



UNITED NATIONS
NATIONS UNIES

ICTR-00-55C-T
30-06-2011
(7744-7738)

7744
Am

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 30 June 2011

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

UNICTR
JUDICIAL RECORDS/ARCHIVE
RECEIVED

2011 JUN 30 A 11:30

**DECISION ON DEFENCE MOTION FOR CERTIFICATION OF THE TRIAL
CHAMBER 7 JUNE 2011 DECISION ON PROSECUTOR'S MOTION FOR LEAVE
TO PRESENT EVIDENCE IN REBUTTAL TO THE ALIBI DEFENCE**

Office of the Prosecution:

Drew White
Kirsten Gray
Yasmine Chubin
Zahida Virani
Astou Mbow

Defence Counsel for Ildéphonse Nizeyimana:

John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi
Sébastien Chartrand

9

INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements of both the Prosecution and the Defence. The Prosecution closed its case-in-chief on 25 February 2011, after having called 38 witnesses. The Defence closed its case on 16 June 2011, after having called 38 witnesses.

2. On 25 May 2011, the Office of the Prosecutor ("Prosecution") filed a motion seeking the Chamber's leave to present evidence in rebuttal to the Accused's alibi defence.¹ The Prosecution submitted, *inter alia*, that it had not received sufficient notice of the Accused's alibi defence, and that the resulting prejudice would best be cured by the presentation of rebuttal evidence.² The Prosecution provided a detailed summary of the three rebuttal witnesses it sought to call.³

3. On 30 May 2011, Defence team of the Accused, Ildéphonse Nizeyimana ("the Defence" and "the Accused" respectively) filed its response.⁴ The Defence submitted that (1) it had provided timely and adequate notice of the Accused's alibi,⁵ (2) the Prosecution did not demonstrate that it suffered prejudice,⁶ (3) the content of the alibi evidence was reasonably foreseeable to the Prosecution,⁷ (4) the Prosecution failed to demonstrate that it could not locate the three rebuttal witnesses before the closing of the Prosecution case,⁸ and (5) the proposed testimony of the rebuttal witnesses was cumulative in nature as Prosecution witnesses have already testified on this matter.⁹

4. The Prosecution filed its reply on 31 May 2011.¹⁰ The Prosecution submitted that (1) the notice of the Accused's alibi was not provided as early as was reasonably practicable,¹¹ (2) the alibi defence was not reasonably foreseeable and thus could not have been

¹ Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Motion for Rebuttal"), 25 May 2011.

² Motion for Rebuttal, paras. 29-33.

³ Motion for Rebuttal, paras. 38-40.

⁴ Defence Response to Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Response to Motion for Rebuttal"), 30 May 2011.

⁵ Response to Motion for Rebuttal, paras. 25-26.

⁶ Response to Rebuttal Motion, paras. 25-39, 49-53.

⁷ Response to Rebuttal Motion, paras. 40-45.

⁸ Response to Rebuttal Motion, paras. 46-48.

⁹ Response to Rebuttal Motion, paras. 54-57.

¹⁰ Prosecutor's Reply to Defence Response to Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence Pursuant to Rules 54, 67(A)(ii) and 85(A)(iii) ("Reply to Rebuttal Motion"), 31 May 2011.

¹¹ Reply to Rebuttal Motion, paras. 10-15.



investigated beforehand,¹² and (3) rebuttal evidence is not rendered cumulative by virtue of it being corroborative.¹³

5. On 7 June 2011, the Chamber rendered its Decision, in which it granted the Prosecution's Motion for Rebuttal.¹⁴ The Chamber held that it has broad discretion to hear evidence that will assist in the determination of the truth and found it in the interest of justice to allow the Prosecution to present rebuttal evidence.¹⁵

6. On 10 June 2011, the Defence filed a motion for reconsideration of the Impugned Decision.¹⁶ The Defence submitted, *inter alia*, that the Impugned Decision (1) misinterpreted the facts and the law on the matter of rebuttal and failed to rule on issues raised by the Parties' in their submissions,¹⁷ (2) constituted an abuse of power and caused the Accused to suffer injustice and prejudice,¹⁸ (3) that the Prosecution was in violation of its Rule 66(A)(ii) disclosure obligations,¹⁹ and (4) it caused considerable problems with the management of the case.²⁰

