



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-44-T
06-12-2010
(52466 - 52461)

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OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 6 December 2010

THE PROSECUTOR

v.

Édouard KAREMERA
Matthieu NGIRUMPATSE

Case No. ICTR-98-44-T

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**DECISION ON PROSECUTOR'S REQUEST FOR CLARIFICATION OF TRIAL
CHAMBER'S "DECISION ON THE PROSECUTION MOTION FOR ADMISSION
INTO EVIDENCE OF POST-ARREST INTERVIEWS WITH JOSEPH NZIRORERA
AND MAT[THIEU] NGIRUMPATSE"**

Rule 89 (C) and 95 of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 2 November 2007, this Chamber rendered its Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mat[t]hieu Ngirumpatse ("Decision")¹. In the Decision, the Chamber denied the admission into evidence of transcripts of post-arrest interviews with Ngirumpatse that investigators from the Office of the Prosecutor ("OTP") conducted on 15, 16, and 17 June 1998, finding that it would be "antithetical to the integrity of the proceedings and the right of the accused to a fair trial."² The Chamber determined that there was no indication and therefore "substantive doubt" that Ngirumpatse was informed of the charges against him according to Article 20 (4) (a) of the Statute.³ The Chamber further held that it would be antithetical to the integrity of the proceedings to admit parts of the interview before Ngirumpatse had determined whether to testify in his own defence.⁴
2. On 12 November 2010 the Prosecution filed a request for clarification of the Decision, seeking explicit authorization from the Chamber to rely on the transcripts and audio-recordings of Matthieu Ngirumpatse's statement to OTP on 15, 16, and 17 June 1998.⁵ Alternatively, the Prosecution seeks reconsideration of the Decision.⁶ The Prosecution submits that the Chamber's Decision was made in the context of an application to admit the transcripts and audio-recordings as evidence in chief, and not as impeachment material for use in cross-examination if the Accused's sworn testimony is contradicted by his previously recorded statement.⁷ The Prosecution also argues that the Decision was limited to the stage of the trial at the time the Decision was made, and since that time Ngirumpatse has clearly indicated that he will testify in his own defence.⁸ At bottom, the Prosecution argues that the limited context of the Decision does not preclude the use of this material to challenge the credibility of Ngirumpatse in cross-examination.⁹

¹ *Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et. al."), Decision on the Prosecution's Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mat[t]hieu Ngirumpatse ("Decision"), 2 November 2007.

² *Ibid.*, para. 47.

³ *Ibid.*, paras. 41, 42.

⁴ Decision, para. 46.

⁵ Prosecutor's Request for Clarification of Trial Chamber's "Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mat[t]hieu Ngirumpatse", filed on 12 November 2010 ("Prosecutor's Request for Clarification"), para 1.

⁶ *Id.*

⁷ *Ibid.*, para. 15.

⁸ *Ibid.*, para. 22.

⁹ Prosecutor's Request for Clarification, para. 22.

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3. Matthieu Ngirumpatse argues that because the Chamber indicated that these materials were obtained by methods which cast substantial doubt on their reliability and that admission of these documents could harm the integrity of the proceedings, these materials cannot be admitted at any stage of the proceeding and that any other approach would seriously undermine Ngirumpatse's right to a fair trial.¹⁰
4. The Prosecution filed a response on 23 November 2010.¹¹

DELIBERATIONS

5. As a preliminary matter, there are no specific provisions in the ICTR's Rules of Procedure and Evidence that cover this issue. The Chamber is also mindful that there is a vast difference between national legal systems about the use of inadmissible prior statements. Generally, civil law systems do not distinguish between the use of prior statements of an accused being used for the purpose of testing the credibility of his evidence given in court and between its use in establishing the accused's guilt or innocence.¹² Some adversarial legal systems, such as England, also do not allow an accused to be cross-examined on an inadmissible confession.¹³ However, most adversarial legal systems hold that the prosecution is allowed to use otherwise inadmissible evidence in order to impeach the credibility of a testifying defendant.¹⁴ With this national law background, the Chamber examines the existing jurisprudence of international criminal tribunals.

