



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-05-88/2-T

Date: 13 January 2012

Original: English

IN TRIAL CHAMBER II

Before: Judge Christoph Flügge, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: Mr. John Hocking

Decision of: 13 January 2012

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

DECISION ON DEFENCE REQUEST FOR CERTIFICATION TO APPEAL

Office of the Prosecutor

Mr. Peter McCloskey

The Accused

Zdravko Tolimir

I. PROCEDURAL BACKGROUND

1. On 4 November 2011, the Chamber issued its “Decision on Prosecution’s Request for Reconsideration of the Admission of Written Evidence of Witness No. 39 pursuant to Rule 92 *bis*” (“Impugned Decision”). On 22 November 2011, Zdravko Tolimir (“the Accused”) submitted a request for certification to appeal the Impugned Decision,¹ filed in English on 24 November 2011 (“Request”). The Prosecution response was filed on 5 December 2011 (“Response”).²
2. The procedural history of the Impugned Decision is set out in detail therein, and shall not be repeated here.

II. SUBMISSIONS

A. Request

3. The Accused requests certification to appeal the Impugned Decision pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”), submitting that: 1) neither the conditions for reconsideration nor the conditions for admission of evidence pursuant to Rule 92 *bis* were met in this specific instance;³ 2) it is inappropriate to redact parts of the evidence of a witness relating to acts or conduct of the Accused when that witness is available for testimony;⁴ and 3) the Prosecution’s submission requesting the admission of Witness No. 39’s evidence was made at a late stage of the proceedings and should have been a factor weighing against the admission of the evidence.⁵
4. The Accused submits that the admission of the evidence pursuant to Rule 92 *bis* is an “important matter” and “might significantly affect the outcome of the proceedings”.⁶ The Accused submits that despite the fact that a possible conviction of the Accused cannot be based solely on evidence pursuant to Rule 92 *bis*, the evidence, “by its nature, may influence the Trial Chamber about relevant circumstances”.⁷ The Accused asserts that he challenges the evidence given by Witness No. 39, and that “[a]lthough the Trial Chamber will decide about these circumstances at the

¹ Request for Leave to Appeal the Decision on the Prosecution’s Request for Reconsideration of Admission of Written Evidence of Witness No. 39 pursuant to Rule 92 *bis*.

² Prosecution Response to the Accused’s Request for Certification to Appeal the Decision on the Prosecution’s Request for Reconsideration of Admission of Written Evidence of Witness No. 39.

³ Request, para. 3.

⁴ Request, para. 3.

⁵ Request, para. 6.

⁶ Request, para. 4.

⁷ Request, para. 4.

end of the proceedings,” the admission of this evidence “may potentially have a significant affect (*sic*) on the final outcome of the proceedings” within the meaning of Rule 73(B).⁸

5. The Accused submits that admitting the prior testimony of Witness No. 39 containing redactions of the acts and conduct of the Accused while Witness No. 39 is in fact available for testimony deprives the Chamber of “relevant information which might affect the outcome of the proceedings”.⁹ The Accused further contends that a decision by the Appeals Chamber on the admission of Witness No. 39’s evidence in this form would significantly advance the proceedings.¹⁰

6. Finally, the Accused submits that the decision to admit the evidence of Witness No. 39, despite the fact that the Prosecution’s motion seeking its admission was filed at a late stage of the proceedings, is an issue which may affect the fair conduct of the proceedings.¹¹ It is the position of the Accused that while the Rules do not limit submission of motions seeking admission of evidence pursuant to Rule 92 *bis* to a particular phase of the proceedings, “it is in keeping with the requirements of the proper administration of justice and requests for fairness to discuss and decide on the Prosecution’s requests pursuant to Rule 92 *bis* during the pre-trial phase of the proceedings”.¹² The Accused asserts that a decision of the Appeals Chamber on the matter may materially advance not only the proceedings in the *Tolimir* trial, “but also other proceedings and it is of importance for the further development of the jurisprudence of the Tribunal”.¹³

B. Response

7. The Prosecution submits that none of the issues raised by the Accused, individually or cumulatively, satisfy the conditions for certification, and that consequently, the Request should be dismissed.¹⁴

8. According to the Prosecution, the Accused’s arguments with respect to the Chamber’s decision to reconsider the admission of Witness No. 39’s evidence pursuant to Rule 92 *bis* merely reflect his disagreement with this decision.¹⁵ The Prosecution submits in this regard that the Accused fails to identify a specific issue regarding the Chamber’s application of the reconsideration standard which would have a significant impact on the fair and expeditious conduct of the

⁸ Request, para. 4.

