

ICTR-07-91-T
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UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER III

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

Registrar: Mr. Adama Dieng

Date: 18 February 2009

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THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-T

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE
CHAMBER'S ORAL DECISION OF 9 FEBRUARY 2009 DENYING AN
ADJOURNMENT OF THE PROCEEDINGS**

Rules 54, 66, 68, 73, and 77 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Paul Ng'aura
Abdoulaye Seye
Dennis Mabura
Marie Ka

For the Accused:

Allison Turner

INTRODUCTION

1. By way of motion filed on 5 February 2009, the Defence sought to stay the proceedings until thirty days after the Prosecutor has fully complied with his disclosure obligations under Rules 66 and 68 of the Rules of Procedure and Evidence ("Stay Motion").¹
2. During the course of the proceedings on 9 February 2009, the Defence moved orally, in the absence of a decision on the Stay Motion, for the Chamber to adjourn the proceedings due to the alleged disclosure violations. The Chamber ruled orally to deny the Defence motion for adjournment ("Impugned Decision"), concluding that witnesses could be recalled if necessary.² Further, the Chamber advised that it was already in possession of the Defence Stay Motion and would issue a decision shortly. A decision on the Stay Motion was issued on 10 February 2008.³ The Defence seeks reconsideration, or in the alternative, certification to appeal the Impugned Decision ("Motion").⁴
3. The Prosecutor objects to the Motion, submitting that the Defence is endlessly re-litigating the same issue and that the tests for reconsideration and certification to appeal are not met.⁵

DISCUSSION

The Applicable Law

4. Though reconsideration is not expressly provided for in the Statute or the Rules, the Trial Chamber has an inherent power to reverse or revise a prior decision where new material circumstances have arisen that did not exist at the time of the original decision, or where the decision was erroneous and has caused prejudice or injustice to a party.⁶ Further, it is for the

¹ *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-T, "Motion for Stay of Proceedings Due to the On-going Violation of the Prosecutor's Disclosure Obligations," filed 5 February 2009.

² Insert transcript reference if possible.

³ *Nshogoza*, Decision on Defence Motion for Order to Prosecutor to Comply with his Disclosure Obligations and Motion for Stay of Proceedings Due to the On-going Violation of the Prosecutor's Disclosure Obligations, 10 February 2008 ("Decision on Stay Motion").

⁴ *Nshogoza*, "Defence Request for Reconsideration, or, in the alternative, Certification to Appeal the Trial Chamber's Oral Decision of 9 February 2009 Denying a Postponement of Proceedings Due to Disclosure Violations," filed 12 February 2009 ("Motion").

⁵ *Nshogoza*, "Prosecutor's Response to 'Defence Request for Reconsideration, or, in the Alternative, Certification to Appeal the Trial Chamber's Oral Decision of 9 February 2009 Denying a Postponement of Proceedings Due to Disclosure Violation'," filed 16 February 2009 ("Prosecutor's Response").

⁶ *Prosecutor v. Bizimungu et al.*, 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), 26 April 2007, para. 7; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions, 8 November 2007, para. 6; *Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera et al.*, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005, para. 3; *Karemera et al.*, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8 (note also the authorities cited in footnotes contained within that paragraph).

party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.⁷

5. Rule 73 (B) of the Rules provides that decisions on motions brought pursuant to Rule 73 are without interlocutory appeal, unless certified by the Trial Chamber.

6. The Chamber may grant certification "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or 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."⁸ However, the decision to certify is discretionary and should remain exceptional, even where the criteria for certification are met.⁹

7. The correctness of the decision is a matter for the Appeals Chamber. Trial Chambers need not consider the merits of the impugned decision; but rather, whether the moving party has demonstrated that the criteria set out in Rule 73 (B) have been met.¹⁰ However, the Trial Chamber can revisit the substance of the impugned decision to the extent that this is done within the context of determining whether the Rule 73 (B) criteria are met.¹¹ Arguments which were not advanced in the original motion cannot form the basis for certification to

⁷ See *Prosecutor v. Nzirorera et al.*, Case No. ICTR-98-44-T, Decision on the Defence Motion for Reconsideration of Sanctions Imposed on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago, 10 October 2003, para 6.

⁸ Rule 73 (B).

⁹ *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-95-14-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, 13 May 2008, para. 15; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-00-50-T, 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.3 (citations omitted); *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, 9 October 2007, para. 6; *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. 3.

¹⁰ *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision on False Testimony, 23 March 2007, para. 4; *Karemera et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Motion for Subpoena to President Paul Kagame, 15 May 2008, para. 2; *Niyitegeka*, 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, 13 May 2008, para. 17; *Prosecutor v. Theoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, 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 20089, para. 6 (citations omitted).

¹¹ *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, para 4; *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para 5; *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 20089, 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.

appeal.¹² Nor is the burden of proving the criteria for certification discharged by merely repeating arguments advanced in the original motion.¹³

8. A Trial Chamber may grant certification to appeal a decision in its entirety, or limit the certification to one or more specific issues in the decision.¹⁴

Should the Chamber Reconsider the Impugned Decision?

