



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** KSC-BC-2020-06

**The 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:** Fidelma Donlon

**Date:** 3 June 2024

**Language:** English

**Classification:** Public

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**Decision on Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155**

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**TRIAL PANEL II** (“Panel”), pursuant to Articles 21 and 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 3 May 2024, the Panel issued “Decision on Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155” (“Impugned Decision”).<sup>1</sup>
2. On 13 May 2024, the Defence for Mr Krasniqi (“Krasniqi Defence”) filed a request for leave to appeal the Impugned Decision (“Request”).<sup>2</sup>
3. On 24 May 2024, the Specialist Prosecutor’s Office (“SPO”) responded to the Request, opposing the Request (“Response”).<sup>3</sup> The Krasniqi Defence did not file a reply.

## II. SUBMISSIONS

4. The Krasniqi Defence requests leave to appeal the Impugned Decision on the following two issues relating to the Panel’s decision to admit W00067’s evidence relating to the presence of Mr Krasniqi at a particular crime site relevant to the Indictment:

1. Whether the Trial Panel erred in finding that the probative value of the identification evidence was not outweighed by its prejudicial effect and the inability of the Defence to confront the witness (“First Issue”); and

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<sup>1</sup> F02283, Panel, *Decision on Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155*, 3 May 2024, confidential. A public redacted version was filed the same day.

<sup>2</sup> F02305, Specialist Counsel, *Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155*, 13 May 2024, confidential.

<sup>3</sup> F02336, Specialist Prosecutor, *Prosecution Response to “Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155”*, confidential, 24 May 2024.

2. Whether the Trial Panel erred in finding that the prejudice to the Defence was limited by the ability of the Defence to confront other witnesses, where none of those witnesses corroborates the identification evidence (“Second Issue”).<sup>4</sup>

5. The SPO responds that the Request should be rejected as it fails to meet the requirement for leave to appeal under Article 45(2) and Rule 77.<sup>5</sup>

### III. APPLICABLE LAW

6. 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. Rule 77(2) provides 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.

7. The Panel incorporates by reference the applicable law on the legal standard for certification to appeal set out in past decisions.<sup>6</sup>

### IV. DISCUSSION

#### A. Relevant Part of the Impugned Decision

8. In the Impugned Decision, after assessing the Parties’ submissions and arguments, the Panel found that W00067’s evidence, consisting of prior statements

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<sup>4</sup> Request, para. 3.

<sup>5</sup> Response, para. 1.

<sup>6</sup> F01237, Panel, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; KSC-BC-2020-07, F00484, Panel, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14; F00423, Panel, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00372, Panel, *Decision on Haradinaj Defence’s Application for Certification of F00328*, 15 October 2021, paras 15-17. See also KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17.

and associated exhibits, was *prima facie* relevant, authentic and probative. The Panel also found that the admission of W00067's evidence was not unduly prejudicial within the meaning of Rule 138(1), and that such evidence was suitable for admission pursuant to Rule 155 as it: (i) is corroborated by witnesses whom the Accused were and will be able to cross-examine; and (ii) otherwise meets the requirements under Rules 155 and 138.<sup>7</sup>

9. Regarding W00067's identification of Mr Krasniqi, the Panel found that the evidence of W00067 might be relevant to establishing his presence at a location relevant to the SPO's case and, possibly, elements of the alleged acts and conduct of Mr Krasniqi.<sup>8</sup> However, the Panel recalled that Rule 155 does not exclude evidence going to acts and conduct of the Accused but only requires the Panel to account for this fact when exercising its discretion to either admit or reject admission.<sup>9</sup> In addition, the Panel noted that at least six SPO witnesses were scheduled to give evidence about the circumstances in relation to which the witness' evidence pertains. Two had already testified at the time of the Impugned Decision and were cross-examined by the Defence. Finally, the Panel recalled that the admission of evidence pursuant to Rule 155 is not conditioned on the existence of corroborating evidence and the lack of it, in respect of a statement or a portion thereof, does not render it inadmissible. The absence of corroboration would be relevant to the Panel's assessment of the probative value and weight of the evidence in light of the entire body of evidence admitted at trial, in accordance with Rule 139.<sup>10</sup>

10. The Panel then exceptionally granted the Defence's request to tender into evidence other prior statements of W00067 that had not been tendered by the SPO

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<sup>7</sup> Impugned Decision, paras 13-20.

<sup>8</sup> Impugned Decision, para. 14.

<sup>9</sup> Impugned Decision, para. 14.

<sup>10</sup> Impugned Decision, para. 14.

in its Motion, which the Defence submitted would undermine W00067's suggestion that Mr Krasniqi had been present at the said location.<sup>11</sup>

## B. First Issue

11. The Krasniqi Defence submits that the Panel erred in its conclusion that the probative value of the identification evidence, which goes directly to the acts and conduct of Mr Krasniqi, was not outweighed by its prejudicial effect.<sup>12</sup> The Defence argues that the terms of Rule 155(5), the low probative value of this particular identification of Mr Krasniqi, and its highly prejudicial impact, together with Mr Krasniqi's fundamental right to confront the evidence against him, mean that there is a discrete issue of principle.<sup>13</sup> According to the Defence, in prior decisions, the Panel recognised the prejudice occasioned by admitting identification evidence of the Accused pursuant to Rule 155 and declined to admit the evidence. The Defence challenges why, as a matter of consistency, the same approach was not taken by the Panel in relation to W00067.<sup>14</sup>

12. The SPO responds that the First Issue does not constitute an appealable issue, as it fails to identify any clear or discrete issue arising from the Impugned Decision.<sup>15</sup> It argues that the First Issue reveals a mere disagreement with the Impugned Decision.<sup>16</sup>

13. The Panel is not entirely convinced that, in its formulation of the First Issue, the Krasniqi Defence has clearly identified the error for which it seeks leave to appeal. The Panel is prepared to consider, however, that the issue is one that alleges an improper and/or erroneous exercise of the Panel's discretion pursuant

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<sup>11</sup> Impugned Decision, para. 17.

