



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: 18 June 2024

Language: English

Classification: Public

Decision on Joint Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Evidence of Seven Proposed Witnesses Pursuant to Rule 154 (F02346)

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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 22 May 2024, the Panel issued its Decision on Prosecution Motion for admission of evidence of Seven Proposed Witnesses pursuant to Rule 154 (“Impugned Decision”).¹
2. On 29 May 2024, the Defence teams for the four Accused (collectively, “Defence”) filed a joint request for leave to appeal the Impugned Decision (“Defence Request”).²
3. On 10 June 2024, the Specialist Prosecutor’s Office (“SPO”) filed a response to the Defence Request (“SPO Response”).³
4. The Defence did not file a reply.

II. SUBMISSIONS

5. The Defence requests leave to appeal the Impugned Decision regarding the following four issues (collectively, “Issues”):
 1. Whether the Panel erred in determining that admitting [the evidence of a specific witness] (“Witness”) evidence pursuant to Rule 154 materially enhanced the efficiency of proceedings, without taking into account the

¹ F02328, Panel, *Decision on Prosecution Motion for Admission of Evidence of Witnesses Pursuant to Rule 154*, 22 May 2024, confidential (a public redacted version was issued on the same day, F02328/RED).

² F02346, Specialist Counsel, *Joint Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Evidence of Witnesses Pursuant to Rule 154*, 29 May 2024, confidential.

³ F02366, Specialist Prosecutor, *Prosecution Response to F02346*, 10 June 2024 (a public redacted version was filed on the same date, F02366/RED).

encumbrance of admitting more than 700 pages of interviews plus 20 associated exhibits onto the record (“First Issue”);

2. Whether the Panel erred in determining that the importance of the Witness’s evidence and its relevance to the acts and conduct of the accused did not constitute an impediment to admission pursuant to Rule 154; (“Second Issue”);
3. Whether the Panel erred in the exercise of its discretion by failing to give any weight to the fact that the Witness was interviewed as a suspect and was told that he did not need to tell the truth; (“Third Issue”); and
4. Whether the Panel erred in assessing that the probative value of the Witness’s evidence was not outweighed by the prejudicial effect of admitting his evidence in writing pursuant to Rule 154 (“Fourth Issue”).⁴

6. The Defence submits that the issues presented satisfy the test for certification as: (i) they originate from the Impugned Decision, are sufficiently specific and identifiable, and do not amount to mere disagreements, abstract questions, or hypothetical concerns;⁵ (ii) they affect the fair and expeditious conduct of the proceedings or the outcome of the trial;⁶ and (iii) their immediate resolution by the Court of Appeals Panel may materially advance the proceedings.⁷ The Defence further submits that, in the event certification is granted, the Panel’s decision to have the Witness testify pursuant to Rule 154 should be suspended until the matter is resolved by the Court of Appeals.⁸

7. In response, the SPO submits that the Defence Request should be rejected because it amounts to mere disagreement with the Panel’s reasonable exercise of discretion in determining that the Witness’s evidence is appropriate for admission under Rule 154.⁹ The SPO submits that the Panel has considerable discretion in deciding whether evidence is admissible or not, and appellate intervention on

⁴ Defence Request, para. 5.

⁵ Defence Request, paras 16-20.

⁶ Defence Request, paras 16, 21-25.

⁷ Defence Request, paras 16, 26-30.

⁸ Defence Request, paras 31-32.

⁹ SPO Response, paras 1-2, 5.

such decisions is warranted only in very limited circumstances.¹⁰ Certifying admissibility rulings must therefore be the absolute exception and no such exceptional reasons are offered in the Request.¹¹ The SPO submits that the Defence Request is ostensibly a challenge to Rule 154 generally, rather than the reasonable manner in which it was applied by the Panel.¹² The SPO also argues that the Issues do not satisfy the other requisite factors for certification.¹³ Finally, the SPO submits that suspensive effect of the Impugned Decision is not merited.¹⁴

III. APPLICABLE LAW

8. 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.

The Panel incorporates by reference the applicable law on the legal standard for certification to appeal set out in past decisions.¹⁵

¹⁰ SPO Response paras 2, 5.

¹¹ SPO Response, para. 5.

¹² SPO Response, paras 3-4, 6.

¹³ SPO Response, paras 21-26.

¹⁴ SPO Response, para. 27.

¹⁵ See 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, 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; F00484, Panel, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14. See also F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17.