6. Trial Chamber II of this Tribunal has determined that generally the use of prior statements during a witness's cross-examination as a method of challenging the credibility of that witness is allowed and should not be precluded if the statement is shown to be relevant and reliable.¹⁵ It further stated that there is no distinction between a witness and an accused who testifies on his own behalf.¹⁶ As long as the materials were admissible, that Chamber saw no reason to preclude any party from

¹⁰ Reponse de Matthieu Ngirumpatse a la Requete du Procureur aux fins d'eclaircissement et/ou Reconsideration de la Decision du 2 novembre 2007, filed 18 novembre 2010, paras. 11, 12.

¹¹ Prosecutor's Reply to Ngirumpatse's Response, filed 23 November 2010.

¹² *Prosecutor v. Mile Mrkšić, Miroslav Radić, and Veselin Šljivančanin*, Case No. IT-95-13/1-T, Decision Concerning the Use of Statements Given by the Accused, 9 October 2006 (TC), para. 36 ("Mrkšić Decision") and sources cited therein.

¹³ *Mrkšić Decision*, para. 35 and sources cited therein.

¹⁴ *Mrkšić Decision*, para. 34 and sources cited therein.

¹⁵ *Prosecutor v. Élie Ndayambaje, Joseph Kanyabashi, Pauline Nyiramasuhuko & Arsène Shalom Ntahobali, Sylvain Nsabimana & Alphonse Nteziryayo*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali using Ntahobali's Statements to Prosecution Investigators in July 1997, 15 May 2006(TC), para 60 ("Butare Decision").

¹⁶ *Ibid.*, para. 60.

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using interview transcripts for the purpose of cross-examining the Accused on issues pertaining to his credibility.¹⁷

7. Similarly, Trial Chamber II of the ICTY has determined that the use of statements "solely for the purposes of cross-examination as to credibility, need not involve the admission into evidence as an exhibit."¹⁸ Furthermore, that Chamber held that use of these types of statements "solely for the specific and limited purpose of assessing the credibility of the evidence actually given in the trial by that Accused would not be antithetical to the integrity of the proceeding."¹⁹ That Chamber found it "even less apparent that such use of the Statements of an Accused would seriously damage the integrity of the proceedings" finding that the proceedings would be open to great threat "if an Accused was not tested in cross-examination about an earlier account he had given which was materially inconsistent with his evidence given at trial."²⁰ Therefore, that Chamber found that:

Any scope for unfairness, given the proposed specific and limited use of the Statements in the trial, would appear at most to be somewhat scant and indirect, whereas the probative value may well be

¹⁷ *Ibid.*, para. 61.

¹⁸ *Mrkšić Decision*, 9 October 2006 (TC), para 25. This Chamber also agrees with that Chamber that "whether this issue is approached as a matter of mere procedure, or one of evidence" the underlying policies reflected in the Rules provide a "useful and appropriate guide" to the determination of the issue from either perspective. *Id.* at para. 25.

¹⁹ *Ibid.*, para 31.

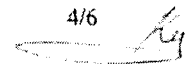
²⁰ *Mrkšić Decision*, para. 31. The Chamber stated:

That is so whether, for example, the inconsistency is explicable by confusion or lapse of memory given the lapse of years since the events, or to deliberate falsity of the evidence given in the trial. In the former case, without cross-examination on the inconsistency, a material but innocent error in the evidence of the Accused could go undetected. In the latter case, the Chamber may be misled by perjury concerning a material matter. Further, given the specific and limited purpose for which the earlier Statements of an Accused might be used, the potential probative value as to the credibility of the Accused given in the trial can hardly be substantially outweighed by the need to ensure a fair trial.

Id. The Chamber continued:

Viewed from another viewpoint, [. . .], it can hardly be considered necessary in the interests of fairness, or supportive of the integrity of trial proceedings, that an Accused's evidence in trial remain unquestioned, even though it may be directly contradicted by an earlier statement of the Accused. Of course, the Accused well knows the circumstances in which the earlier statement was made and any considerations which adversely affected the correctness or honesty of the earlier statement. If tested about material differences between his earlier statement and his evidence he is well able to draw attention to such matters with a view to satisfying the Chamber that the evidence given in the trial is truthful and reliable, notwithstanding any earlier inconsistent statement he had made.

