chamber to consider the entirety of Witness GAP's testimony in the *Karemera et al.* proceedings when assessing his credibility. It further requests the Chamber to consider the reasons that prompted him to give the alleged exculpatory statements to Mr. Peter Robinson, the Lead Counsel for Nzirorera.³

DELIBERATIONS

Law on the Admission of Written Statements as Applied to the Requested Transcripts and Exhibits Pertaining to Witness GAP

5. The Chamber notes that the Defence seeks to admit the materials relating to witness GAP pursuant to Rule 92 *bis* of the Rules of Evidence and Procedure. The Chamber recalls that

¹ *Prosecutor v. Nindilyimana et al.*, Case No. ICTR-00-56-T, T. 15-22 February 2005.

² Requete de la defense du General Augustin Bizimungu afin que soient admis en prevue les transcripts du temoinage du temoin GAP dans l'affaire *karemera et al* du 21, 25, e 26 Janvier 2010 ainsi que des pieces produites lors dudit temoinage, 19 July 2010 ("Defence Motion").

³ Prosecutor's Response to "Requete de la defense du General Augustin Bizimungu afin que soient admis en prevue les transcripts du temoinage du temoin GAP dans l'affaire *karemera et al* du 21, 25, e 26 Janvier 2010 ainsi que des pieces produites lors dudit temoinage, 19 July 2010" ("Prosecution Response").

Rule 92 *bis* provides the Chamber with a discretionary power to admit into evidence written statements provided that such statements go to the proof of a matter other than the acts and conduct of the accused as charged in the indictment. The meaning of the term "acts and conduct of the accused as charged in the indictment" is a plain expression which should be accorded its ordinary meaning: deeds and behavior of the accused himself and not the acts and conduct of his co-perpetrators and/or subordinates.⁴ Once the threshold requirement of Rule 92 *bis* is satisfied, the Chamber's discretion to admit the written material is enlivened.

6. For written materials to be admissible under Rule 92 *bis*, the general requirements of relevance and probative value, applicable to all evidence under Rule 89 (C), must also be satisfied. Evidence will be considered to be relevant if a connection exists between such evidence and proof of an allegation pleaded in the Indictment. Evidence will be deemed to have probative value if it tends to prove, or disprove, an issue and has sufficient *indicia* of reliability.⁵ The Chamber notes that material relating to the credibility of a witness is *prima facie* relevant and has probative value.⁶ Finally, the Chamber notes that its discretion under both Rules 89 (C) and 92 *bis* must be governed by the right of the accused to a fair trial, as provided for in Articles 19 and 20 of the Statute.⁷
7. Having meticulously reviewed the materials sought to be admitted into evidence by the Defence, the Chamber is satisfied that the majority of these statements do not contravene the threshold requirement of Rule 92 *bis* since they do not address the acts and conduct of the Accused. However, some portions of these statements may be interpreted to allude to the acts and conduct of the Accused and may therefore be deemed to be inadmissible under Rule 92 *bis*. The Chamber is of the view that in this instance, redacting the portions that allude to the acts and conduct of the Accused from the admitted material will not only consume time, but will also make it difficult to determine the import of the statements during its deliberations. The Chamber will therefore admit the requested materials in their entirety with the caveat that it will use them exclusively to determine the credibility of the witness rather than acts and conduct of the Accused.
8. The Chamber is also satisfied that the materials sought for admission into evidence satisfy the general requirements of relevance and probative value provided in Rule 89 (C) of the Rules since they relate to the credibility of Witness GAP. For the foregoing reasons, the Chamber is inclined to admit the specified Transcripts and Exhibits into evidence.

⁴ *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92 *bis* (TC), 21 March 2002, para. 22.

⁵ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA Before the *Karemera et al* Chamber (TC), 26 September 2008, para. 13.

⁶ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Jerome Bicumupaka's Confidential and Amended Motion to Admit Rwandan Judicial Records into Evidence (TC), 10 June 2008, para. 11.

⁷ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi's Motion to Admit Transcript Extracts of General Romeo Dallaire's Evidence in the *Ndindiliyimana* Proceedings, 4 November 2008, paras. 26, 28 ("4 November 2008 *Bizimungu* Decision"); *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Decision on Kamuhanda's Motion to Admit Into Evidence Two Statements by Witness GER in Accordance With Rules 89(C) and 92 *bis* of the Rules of Procedure and Evidence, para. 31 (stating that "a proper reading of Rules 89(C) and 92 *bis* may not interfere with the Chamber's discretion in a fitting case, at the instance of the accused, to admit statements of witnesses which are relevant and have probative value...").

9. The Chamber notes that both the Defence Motion and the Prosecution Response contain submissions regarding the probative weight that should be accorded to the testimony of Witness GAP. The Defence avers that the contradictions between the testimony of Witness GAP before this Trial Chamber and other Trial Chambers are material and significantly impair his credibility, and therefore his evidence should be excluded. On its part, the Prosecution requests that the Chamber disregard Witness GAP's adverse claims against other Prosecution witnesses when assessing the credibility of those witnesses. The Chamber considers this request to be immature at this juncture. The Chamber's sole function at this stage in the proceedings is to determine whether the materials sought for admission satisfy the criteria of admissibility of evidence under the standards set forth in Rules 89 (C) and 92 *bis* (D). The probative weight to be attached to this evidence or whether this evidence impinges on the credibility of other witnesses will be determined in the Chamber's final Judgement.

FOR THE FOREGOING REASONS, THE CHAMBER

- I. **GRANTS** the Defence Motion;
- II. **ADMITS** into evidence the following documents: (i) open session transcripts of Prosecution Witness GAP's testimony in *Karemera et al.* on 21, 25 and 26 January 2010; (ii) the exhibits contained in the Compact Disc submitted with the Defence Motion, and (iii) the transcript of the audio recording of an 18 November 2009 interview between Witness GAP and Mr. Peter Robinson, also contained in the Compact Disc submitted with the Defence Motion;
- III. **DIRECTS** the Registrar to assign appropriate exhibit numbers to the aforementioned documents, forthwith.

Arusha, 13 October 2010, done in English.

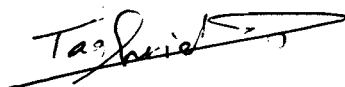
Read and approved by

Asoka de Silva



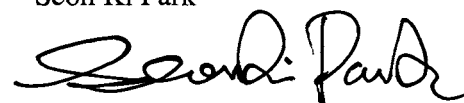
Presiding Judge

Taghrid Hikmet




[Seal of the Tribunal]

Seon Ki Park



Judge