⁹ Request, para. 5.

¹⁰ Request, para. 5.

¹¹ In this regard, the Accused argues that motions pursuant to Rule 92 *bis* should be filed and decided upon during the Pre-Trial phase of the proceedings. Request, para. 6.

¹² Request, para. 6.

¹³ Request, para. 6.

¹⁴ Response, paras. 1, 4.

¹⁵ Response, para. 5.

proceedings or the outcome of the trial.¹⁶ Similarly, the Prosecution asserts that other than expressing his dissatisfaction with the admission of unfavourable evidence the Accused fails to identify any issue arising from the Chamber's application of the Rule 92 *bis* criteria, and likewise does not establish how this admission could affect the outcome of the trial.¹⁷

9. The Prosecution asserts that the Accused has failed to demonstrate how the exclusion of the portions of Witness No. 39's testimony concerning the acts and conduct of the Accused would significantly impact the fairness of the proceedings.¹⁸

10. In response to the argument that the Prosecution's motion to admit Witness No. 39's evidence pursuant to Rule 92 *bis* was filed at a late stage of the proceedings, the Prosecution submits that it has consistently sought to introduce the evidence of Witness No. 39, first through Rule 92 *ter* in March of 2009 and subsequently pursuant to Rule 92 *bis* in April 2010, shortly after the Prosecution opened its case, and that at no point did the Accused object to the timeliness of the Prosecution's requests.¹⁹ According to the Prosecution, the Accused's assertion lacks support and fails to demonstrate how the fairness of the proceedings or outcome of the trial would be compromised by the timing of the Prosecution's request to seek admission of Witness No. 39's evidence pursuant to Rule 92 *bis*.²⁰

III. APPLICABLE LAW

11. The Chamber recalls that even where an important point of law is raised,²¹ Rule 73(B) precludes certification unless the Chamber finds that both of the following criteria are satisfied: 1) that the decision involved an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and 2) that, in the opinion of a Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. Certification remains in the discretion of the Trial Chamber, despite the fulfilment of these two criteria.²² Finally, certification pursuant to Rule 73(B) is not concerned with whether a decision was

¹⁶ Response, para. 5.

¹⁷ Response, para. 6.

¹⁸ Response, para. 7.

¹⁹ Response, para. 8.

²⁰ Response, para. 8.

²¹ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's Application for Certification to Appeal Decision on Motions for Extension of time: Rule 92 *bis* and Response Schedule, 8 July 2009, para. 11.

²² *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Tolimir's Motion for Leave to File an Appeal Against Decision Regarding Second Amended Indictment, 19 February 2009, pp. 3–4; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

correctly reasoned or not, as this is a matter for appeal, be it an interlocutory appeal or one after the final judgement has been rendered.²³

IV. DISCUSSION

12. In the Impugned Decision, the Chamber found that the criteria for admission of the transcript of Witness No. 39's testimony in the *Popović et al.* case pursuant to Rule 92 *bis* were met and that the witness need not appear for cross-examination.²⁴ It concluded, in this respect, that a reconsideration of its decision denying admission of Witness No. 39's evidence pursuant to Rule 92 *bis*²⁵ was necessary to prevent an injustice.²⁶ Accordingly, the Chamber admitted the transcript of Witness No. 39's testimony in the *Popović et al.* case pursuant to Rule 92 *bis*, ordering a redaction of specific portions of the testimony relating to the acts and conduct of the Accused, in accordance with Rule 92 *bis*(A).²⁷