Ibid., para 32.



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substantial and direct as to the credibility of the actual evidence the Accused elected to give in his own defence in trial.²¹

8. In the Decision, the Prosecution sought to use the transcripts and audio-recordings as substantive evidence against the Accused, *i.e.* as evidence considered in determining the guilt or innocence of Matthieu Ndirumpatse and Joseph Nzirorera, and that request was denied. However, Ndirumpatse has decided to testify on his behalf, and when an accused elects to give evidence in his defence, an issue which arises is the extent to which the Prosecution is able to test the credibility of that Accused because ultimately the Accused's testimony will have to be accepted or rejected.²² The Chamber recalls that Rule 90 (G) (i) provides that cross-examination is limited to the subject matter of three distinct areas, one of which being the credibility of the witness.

9. When reaching the Decision, the Chamber dealt with the motion and did not rule on any as yet unpled future possibilities. Matthieu Ndirumpatse has provided examples of case law in support of his argument, but the Chamber finds these decisions to be factually distinguishable from the current matter before the Chamber.²³ The Chamber recalls that it is not bound by the precedent coming from other Trial Chambers in the ICTR²⁴, and adopts the reasoning of Trial Chamber II only insofar as it holds that use of prior statements should not be precluded if they are probative and relevant.²⁵ In considering the issue of whether the transcripts and audio-recordings can be used for the specific and limited purpose of potential impeachment materials, the Chamber is persuaded by its brethren at the ICTY and adopts the same rationale in deciding that these documents may be used for such purposes.

10. The Chamber remains mindful of the overarching obligations to ensure a fair trial in reaching the present Decision. The transcripts and audio-recordings in question were given by Matthieu Ndirumpatse and deal with his role in the events which make up charges in the Indictment, so the content is clearly relevant and has probative value to the trial. The Chamber recalls that in denying the admission of the transcripts and audio-recordings, it had concerns about the methods by which

²¹ *Mrkšić Decision*, para. 31.

²² *Mrkšić Decision*, para. 30.

²³ See *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C) (TC), 14 October 2004, para. 19 (holding that an audio-recording and transcripts of an interview of Kabiligi taken by OTP were not *admissible* because the Prosecution has not discharged its burden to show that the provision of Rule 42(b) were met (*italics added*)); and *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-2001-63-T, Decision on the Prosecutor's Application to Admit into Evidence the Transcript of the Accused's Interview as a Suspect and the Defense's Request to Hold a *Voir Dire*, 3 February 2007 (TC), paras 21-25 (holding that transcripts of an OTP interview were not *admissible* because the Accused's right were not respected during the interview) (*italics added*). Neither decision mentions whether these transcripts could be used during a cross-examination of that Accused.

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²⁵ See *Butare Decision*, para 25.

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the interview was conducted, but concludes it does not need to reach any determination about whether those concerns are still valid or whether its decision regarding the admissibility of the transcripts and audio-recordings needs to be re-considered, given the limited ruling of this Decision.


11. The Chamber is not making any determination on the possible admissibility of these transcripts and audio-recordings at this stage but stating that the 2 November 2007 Decision does not preclude the interview transcripts from being used in the cross-examination of the Accused. If at some later point their admission into evidence is sought, the Chamber will consider all relevant Statute provisions and Rules and make a determination at that time. In light of the foregoing, the Chamber does not need to determine whether reconsideration of the Decision is warranted.


FOR THESE REASONS, THE CHAMBER

GRANTS the Prosecution's request to use the transcripts and audio-recordings of post-arrest interviews of Matthieu Ngirumpatse for the limited purpose of impeachment during the cross-examination of Matthieu Ngirumpatse.

Arusha, 6 December 2010, done in English.


P/ Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


P/ Vagn Joensen
Judge