IV. DISCUSSION

9. In the Impugned Decision, the Panel found that the Witness's evidence, consisting of his Rule 154 statements and associated exhibits, was *prima facie* relevant,¹⁶ authentic,¹⁷ probative,¹⁸ and suitable for admission pursuant to Rule 154.¹⁹ Based upon submissions made by the SPO²⁰ and the Defence,²¹ the Panel found that admitting the Witness's evidence pursuant to Rule 154 would materially enhance the efficiency of proceedings.²² The Panel also found that, in the circumstances, the Witness's evidence relating to matters central to the case and/or the acts and conduct of the Accused would not cause its probative value to be outweighed by its prejudicial effect because the Defence would have the opportunity to cross-examine the Witness.²³

10. In addition, the Panel found that Defence's representations that the Witness's SPO interview cannot fulfil Rule 154(c) criteria regarding an attestation of truthfulness²⁴ to be both factually and legally incorrect.²⁵ The Panel therefore found the Witness's evidence appropriate for admission pursuant to Rules 138(1) and 154.²⁶

¹⁶ Impugned Decision, paras 65, 75-80.

¹⁷ Impugned Decision, paras 66-67, 75-80.

¹⁸ Impugned Decision, paras 68, 75-80.

¹⁹ Impugned Decision, paras 69-73, 75-80.

²⁰ F02204, Specialist Prosecutor, *Prosecution Motion for Admission of Evidence of Witnesses Pursuant to Rule 154* ("SPO Rule 154 Motion"), 27 March 2024, confidential, paras 43-53, with Annexes 1-8, confidential (a public redacted version was filed on the same day, F02204/RED); F02286, Specialist Prosecutor, *Prosecution Reply Relating to Rule 154 Motion F02204*, ("SPO Rule 154 Reply") 6 May 2024, confidential, paras 8-11 (a public redacted version was filed on the same day, F02286/RED).

²¹ F02272, Specialist Counsel, *Joint Defence Consolidated Response to F02204, and the Remaining Witnesses in F02195* ("Defence Response to SPO Rule 154 Motion"), 29 April 2024, confidential, paras 40-50, with Annexes 1-6, confidential (a public redacted version was filed on 8 May 2024, F02272/RED).

²² Impugned Decision, para. 69.

²³ Impugned Decision, paras 70-71, 73.

²⁴ Defence Response to SPO Rule 154 Motion, paras 45-46.

²⁵ Impugned Decision, paras 67, 72.

²⁶ Impugned Decision, para. 80.

A. THE DEFENCE'S FIRST ISSUE

11. The Defence submits that the Panel did not properly consider the effect that admitting more than 700 pages of interviews plus 20 associated exhibits may have when it found that admission of the Witness's evidence pursuant to Rule 154 would materially enhance the efficiency of proceedings.²⁷ According to the Defence, the Panel only took into account the SPO's representation that admitting the Witness's evidence pursuant to Rule 154 would result in a reduction of 14 hours to the SPO's examination-in-chief.²⁸

12. The SPO responds that the Defence's First Issue is unfounded because the language in the Impugned Decision demonstrates that the Panel was cognisant of the volume of information at issue and its effect upon the proceedings.²⁹ The SPO submits the Defence's First Issue lacks precision, and improperly calls for the Panel to apply an undefined "test" when exercising its discretion in this manner.³⁰ The SPO asserts that the Defence's First Issue is not appealable.³¹

13. As noted above, the Panel found that admitting the Witness's evidence pursuant to Rule 154 would materially enhance the efficiency of proceedings.³² The SPO specifically submitted that it conservatively estimates that its examination-in-chief would be shorted by 14 hours by permitting the Witness's evidence to be admitted pursuant to Rule 154.³³ In response, the Defence set out the number of pages of the Witness's proposed evidence and argued that the time needed to address the points raised in the Witness's Rule 154 material and additional live testimony would be "considerable".³⁴ Further, in its Reply, the SPO

²⁷ Defence Request, paras 5, 17, 24.

²⁸ Defence Request, para. 17.

²⁹ SPO Response, para. 8.

³⁰ SPO Response, para. 9.

³¹ SPO Response, para. 10.

³² *See above*, para. 9.

³³ SPO Rule 154 Motion, para. 51; SPO Reply to Rule 154 Motion, para. 10.

³⁴ Defence Response to SPO Rule 154 Motion, para. 48.

noted that it would ensure that the content addressed *viva voce* during its examination-in-chief will not be duplicative of that contained in the Witness's Rule 154 material.³⁵ Having considered the submissions of the Parties, the Panel determined that admission of the Witness's evidence pursuant to Rule 154 would nevertheless materially enhance the efficiency of proceedings by reducing the time needed for the SPO's examination-in-chief from 24 hours to 10 hours. Having considered the Parties' submissions and reviewed the proposed material for the purpose of deciding its admission, the Panel was fully aware of the size and nature of the proposed evidence.