7. On 13 June 2011, the Prosecution filed a response to the Defence Motion.²¹ The Prosecution submitted, *inter alia*, that the Defence request did not meet the standard for reconsideration, as there was "insufficient reason to believe the original decision was erroneous or constituted an abuse of power."²²

8. On 14 June 2011, the Defence filed its reply to the Prosecution Response.²³ The Defence submitted, *inter alia*, that it could not commence investigations until the close of the Defence case, due to the limited resources available to it.²⁴

¹² Reply to Rebuttal Motion, paras. 16-19.

¹³ Reply to Rebuttal Motion, paras. 20-23.

¹⁴ Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Impugned Decision"), 7 June 2011.

¹⁵ Impugned Decision, para. 26.

¹⁶ Extremely Urgent Motion for Reconsideration of the Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Defence Motion for Reconsideration"), 10 June 2011.

¹⁷ Defence Motion for Reconsideration, para. 10.

¹⁸ *Ibid.*

¹⁹ Defence Motion for Reconsideration, paras. 19-32.

²⁰ Defence Motion for Reconsideration, paras. 33-35.

²¹ Prosecution Response to Extremely Urgent Motion for Reconsideration of the Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Prosecution Response to Motion for Reconsideration"), 13 June 2011.

²² Prosecution Response to Motion for Reconsideration, paras. 7-11.

²³ Defence Reply to Prosecution Response to Extremely Urgent Motion for Reconsideration of the Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Defence Reply to Motion for Reconsideration"), 14 June 2011.

²⁴ Defence Reply to Motion for Reconsideration, paras. 8-9, 16. Page 6, paras. 4-5.

9. On 13 June 2011, the Defence filed a motion for certification of the Impugned Decision.²⁵ In its Motion, the Defence raises the following grounds for appeal: the Chamber erred in (1) holding that it has a wide discretion in deciding to grant leave to call rebuttal evidence; (2) allowing rebuttal evidence on the grounds that the alibi evidence was not reasonably foreseeable; (3) failing to consider whether the Prosecution could have produced the rebuttal evidence during its own case; (4) considering the notice of the alibi to be incomplete with respect to the rebuttal evidence; (5) inferring that the Prosecution suffered prejudice with respect to the disclosure of the alibi notice; (6) allowing the Prosecutor to call rebuttal witnesses on 21 to 23 June 2011, in violation of Article 20(4)(b) of the Statute and Rule 66(A)(ii), by which the Defence is entitled to disclosure of the Prosecution's intended witnesses 60 days prior to their testimony; (7) misrepresenting the facts and the law on the matter of rebuttal and (8) allowing the Prosecution to split its case without cause.²⁶

10. On 15 June 2011, the Chamber rendered its decision on the Motion for Reconsideration.²⁷ The Chamber was persuaded by the Defence's submission that it needed additional time to investigate and prepare for both the rebuttal witnesses and potential rejoinder witnesses.²⁸ The Chamber ordered that any potential rejoinder take place immediately following the rebuttal case, and that the Defence disclose any potential rejoinder statements to the Prosecution at least 30 days before the testimony of the rejoinder witnesses.²⁹

11. On 20 June 2011, the Prosecution responded to the Defence Motion for Certification.³⁰ The Prosecution submits that the Defence has failed to discharge its burden of demonstrating that the requirements for certification have been met.³¹ The Prosecution further opposes the Defence Motion on the basis that the Defence failed to demonstrate that the Impugned Decision significantly affects the fair and expeditious conduct of the proceedings³² and the Defence misconstrued the legal standard applicable to certification.³³

²⁵ Defence Motion for Certification of Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Motion for Certification"), 13 June 2011.

²⁶ Motion for Certification, para 10.

²⁷ Decision on Extremely Urgent Motion for Reconsideration of the Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Decision on Motion for Reconsideration"), 15 June 2011.

²⁸ Decision on Motion for Reconsideration, paras. 35-36.

²⁹ Decision on Motion for Reconsideration, paras. 36, 38.

