

In: KSC-BC-2020-06

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

Date: 2 April 2024

Language: English

Classification: Public

Public Redacted Version of Veseli Defence Request for Leave to Appeal Decision to Admit P1064 and P1065

Specialist Prosecutor's Office

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I. INTRODUCTION

1. In accordance with Article 45(2) of the Law¹ and Rule 77(2) of the Rules,² the Defence for Mr Kadri Veseli (“Defence”) hereby files this request for leave to appeal the Decision of 25 March 2024 admitting P1064 and P1065 (“Impugned Decision”).³
2. The Defence submits the following **issues** for certification:
 - a. **First issue:** Whether the Trial Panel erred in its Decision by improperly reversing the burden of proof.
 - b. **Second Issue:** Whether the Trial Panel erred in its Decision by making findings of fact not based upon evidence or reasonable inference.

II. APPLICABLE LAW

3. Pursuant to Article 45(2) and Rule 77(2), a right to appeal only arises if the standard of certification set forth therein has been met.
4. Rule 77(2) states that:

The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.
5. The Defence recalls the legal test set for certification of appeal under Rule 77(2) has been developed in prior decisions issued by this Court, which are incorporated herein by reference.⁴

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (“Law”).

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

³ Transcript of 25 March 2024, T. 13519.15 – 13522.24 (“Impugned Decision”).

⁴ F01678, *Decision on Veseli and Krasniqi Defence Request for Certification to Appeal the Second Decision on Specialist Prosecutor’s Bar Table Motion*, 17 July 2023, public, paras 9-11; F01237, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8;

III. SUBMISSIONS

6. The **Two Issues** satisfy the requirements for leave to appeal. They arise from the Impugned Decision, do not merely disagree with said Decision, are liable to significantly affect the fair and expeditious conduct of the proceedings and require immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

A. The Issues Arise from the Impugned Decision

i. First Issue

7. The Trial Panel erred in its Decision by improperly reversing the burden of proof. Despite initially articulating the correct burden of proof, the Panel, in actuality, in both its reasoning and Decision, unlawfully reversed it. The Panel stated;

“[T]hough the Defence bears no burden in this regard, the Panel finds that the Defence has not offered any credible explanation as to why the documents should be taken to be anything other than records of intelligence and counter-intelligence gathering conducted by unknown individuals in respect of individuals suspected of collaboration with Serb authorities or Serb officials.”⁵

8. This is an incorrect misstatement of the burden. Under Rule 138, it is incumbent upon the Prosecution to prove that the four requirements stated therein are satisfied.⁶ It is for the Prosecution to prove a document is what it purports to be; it is not for the Defence to show that it is not.

9. It was, therefore, for the SPO to prove that P1064 and P1065 were “records of intelligence and counter-intelligence gathering conducted by unknown individuals in respect of individuals suspected of collaboration with Serb

F00172, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17. See also, KSC-BC-2020-07, F00423, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00372, *Decision on Haradinaj Defence’s Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14.

⁵ Transcript of 25 March 2024, T.13520.24-T.13521.4.

⁶ Rule 138(1) of the Rules.

authorities or Serb officials.”⁷ It was not for the Defence to show that they were not. The SPO proffered no evidence in support of the proposition and as such failed to meet its burden.

10. The Panel also found “There is no indication that the documents have been tampered with or that they are anything other than contemporaneous records of the information they contain.”⁸ This again misstates the burden. It is not for the Defence to prove that these were not contemporaneous; it is for the SPO to prove they were. The SPO proffered no evidence in support of the proposition and as such failed to meet its burden – a fact unrecognised by the Panel in rendering the Impugned Decision.

11. It is not for the Defence to show the documents have been tampered with; it is for the Prosecution to prove authenticity under Rule 138. The Panel improperly reversed the burden of proof and committed a fundamental error of law in reaching the Impugned Decision.

ii. Second Issue

12. The Trial Panel erred in its Decision by making factual findings not based upon evidence, or reasonable inference.

13. Firstly, the Panel noted that “[t]he SPO indicated that the documents were seized by Serbian authorities and then provided them to the [REDACTED], which the Defence is not disputing.”⁹ There is, in fact, no evidence whatsoever as to whether, where, when or by whom P1064 was seized. Further, there is no witness statement from the Serbian authorities accompanying the provision of this exhibit to the

⁷ Transcript of 25 March 2024, T.13520.5-8.

⁸ Transcript of 25 March 2024, T.13520.8-10.

⁹ Transcript of 25 March 2024, T.13520.11-13.

Court. There is simply an indication on Legal Workflow that the document was *provided* (not *seized*) by Serbia; that is not evidence.