9. The Defence requests that the Chamber reconsider the Impugned Decision on the basis that there are new material circumstances that did not exist at the time its decision was rendered.¹⁵ According to the Defence, the new material circumstance is that the Chamber ordered the Prosecutor to unseal original audio recordings of interviews with Witness GAA, and allow the Defence access to the tapes.¹⁶ The Defence submits that the Chamber now has before it, confirmation that Witness GAA “is poised to testify without the Defence having heard the three hours of the original 29 September 2005 interview with GAA, nor the (approx) hour-long OTP interview with GAA....”¹⁷

10. The Chamber does not consider that this amounts to a new material circumstance. At the time the Chamber made the Impugned Decision, the Chamber was already seized of the Stay Motion and the “Extremely Urgent Defence Motion for Order to the Prosecution to Fully and Immediately Comply with 22 December 2008 Disclosure Court Order and other Disclosure Obligations” (“Urgent Disclosure Motion”) in which the Defence submitted that there were problems with the quality of the audio recordings of the 9 August 2007 and 29 September 2005 interviews with Witness GAA.¹⁸ Further, the Chamber had in its possession the Prosecutor’s Response to the Urgent Disclosure Motion, in which the Prosecutor advised that the original recordings were sealed but that he had no objection to unsealing the tapes so that the Defence could compare the originals with the disclosed copies.¹⁹ The Chamber notes that since the filing of the Motion, the Defence has been able to compare the original recording with the copy disclosed by the Prosecutor.²⁰

11. In the view of the Chamber, its decision to unseal the tapes, based on the information that was already before it, does not amount to a new material circumstance warranting reconsideration of the Impugned Decision.

¹² *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para. 3.

¹³ *Ndindiliyimana et al.*, Decision on Nzuwonemeye’s Request for Certification to Appeal the Chamber’s Decision of 29 February 2008, 22 May 2008, para. 7.

¹⁴ *Karemera et al.*, Decision on Joseph Nzirorera’s Application for Certification to Appeal Decision on Eleventh Rule 68 Motion, 10 November 2008, para. 3.

¹⁵ Motion, para. 1.

¹⁶ Motion, para. 10.

¹⁷ Motion, paras. 10-11.

¹⁸ *Nshogoza*, “Extremely Urgent Defence Motion for Order to the Prosecution to Fully and Immediately Comply with 22 December 2008 Disclosure Court Order and Other Disclosure Obligations,” filed 29 January 2009.

¹⁹ *Nshogoza*, Prosecutor’s Response to “Extremely Urgent Defence Motion for Order to the Prosecution to Fully and Immediately Comply with 22 December 2008 Disclosure Court Order and other Disclosure Obligations pursuant to Rules 41, 54, 66, 68 and 73 of ICTR Rules of Procedure and Evidence,” filed 4 February 2009.

²⁰ “Inspection of GAA Audio Cassettes/Waiver Forms and Evidence Receipt Forms,” filed by the Prosecutor, 13 February 2009.

II) Should the Chamber Certify the Impugned Decision for Appeal?

12. The Defence asserts that the decision affects the fair and expeditious conduct of the proceedings because a postponement of the trial would ensure that outstanding disclosure issues would be addressed, and that the recall of witnesses could be avoided.²¹ In addition, the Defence submits that a decision by the Appeals Chamber would materially advance the proceedings because it would "ensure that the trial continues on the correct legal footing, and ensure that witnesses do not have to be recalled and re-heard."²²

13. The Defence continues to allege disclosure violations. The Chamber has addressed the various Defence disclosure-related motions as they have been filed; and, following the filing of the Urgent Disclosure Motion, the Chamber ordered the Prosecutor to certify that he has complied with his Rule 66 and 68 disclosure obligations.²³ The Prosecutor's certification was filed on 9 February 2009 and, in his Response, the Prosecutor maintains that he has already disclosed the documents and statements in his possession.²⁴ Moreover, on 10 February 2009, the Chamber, having considered the Defence submissions, issued a decision denying the Stay Motion, in which on the Defence sought a stay of proceedings due to alleged disclosure violations.²⁵

14. Since the Chamber has addressed disclosure matters as they have arisen, and as the Chamber can recall Witness GAA or provide other remedies should it find that the Prosecutor has violated his disclosure obligations, the Chamber is not satisfied that the Impugned Decision involves an issue which would significantly affect the fair and expeditious conduct of the proceedings, or outcome of the trial.

FOR THESE REASONS, the Chamber

DENIES the Motion in its entirety.

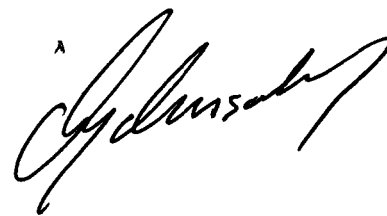
Arusha, 18 February 2009



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Aydin Sefa Akay
Judge

[Seal of the Tribunal]



²¹ Motion, paras. 23, 24.

²² Motion, para. 25.

²³ *Nshogoza*, Order for the Prosecution to Conduct a Thorough Review and Certify that it has Complied with its Disclosure Obligations, 5 February 2009.

²⁴ *Nshogoza*, "Prosecutor's Certification of Compliance with Trial Chamber's Order of 5 February 2009 Regarding Disclosure Obligations, 9 February 2009; Prosecutor's Response, para. 11.

²⁵ Decision on Stay Motion. The Chamber found, among other things, that the Accused had not demonstrated prejudice in respect of the Rule 66 disclosures and that a stay of the proceedings was not therefore warranted.