UNITED NATIONS
NATIONS UNIES

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: 7 July 2011

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

DECISION ON NIZEYIMANA DEFENCE MOTION FOR RECALL OF PROSECUTION WITNESS AJP OR ADMISSION OF DOCUMENTARY EVIDENCE

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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 22 June 2011, the Defence team of the Accused, Ildéphonse Nizeyimana ("the Defence" and "the Accused" respectively) filed a motion to recall Prosecution Witness AJP, or alternatively to admit a prior statement made by the Witness into evidence, attached to the Motion as "Annexure 1".[1] The Defence submits that a signed statement by the Witness, received after the hearing of his testimony, differs significantly from his testimony in court.[2] The Defence therefore requests that Witness AJP be recalled for cross-examination on the prior statement.[3] Alternatively, the Defence requests that the prior statement, which details Witness AJP's involvement in the killing of a girl upon orders of the Accused, be admitted into evidence "in order to compare it with the witness' testimony [in court] when evaluating his credibility" pursuant to Rule 89(C) of the Rules of Procedure and Evidence ("Rules").[4]

3. On 27 June 2011, the Office of the Prosecutor ("Prosecution") filed its response.[5] The Prosecution submits that there exists no compelling reason to recall Prosecution Witness AJP, as the cross-examination already covered this very issue.[6] The Prosecution opposes Annexure 1 being admitted as a Defence exhibit pursuant to Rule 89(C). Alternatively, the Prosecution submits that if the statement is to be admitted, it ought to be admitted in whole "as an exhibit [to be] reviewed by the Chamber as such."[7]

4. On 29 June 2011, the Defence filed its reply, reiterating the arguments set forth in the Defence Motion.[8] The Defence further requests that if Witness AJP is recalled, the cross-examination take place just prior to the rebuttal evidence,[9] which is scheduled to be heard on 7 and 8 September 2011.

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[1] Nizeyimana Defence Motion for Recall of Prosecution Witness AJP or Admission of Documentary Evidence ("Defence Motion"), 22 June 2011.
[2] Defence Motion, paras. 14-22.
[3] Defence Motion, para. 22.
[4] Defence Motion, para. 24.
[5] Prosecutor's Confidential Response to Defence Motion for Recall of Prosecution Witness AJP or Admission of Documentary Evidence ("Prosecution Response"), 27 June 2011.
[6] Prosecution Response, para. 15.
[7] Prosecution Response, para. 16.
[8] Reply to Prosecution Response to Nizeyimana Defence Motion for Recall of Prosecution Witness AJP or Admission of Documentary Evidence ("Defence Reply"), 29 June 2011, paras. 3-4.
[9] Defence Reply, para. 5.

DELIBERATIONS

Standard for the Recall of a Witness

5. The Chamber notes that the Rules do not explicitly provide for the recall of a witness by either party. In other words, the recall of a witness is not an automatic right bestowed upon a party and will only be granted in exceptional circumstances. According to the jurisprudence of this Tribunal, a party seeking to recall a witness must demonstrate that there exists "good cause" warranting such a measure.[10] In assessing good cause, the Chamber must carefully consider: 1) the purpose of the proposed testimony; and 2) the party's justification for not having offered such evidence when the witness originally testified. The right to be tried without undue delay as well as concerns of judicial economy demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature.[11]

6. Further jurisprudence has elaborated that recall may be warranted in order to demonstrate inconsistencies between the testimony of a witness and any statement obtained subsequently, if the moving party can show that prejudice would result from the inability to put such inconsistencies to the witness.[12]

7. The Defence seeks to recall Witness AJP on the basis that his account in that statement regarding the murder of a girl on the orders of the Accused "differs significantly from his testimony."[13] Specifically, Witness AJP testified that he killed the girl with a knife, whereas in Annexure 1 he states that he killed the girl with a rifle.[14] The Defence admits that this contradiction was explored on cross-examination "to some extent" on the basis of other

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[10] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 2; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination (TC), 28 October 2004, para. 5; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Recall Ahmed Mbonyunkiza (TC), 25 September 2007, para. 5. *See also Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Decision on the Defence Motion for the Re-examination of Defence Witness DE (TC), 19 August 1998, para. 14; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to recall Prosecution Witness BTH (TC), 12 March 2008, para. 5.

[11] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Prosecution Motion to Recall Witness Nyanjwa (TC), 29 September 2004, para. 6.

[12] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 8.

[13] Defence Motion, para. 21.

[14] *Ibid.*

documents, but it submits that it did not have the opportunity to do so on the basis of the signed statement now in the possession of the Defence.[15]

8. The Chamber notes that the Defence did indeed cross-examine Witness AJP on whether he killed the girl by means of a gun or by means of a knife, using a variety of documents as a basis for doing so.[16] The Chamber is of the view that any further questioning of Witness AJP on this issue would be cumulative in nature and of little probative value. The Defence has already had the opportunity to explore this very same contradiction with Witness AJP on the basis of other documents. The Chamber therefore finds that the Defence has not discharged its burden of demonstrating that it will suffer any prejudice if Witness AJP is not recalled. In light of the circumstances, the Chamber finds no compelling circumstances justifying the extraordinary measure of recalling Witness AJP.

Admission of Witness Statement

9. As an alternative to recalling Witness AJP, the Defence requests that the statement attached to its motion as Annexure 1 be admitted into evidence.[17] The Chamber notes that the Defence does not cite any case law in support of its submission that a witness statement can be admitted pursuant to Rule 89(C) to buttress a line of questioning already pursued during cross-examination four months before.

10. Indeed, the Chamber notes that an application for the admission of a written statement of a witness is governed by Rule 92*bis*, and not Rule 89(C) only.[18] The Appeals Chamber held in the context of a hearsay-statement that "[a] party cannot be permitted to tender a written statement [...] under Rule 89(C) in order to avoid the stringency of Rule 92*bis*."[19] The Chamber therefore declines to admit Witness AJP's written statement pursuant to Rule 89(C). Moreover, the Chamber notes that even if it were to exercise its discretion under Rule 89(C), it does not consider Witness AJP's prior statement to be of sufficient relevant and probative value to warrant its admission into evidence, considering the plethora of evidence and testimony already available to the Chamber on the subject.

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[15] *Ibid.* Indeed, the Defence noted that the Witness "admittedly had some opportunity to explain himself on the contradictions during his cross-examination on the basis of other documents...". Defence Motion, para. 24.
[16] T. 17 February 2011, pp. 2-13.
[17] Defence Motion, para. 24.
[18] *See e.g., Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admission of Statement of Kabiligi Witness under Rule 89(C) (TC), 14 February 2007, para. 3.
[19] *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C) (AC), 7 June 2002 ("Galić Decision of 7 June 2002"), para. 31. *See also Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T Decision on the Prosecution Motion for Admission of Witness Statements (Rules 89(C) and 92 *bis*) (TC), 20 May 2004, para. 23-28; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Prosecutor's Motion to Remove From her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses (TC), 22 January 2003, para. 20.

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FOR THESE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 7 July 2011, done in English.

Lee Gacuiga Muthoga	Seon Ki Park	Robert Fremr
Presiding Judge	Judge	Judge

[Seal of the Tribunal]