14. Contrary to the observation of the Panel,¹⁰ the Defence does not, and cannot, accept P1064 was seized by Serbian officials without *evidence* of that fact, and it is submitted that neither can the Panel.
15. Secondly, the Panel found that “there is no indication that the records are anything other than records of intelligence and counter-intelligence gathering”.¹¹ Firstly, the SPO did not submit these were “records of intelligence and counter-intelligence gathering.” In the absence of any evidence whatsoever as to who wrote the document, when or where, there is no sound evidential basis for the Panel drawing a conclusion that these documents were KLA “records of intelligence and counter-intelligence gathering” or that there is any link between the exhibits and any KLA intelligence activity or function.
16. W04571 gave minimal evidence about P1046, which is a 42-page document. He simply identified names known to him and confirmed allegations against himself were false. Therefore, the content, and the evidence about the content, are not a sufficient basis upon which to base this finding. This finding is, therefore, without sound evidential foundation and is not a reasonable inference that could be drawn from the contents of the document.
17. The Panel also stated that “*both* documents appear to refer to KLA members, meetings, and operations.”¹² P1064 contained no reference to KLA members, meetings, and operations. As such this evidential finding is erroneous.
18. Finally, the Panel found “that there is no indication of any third party engaging in observation and surveillance or having any interest in respect of any of the

¹⁰ Transcript of 25 March 2024, T.13520.12-13.

¹¹ Transcript of 25 March 2024, T.13520.4-6.

¹² Transcript of 25 March 2024, T.13520.16-17 (emphasis added).

supposed collaborators mentioned and listed in the documents.”¹³ This broad statement is again, incorrect.

19. The Panel has heard evidence as recently as that of W04147 about the extent to which the Serbian Intelligence Services had infiltrated the KLA and were conducting extensive and sophisticated intelligence monitoring and surveillance activities in Kosovo, including from within the KLA itself.¹⁴ The proposition that surveillance of the population was unique to the KLA is simply wrong. The proposition that third parties were not monitoring the KLA from outside or indeed from within is also wrong.
20. Further, in terms of the specific villages mentioned in the document, while there is evidence of third-party surveillance, there is no evidence available to support the proposition that the KLA soldiers in the villages concerned were in fact conducting surveillance; any such suggestion is without evidential foundation.
21. A careful examination of the document indicates that it is more likely, or, at the very least, equally consistent with it being authored by a person gathering information *on* the KLA for Serb authorities, or those working for the Serbian state. Several passages, written in first person, detail regular meetings with those previously identified to be Serbian [REDACTED], receiving instructions from them and expressing awareness of tasks assigned by them to others.¹⁵ Given that the passages are written in first person and not otherwise attributed to another individual, the most natural inference is that they are attributable to the author.
22. The Panel therefore erred in its decision making by making the above erroneous factual findings, which were not based upon evidence, or reasonable inference.

¹³ Transcript of 25 March 2024, T.13522.2-5.

¹⁴ Transcript, 27 March 2024, T.13866.4 *et seq.*

¹⁵ P01064, pp. 29- 33.

B. The Issues Significantly Affect the Fair and Expeditious Conduct of the Proceedings

23. The **Two Issues** for which certification is sought significantly affect the conduct of the proceedings. As indicated above, the Impugned Decision contains manifest errors which affect the fairness of the trial process. It is crucial that these errors are addressed such that Mr Veseli's fair trial rights are safeguarded. Specifically, leave to appeal should be granted to ensure that:

- a. The burden of proof is respected; and
- b. The Panel are enjoined to make decisions based on evidence and reasonable inference.

C. An Immediate Resolution by the Appeals Chambers Will Materially Advance the Proceedings

24. A positive resolution from the Appeals Chamber at this juncture would obviate the risk of any prejudice caused to the Accused, thereby materially advancing the proceedings. The Defence avers, in this regard, that an authoritative determination by the Appeals Panel will rectify the abovementioned errors of reasoning in the Impugned Decision and clarify (a) the burden of proof and (b) that the Panel must base their decisions on evidence within the record and may not speculate.

IV. CLASSIFICATION

Pursuant to Rule 82(3) of the Rules, these submissions are filed confidentially as Reference is made to confidential information.

V. CONCLUSION

25. In light of the foregoing, the Defence respectfully seeks leave to appeal the **two issues** identified above.

Word Count: 1,721



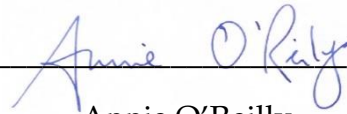
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