³⁰ Prosecution Response to Defence Motion for Certification of the Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Response to Motion for Certification"), 20 June 2011.

³¹ Response to Motion for Certification, para. 6.

³² Response to Motion for Certification, paras. 18-28.

³³ Response to Motion for Certification, paras. 11-14.



12. On 23 June 2011, the Defence filed its reply to the Prosecution Response to the Motion for Reconsideration.³⁴ The Defence submits, *inter alia*, that the test for certification has been met.³⁵

DELIBERATIONS

Law on Certification

13. The Chamber recalls that certification to appeal is a matter of Trial Chamber discretion and is only warranted under exceptional circumstances.³⁶ Indeed, decisions rendered under Rule 73 of the Rules of Procedure and Evidence ("Rules") "are without interlocutory appeal save with certification by the Trial Chamber." According to Rule 73(B) the Chamber may grant certification to appeal a decision if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.³⁷ Certification to appeal may be granted only if both criteria are satisfied.³⁸

14. In considering whether to grant certification for appeal, the Chamber need not determine whether the Impugned Decision is correct.³⁹ Rather, the Chamber must determine whether the issue is one that merits certification under Rule 73(B).⁴⁰

³⁴ Reply to Prosecutor's Response to Defence Motion for Certification of the Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Reply to Motion for Certification"), 23 June 2011.

³⁵ Reply to Motion for Certification, paras. 20-28.

³⁶ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Mathieu Ndirumpatse's Request for Certification to Appeal the Order of 17 April 2008 on the Presentation of the Defence Case (TC), 14 May 2008, para. 4 ("The Appeals Chamber recognizes the discretionary powers of the Trial Chamber over Rule 73(B) procedures and regularly emphasizes that requests for certification to appeal are only warranted under exceptional circumstances."). See also *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-R75, Decision on Motion for Reconsideration of Decision on Motion from Eliézer Niyitegeka for Disclosure of Closed Session Testimony and Evidence Under Seal, or Alternatively for Certification to Appeal (TC) ("Niyitegeka Decision of 13 May 2008"), 13 May 2008, para. 15; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-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 (TC), 22 May 2007, para. 6.

³⁷ *Prosecutor v. Nindiliyimana*, Case No. ICTR-00-56-T, Decision on Defence Request for Certification to Appeal the Chamber's Decision Pursuant to Rule 98bis (TC), 24 April 2007, para. 5.

³⁸ *Ibid.*

³⁹ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision on False Testimony (TC), 23 March 2007, para. 4; Niyitegeka Decision of 13 May 2008, para. 17; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC) ("Bagosora Decision of 16 February 2006"), 16 February 2006, para. 4; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Jerome Bicamumpaka's Application for Certification to Appeal the Trial Chamber's Decision on the Rule 92bis Admission of Faustin Nyagahima's Written Statement (TC), 22 August 2007, para. 4; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi's Motion for Certification to Appeal the *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-2000-55C-T

15. The Chamber notes at the outset that in partially granting the Motion for Reconsideration, the Chamber provided the Defence with sufficient time to properly investigate and prepare for the cross-examination of the Prosecution rebuttal witnesses by postponing the rebuttal case to a later date and allowing the Defence the opportunity to present witnesses in rejoinder.⁴¹ In doing so, the Chamber substantially mitigated any unfairness caused to the Accused. The Chamber is therefore of the view that the hearing of the rebuttal evidence does not significantly affect the fairness of the proceedings and does not consider the first prong of Rule 73(B) to have been satisfied.

16. Second, the Chamber agrees that the alibi defence is a pivotal and important aspect of the proceedings. The Chamber therefore considered it in the interest of justice to hear *all* evidence involved, including rebuttal and rejoinder evidence if the Defence so chooses. This does not, however, mean that all issues touching upon the Chamber's decision to hear evidence should be certified to the Appeals Chamber for resolution.