<sup>12</sup> Request, para. 14.

<sup>13</sup> Request, para. 15.

<sup>14</sup> Request, para. 16.

<sup>15</sup> Response, para. 4.

<sup>16</sup> Response, para. 7.

to Rule 155(5). Thus conceived, the Panel is prepared to regard the First Issue as a discrete topic arising from the Impugned Decision.

14. Regarding the requirement that the First Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, the Panel finds that the Krasniqi Defence has failed to establish that this requirement is met in the present circumstances.<sup>17</sup> The Krasniqi Defence has failed to convincingly articulate how, in its view, the Panel's assessment of the admissibility of this evidence and its exercise of discretionary power in this context would have that effect. The Panel cannot and will not pre-judge what use, if any, it will make of that evidence in its Judgment. The alleged unfairness has therefore not been demonstrated.

15. Moreover, as to the second criterion in Rule 77(2), the Panel is, for similar reasons, not persuaded that immediate resolution by a Court of Appeals Panel would materially advance the proceedings. Interlocutory appellate intervention in respect of admissibility decisions is an exceptional relief. It has not been shown to be justified here.<sup>18</sup>

16. Accordingly, the Panel concludes that the Krasniqi Defence has not demonstrated that the request for certification to appeal the First Issue satisfies the criteria set out in Article 45(2) and Rule 77(2) and it is rejected.

### C. Second Issue

17. The Krasniqi Defence submits that the Panel erred in its reasoning by (i) expressly relying on the ability of the Defence to cross-examine other witnesses

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<sup>17</sup> See Request, para. 19.

<sup>18</sup> Cf. KSC-CA-2023-02, F00038, Court of Appeals, *Appeal Judgment*, 14 December 2023, confidential, para. 37. A public redacted version was filed the same day (F00038/RED): "The Panel recalls that a decision on whether to admit or exclude evidence pursuant to Rule 138(1) of the Rules is one that lies within a trial panel's discretion in its assessment of the relevance, authenticity and probative value of the submitted evidence. [...] Moreover, appellate intervention in decisions relating to the admission of evidence is warranted only in very limited circumstances" (references omitted).

as a factor in support of admitting the evidence regarding the acts and conduct of Mr Krasniqi; and (ii) failed to address the Defence submission that none of the alleged six witnesses actually corroborates the identification of Mr Krasniqi. The Krasniqi Defence submits that the absence of corroboration by six witnesses of the identification of Mr Krasniqi is an additional essential factor against the admission of that evidence, and the Panel erred in its evaluation of the ability of the Defence to cross-examine other witnesses as a factor in support of admitting the evidence.<sup>19</sup>

18. The SPO responds that the Second Issue is not appealable as it is based on the already considered argument that W00067's allegations concerning Mr Krasniqi are uncorroborated, and does not identify any appealable issue.<sup>20</sup> It argues that the Krasniqi Defence offers no explanation supporting its argument that there is "a fundamental flaw in the chain of reasoning which led the Panel to admit the contested identification evidence".<sup>21</sup>

19. The Panel agrees with the SPO that the Krasniqi Defence's submissions are to a large extent repetitious of submissions already made and addressed by the Panel in the Impugned Decision. To that extent, the submissions made in this context reflect a disagreement with the findings of the Panel rather than the demonstration of an issue relevant to Rule 77(2).

20. As concerns the first criterion under Rule 77(2), the Panel finds that the Krasniqi Defence has failed to establish that the Second Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The reasons outlined above in relation to the First Issue also apply here. As already noted, fairness does not require that admission of evidence is limited to evidence that can or will be corroborated. Corroboration is not a requirement for admission and admission of evidence without actual or expected corroboration

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<sup>19</sup> Request, paras 17-18.

<sup>20</sup> Response, para. 8.

<sup>21</sup> Response, para. 9.

would not demonstrate an abuse of discretion. What corroboration, if any, there is of this evidence will, however, be of potential relevance at the end of these proceedings when the Panel is called upon to decide on what use it can make of that evidence. That point has not been reached and the Panel is not prepared to pre-judge what use it might make of that evidence.

21. For similar reasons, the Panel finds that the Krasniqi Defence has not established that an immediate resolution of the issue by the Court of Appeals Panel would materially advance the proceedings.

22. Therefore, the Panel finds that the Krasniqi Defence has not demonstrated that the Second Issue satisfies the criteria in Article 45 and Rule 77 and the request for certification to appeal the Second Issue is rejected.

## V. CLASSIFICATION

23. The Panel notes that the Request and the Response are filed only in a confidential version. The Panel orders the SPO and the Krasniqi Defence, pursuant to Rule 82(5), to file a public redacted version of the Request and the Response or seek their reclassification as public by Monday, 10 June 2024.

## VI. DISPOSITION

24. For the above-mentioned reasons, the Panel hereby

- a) **REJECTS** the Request; and
- b) **ORDERS** the SPO and the Krasniqi Defence to file a public redacted version of the Request and the Response or seek their reclassification as public by Monday, 10 June 2024.





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**Judge Charles L. Smith, III**  
**Presiding Judge**

Dated this Monday, 3 June 2024

At The Hague, the Netherlands.