14. In the Panel's view, the Defence attempts to re-litigate the issue of whether the Witness should be heard *viva voce* by reiterating the same objections made prior to the Impugned Decision.³⁶ Furthermore, the Defence "seeks to elucidate the correct test to be applied,"³⁷ but fails to articulate any test beyond that set out in Rule 77, or demonstrate how the Panel's reasoning failed to meet the relevant test. The Panel therefore finds that the Defence has failed to establish that the First Issue amounts to more than mere disagreement with the Panel's findings or constitutes a discrete topic arising from the Impugned Decision.

15. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the Defence's First Issue. The request for certification to appeal the Defence's First Issue is therefore rejected.

B. THE DEFENCE'S SECOND ISSUE

16. The Defence submits that the Panel erred in determining that the importance of the Witness's evidence and the Witness's evidence regarding the acts and conduct of

³⁵ SPO Reply to Rule 154 Motion, para 10.

³⁶ Compare Defence Response to SPO Rule 154 Motion, paras 47-48 with Defence Request, para. 17.

³⁷ Defence Request, para. 17.

the Accused did not constitute an impediment to admission pursuant to Rule 154.³⁸ According to the Defence, the Panel only considered whether these issues precluded the admission of the Witness's evidence pursuant to Rule 154 *per se*, and failed to balance these factors against those in favour of admission via Rule 154.³⁹

17. The SPO responds that the Defence's Second Issue is a mere disagreement with the Panel's discretionary finding that the probative value of the Witness's evidence is not outweighed by any prejudicial effect.⁴⁰ The SPO submits that materials that speak to the acts and conduct of the Accused or which speak to important issues in the case are not precluded from being admitted pursuant to Rule 154.⁴¹ The SPO asserts that the opportunity to cross-examine the Witness remedies any possible undue prejudice that may otherwise exist.⁴² The SPO submits that the Defence's Second Issue is not appealable.⁴³

18. In the Impugned Decision, the Panel noted the Defence's objections to the Witness's evidence being admitted pursuant to Rule 154 because that evidence is said to be of central importance to the SPO's case⁴⁴ and address the acts and conduct of the Accused.⁴⁵

19. The Panel recalled that the perceived importance of a witness's proposed evidence does not necessarily constitute an impediment to its admission pursuant to Rule 154.⁴⁶ To that effect, the Panel provided examples of occasions when

³⁸ Defence Request, para. 5

³⁹ Defence Request, para. 18.

⁴⁰ SPO Response, paras 11-12.

⁴¹ SPO Response, para. 13.

⁴² SPO Response, para. 14.

⁴³ SPO Response, para. 15.

⁴⁴ Impugned Decision, para. 70 (*citing* Defence Response to SPO Rule 154 Motion, paras 41-44).

⁴⁵ Impugned Decision, para. 71 (*citing* Defence Response to SPO Rule 154 Motion, para. 43).

⁴⁶ Impugned Decision, paras 70-71 (*citing* F01595, Panel, *Decision on Second Prosecution Motion Pursuant to Rule 154*, 9 June 2023, confidential, para. 70 (a corrected version was issued on 10 August 2023, F01595/COR) (a public redacted version was filed on 9 November 2023, F01595/COR/RED)l); F01848, Panel, *Decision on Prosecution Motion for Admission of Evidence of Witnesses Pursuant to Rule 154 (F01788)*, 10 October 2023, confidential, para. 49 (a public redacted version was filed on 14 November 2023, F01848/RED)).

evidence regarding the same subject matter as that contained in the Witness's proposed evidence was admitted pursuant to Rule 154.⁴⁷ The Panel also acknowledged and took into account the importance of the proposed evidence to this case.

20. The Panel is of the view that the Defence's Second Issue misrepresents the Panel's findings and constitutes a mere disagreement with them. Moreover, the Defence attempts to re-litigate issues by reiterating the same objections made prior to the Impugned Decision.⁴⁸ The same is true with regard to allegations that the Witness's evidence contains information regarding acts and conduct of the Accused that would result in prejudice to the Accused.⁴⁹ The submissions constitute mere disagreement with the Panel's assessment and decision, not the showing of an alleged error. The Panel therefore finds that the Defence has failed to establish that the Second Issue amounts to more than mere disagreement with the Impugned Decision.

21. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the Defence's Second Issue. The request for certification to appeal the Defence's Second Issue is therefore rejected.

C. THE DEFENCE'S THIRD ISSUE

22. The Defence submits that the Panel erred in exercising its discretion by failing to give any weight to the fact that the Witness was interviewed as a suspect and was told that he did not need to tell the truth.⁵⁰

⁴⁷ Impugned Decision, para. 70.

⁴⁸ Compare Defence Response to SPO Rule 154 Motion, paras 41-44 with Defence Request, para. 18.

⁴⁹ Compare Defence Response to SPO Rule 154 Motion, para. 43 with Defence Request, para. 18.

⁵⁰ Defence Request, para. 5.

23. The SPO responds that the Defence's Third Issue misapprehends the Panel's findings in the Impugned Decision, as well as the scope of Rule 154.⁵¹ The SPO submits that the preconditions for admission under Rule 154 are laid out in the Rule, and the status of an individual as suspect or witness at the time of his statement is immaterial to its implementation.⁵² The SPO submits that the Defence's submission that the Panel failed to give any weight to the Witness's suspect status is a misrepresentation of the Impugned Decision.⁵³ The SPO submits that the Defence's Third Issue is not appealable.⁵⁴

24. In its response to the SPO's Rule 154 Motion, the Defence argued that the Witness's SPO interview did not fulfil the Rule 154(c) criteria, pursuant to which a witness shall "attest that the written statement or transcript accurately reflects his or her declaration and what he or she would say if examined."⁵⁵ The Defence asserted that the SPO explicitly told the Witness that he did not have to tell the truth, and that this raises doubts concerning the reliability of the Witness's statements during his interview, which cannot be cured through a subsequent Rule 154(c) declaration, regarding the veracity of the statement.⁵⁶ The Panel reviewed the transcript of the Witness's SPO interview and determined that the Defence's rendition of the facts did not accurately reflect what transpired during the interview.⁵⁷

25. In the Impugned Decision, the Panel further determined that Rule 154 does not condition admissibility of witness statements to those given under oath or under threat of criminal prosecution, although such factors might be relevant to assessing the *prima facie* reliability of a statement pursuant to Rule 138(1). The Panel further found that Rule 154 makes clear that the pre-conditions placed on a

⁵¹ SPO Response, paras 16-19.

⁵² SPO Response, paras 17-18.

⁵³ SPO Response, para. 19.

⁵⁴ SPO Response, para. 20.

⁵⁵ Defence Response to SPO Rule 154 Motion, paras 45-46.

⁵⁶ Defence Response to SPO Rule 154 Motion, para. 46.

⁵⁷ Impugned Decision, para. 66.

statement's admission are those which must be satisfied during in-court proceedings and that it is for this reason that the Panel's Rule 154 decisions permit admission of Rule 154 statements only after the requirements of sub-paragraphs (a)–(c) of Rule 154 have been met at the time of the witness's testimony. The Panel concluded that the Defence's claim was without merit as it was both legally and factually incorrect.⁵⁸

26. The Panel is of the view that the Defence's Third Issue misrepresents the Panel's findings as the Panel directly engaged with the issue of a witness's status as a suspect, the oath he took, and the requirements for admission under Rule 154. In putting forth the Third Issue, the Defence attempts to re-litigate the matter by reiterating the same objections made prior to the Impugned Decision.⁵⁹ The Panel therefore finds that the Defence has failed to establish that the Third Issue amounts to more than mere disagreement with the Panel's findings in the Impugned Decision.

27. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the Defence's Third Issue. The request for certification to appeal the Defence's Third Issue is therefore rejected.

D. THE DEFENCE'S FOURTH ISSUE

28. The Defence submits that the Panel erred in assessing that the probative value of the Witness's evidence was not outweighed by the prejudicial effect of admitting his evidence in writing pursuant to Rule 154.⁶⁰ The Defence claims that the totality of circumstances created by: (i) the importance of the Witness's evidence ("Factor One"); (ii) his unique evidence regarding the acts and conduct of the accused ("Factor Two");

⁵⁸ Impugned Decision, para. 72.

⁵⁹ Compare Defence Response to SPO Rule 154 Motion, paras 45-46 with Defence Request, para. 19.