13. The Accused has presented several arguments on the basis of which he seeks certification to appeal the Impugned Decision. Two of these challenges clearly pertain to the correctness of the Chamber's reasoning, namely, the Chamber's alleged misapplication of the standard for reconsideration, and its alleged misapplication of Rule 92 *bis* criteria. The Accused does not identify how the Impugned Decision, in this respect, would satisfy the cumulative criteria of Rule 73(B). The Chamber emphasises that whether the Impugned Decision was correctly reasoned is not at issue here, and thus the Chamber will not address these two submissions in this decision.

14. With respect to the argument that the late timing of the Prosecution's motion seeking admission of Witness No. 39's evidence pursuant to Rule 92 *bis* should have been a factor weighing against its admission, the Chamber considers that although disposing of such decisions before the start of the Prosecution case or in its early phase is beneficial to both parties, in light of the fact that the Defence case is yet to start, the timing of the filing is not an issue that could affect the fair conduct of the proceedings or the outcome of the trial.

15. The remaining issue at hand is the question of whether the admission of evidence of Witness No. 39 pursuant to Rule 92 *bis*, with redactions covering the acts and conduct of the Accused, while

²³ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Defence Request for Certification to Appeal the Trial Chamber's "Decision on Defence Request for Extension of time to Response to Second Prosecution Motion for Judicial Notice of Judicial Facts", 20 May 2009, para. 2; *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 Proceedings, 20 June 2005, para. 4.

²⁴ Impugned Decision, paras. 21–23.

²⁵ Partial Decision on Prosecution's Rule 92 *bis* and Rule 92 *ter* Motion for Five Witnesses, 27 August 2010, para. 35.

²⁶ Impugned Decision, para. 24.

the witness is in fact available to testify, would deprive the Chamber of relevant information, and thus amount to 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 Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

16. Firstly, the Chamber notes that redacting portions of evidence concerning the acts and conduct of an accused when admitting evidence pursuant to Rule 92 *bis* is done with the sole purpose of protecting the rights of an accused, given that such admission means he does not have the availability to confront his accuser. The question of whether the Chamber should instead have called Witness No. 39 to appear for testimony calls for an analysis of the Chamber's reasoning in applying the criteria of Rule 92 *bis*. Such a review is not required for the purposes of deciding on a request for certification to appeal. Secondly, the Chamber notes that the Accused's contentions with the redactions of Witness No. 39's prior testimony are based on his position that the redacted portions of the transcript are 1) helpful to the Accused's case, and 2) relevant to the Chamber's understanding of Witness No. 39's evidence. The Chamber recalls that it held, in the Impugned Decision, that these portions are not essential for the Chamber's understanding of Witness No. 39's evidence.²⁸ Moreover, as the Defence case is yet to start, the Accused thus has every opportunity to present evidence on any of the matters that are the subject of the redacted portions of Witness No. 39's evidence, if he considers them helpful to the Defence case.²⁹

17. On the basis of the above, the Chamber finds that the Accused has failed to identify any issues in the Impugned Decision that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and has failed to demonstrate how an immediate resolution by the Appeals Chamber may materially advance the proceedings.

²⁷ Impugned Decision, paras. 24–25.

²⁸ Impugned Decision, para. 22. The Chamber considers that a distinction must be drawn between evidence that is relevant, and evidence which is essential to its understanding of a witness's testimony. *Ibid.*

²⁹ In the view of the Chamber, Rule 89(F) allows would provide a channel for the Accused to seek to admit the entire statement of Witness No. 39 into evidence, or the redacted portions thereof.

V. DISPOSITION

18. For these reasons, pursuant to Rules 73(B) of the Rules, the Chamber hereby **DENIES** the Request, by majority, Judge Nyambe dissenting, with reasons to follow.

Done in English and French, the English text being authoritative.



Judge Christoph Flügge

Presiding Judge

Dated this thirteenth day of January 2012
At The Hague
The Netherlands

[Seal of the Tribunal]