17. Rule 85 addresses the sequence in which evidence is to be heard and vests the Trial Chamber with discretion to decide whether and in what sequence to hear evidence, including rebuttal and rejoinder evidence.⁴² The Chamber will determine the weight to be attributed to the evidence at the close of the evidentiary phase. The Appeals Chamber has previously held that the Trial Chamber, as trier of fact, bears the primary responsibility for admission of evidence and that certification must be "the absolute exception when deciding on the admissibility of evidence."⁴³

18. Certification on the grounds advanced by the Defence would not, in the Chamber's view, be appropriate in respect to the Chamber's decision to hear further evidence on a specific aspect of the case, in the form of rebuttal witnesses. That assessment, which depends heavily on the nature of the evidence in relation to the Indictment and any subsequent timely,

Decision on Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen His Defence (TC), 23 July 2008, para. 6 (citations omitted).

⁴⁰ Prosecutor v. Nizeyimana, Case No. ICTR-2001-55C-PT, Decision on Prosecution's Motion for Certification to Appeal Decision on Prosecutor's Motion to Admit Into Evidence the Statement of General Marcel Gatsinzi (TC), 2 December 2010, para. 5.

⁴¹ Decision on Motion for Reconsideration, paras. 35-36.

⁴² Rule 85(A)(iii) and (iv).

⁴³ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC) ("Nyiramasuhuko Appeal Decision of 4 October 2004"), 4 October 2004, para. 5. *See also* *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Bagosora Request for Certification Concerning Admission of Prosecution Exhibit P-417 (TC), 15 November 2006, para. 2.

The Prosecutor v. Ildéphonse Nizeyimana, Case No. ICTR-2000-55C-T

6/7



7738

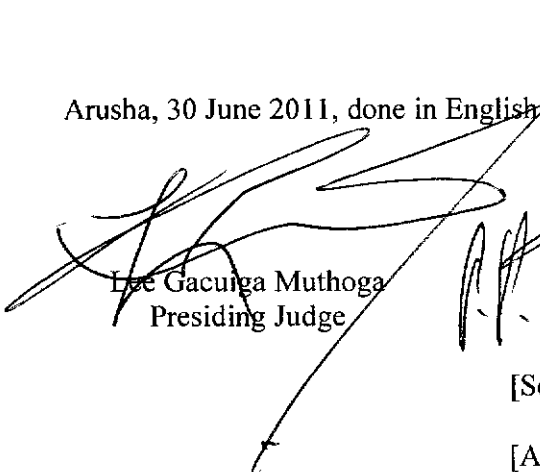
clear and consistent clarification of the material facts alleged against the Accused, involves an evaluation of factual questions which are primarily for the trier of fact to weigh.⁴⁴

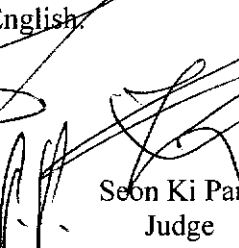
19. Moreover, the Chamber finds that certification to appeal is not granted in respect of types of decisions, but rather in respect of specific issues which merit the exceptional relief that is an interlocutory appeal. In the present case, the Chamber is not satisfied that the Impugned Decision raises an issue the immediate resolution of which by the Appeals Chamber would materially advance the proceedings. Consequently, the Chamber does not find that the Defence has discharged its burden of demonstrating the existence of exceptional circumstances warranting certification of the Decision pursuant to Rule 73 (B).

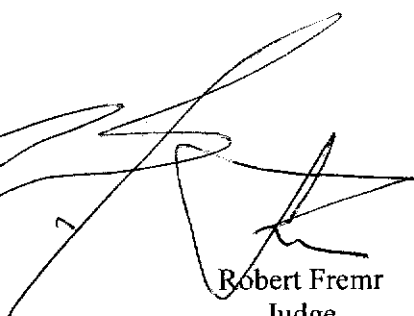
FOR THESE REASONS, THE CHAMBER

DENIES the Defence Motion for Certification.

Arusha, 30 June 2011, done in English.


Lee Gacumba Muthoga
Presiding Judge


Seon Ki Park
Judge


Robert Fremr
Judge

[Seal of the Tribunal]

[Absent at the time of
signing]



⁴⁴ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for Certification of Decision on Exclusion of Evidence (TC), 14 July 2006, para. 7. See also Nyiramasuhuko Appeal Decision of 4 October 2004 ("It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence.") (Citations omitted); Bagosora Decision of 16 February 2006, para. 5.