⁶⁰ Defence Request, paras 5, 20.

and (iii) his status as a suspect (“Factor Three”), should have resulted in a determination that the probative value of the Witness’s proposed evidence was outweighed by its prejudicial effect, and that the Witness’s evidence is not appropriate for admission pursuant to Rule 154.⁶¹ The Defence claims that the Panel abused its discretion when it found otherwise.⁶²

29. The SPO responds that the Defence’s Fourth Issue is the same as the Defence’s Second Issue, as they both relate to the content of the Witness’s testimony and how that testimony should have compelled the Panel to find the Witness’s evidence inadmissible via Rule 154.⁶³ The SPO responds that the Defence’s Fourth Issue is a mere disagreement with the Panel’s discretionary finding that the probative value of the Witness’s evidence is not outweighed by any prejudicial effect.⁶⁴ The SPO submits that materials which speak to the acts and conduct of the Accused or which speak to important issues in the case are not precluded from being admitted pursuant to Rule 154.⁶⁵ The SPO asserts that the opportunity to cross-examine the Witness remedies any possible undue prejudice that may otherwise exist.⁶⁶ The SPO submits that the Defence’s Fourth Issue is not appealable.⁶⁷

30. In its Impugned Decision, the Panel considered the factors identified by the Defence, both individually and together.⁶⁸ Having done so, the Panel was satisfied that the admission of the Witness’s evidence under Rule 154: (i) would contribute to the expeditiousness of the proceedings; and (ii) given that the Defence will have an opportunity to cross-examine the Witness, would not cause unfair prejudice to the Defence.⁶⁹ The Panel therefore found that the *prima facie* probative value of the

⁶¹ Defence Request, para. 20.

⁶² Defence Request, para. 20.

⁶³ SPO Response, para. 11.

⁶⁴ SPO Response, paras 11-12.

⁶⁵ SPO Response, para. 13.

⁶⁶ SPO Response, para. 14.

⁶⁷ SPO Response, para. 15.

⁶⁸ Impugned Decision, paras 62-73.

⁶⁹ Impugned Decision, para. 73.

Witness's evidence was not outweighed by any prejudicial effect, and that the Witness's evidence is suitable for admission pursuant to Rule 154.⁷⁰

31. Factor One and Factor Two identified by the Defence in its Fourth Issue are identical to those raised in the Defence's Second Issue.⁷¹ Factor Three is a reframing of the Defence's Third Issue.⁷² As provided above, regarding both the Defence's Second Issue and Third Issue, the Panel is of the view that the Defence is attempting to re-litigate these issues by reiterating the same objections made prior to the Impugned Decision. The Panel is of the view that the same is true when considered together via the Defence's Fourth Issue.⁷³ The Panel therefore finds that the Defence has failed to establish that the Fourth Issue amounts more than mere disagreement with the Panel's findings in the Impugned Decision.

32. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the Defence's Third Issue. The request for certification to appeal the Defence's Fourth Issue is therefore rejected.

E. REQUEST FOR SUSPENSIVE EFFECT

33. The Defence submits that, in the event certification is granted, the Panel's decision to have the Witness testify pursuant to Rule 154 should be suspended until the matter is resolved by the Court of Appeals.⁷⁴ The SPO opposes the Defence's request for suspensive effect, as the Panel can revisit the evidence, thereby removing the need to do so even if the Panel certifies the Defence's Issues for appeal.⁷⁵

⁷⁰ Impugned Decision, para. 73.

⁷¹ *See above*, paras 16-21.

⁷² *See above*, paras 22-27.

⁷³ *See* Defence Response to SPO Rule 154 Motion, para. 49.

⁷⁴ Defence Request, paras 31-32.

⁷⁵ SPO Response, paras 27-28.

34. As the Panel has denied the Defence's request for certification for leave to appeal the Impugned Decision based upon the First, Second, Third and Fourth Issues identified above, the Defence's request for suspension of the Impugned Decision is moot.

V. CLASSIFICATION

35. The Panel notes that the Defence Request has been submitted confidentially. The Panel therefore orders the Defence to request reclassification of the Defence Request or submit a public redacted version by Friday, 21 June 2024.

VI. DISPOSITION

36. For the above-mentioned reasons, the Panel hereby:

- a) **REJECTS** the Defence request for certification for leave to appeal the Impugned Decision based upon the First, Second, Third and Fourth Issues identified above;
- b) **DECLARES MOOT** the Defence Request for suspension of the Impugned Decision; and
- c) **ORDERS** the Defence to request reclassification of the Defence Request or submit a public redacted version by **Wednesday, 26 June 2024**.



Judge Charles L. Smith, III
Presiding Judge

Dated this Tuesday, 18 June 2024

At The Hague, the Netherlands.