



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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: Specialist Prosecutor's Office

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F02393'

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Luka Mišetić

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagenda

I. INTRODUCTION

1. Pursuant to Article 45 of the Law¹ and Rule 77 of the Rules,² the Panel should grant the Specialist Prosecutor's Office ('SPO') leave to appeal the decision excluding W04846's relevant, first-hand evidence concerning the Second Allegation³ before the Panel had the opportunity to hear his *viva voce* testimony, including any context and clarification he may be able to provide, and observe his demeanour. Exclusion of relevant evidence is 'at the extreme end of a scale of measures available to a Chamber in addressing prejudice'.⁴ Thus, the following discrete and identifiable issues arising from the Decision exceptionally⁵ justify certification (collectively, 'Issues'):

- i. The Panel gave undue weight to purported inconsistencies and speculation in, and lack of corroboration of, the witness's evidence concerning the Second Allegation ('First Issue');
- ii. The Panel gave undue weight to the timing and nature of the Second Allegation ('Second Issue');
- iii. The Panel failed to take into account relevant factors and/or afford them sufficient weight, in particular, that the witness would be available for cross-examination and that the trial is being conducted by professional Judges ('Third Issue'); and
- iv. The Panel failed to provide adequate reasoning to support its findings on reliability, probative value, and/or prejudice ('Fourth Issue').

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'). All references to 'Rule' or 'Rules' are to the Rules, unless otherwise specified.

³ Decision on Selimi Defence Motion to Exclude Evidence of W04846, KSC-BC-2020-06/F02393, 19 June 2024, Confidential ('Decision'), paras 28-29. *See also* para.9 (defining the 'First Allegation' and 'Second Allegation').

⁴ *See e.g.* ICTR, *Prosecutor v. Nizeyimana*, ICTR-00-55C-T, Decision on Motion for Exclusion of Rebuttal Witnesses, 13 September 2011, para.6. *See also* IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019, para.103.

⁵ *See* Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P1046, KSC-BC-2020-06/F02241, 15 April 2024 ('April 2024 Decision'), para.10.

2. As a result of these Issues, the SPO was wrongly deprived of the opportunity to present and rely upon relevant and probative evidence of, *inter alia*, the charged joint criminal enterprise and the Accused's state of mind, and the Panel will not be able to consider the evidence in its holistic assessment at the conclusion of the trial. The Issues therefore significantly impact the conduct and outcome of this trial. Appellate resolution will materially advance the proceedings.

3. Considering the timing of the Decision, issued two days before the commencement of W04846's preparation and one week before his anticipated testimony, as well as the witness's personal circumstances and security concerns, the SPO proceeded with W04846's testimony in accordance with the Decision so as not delay the proceedings. However, its decision to do so is without prejudice to any necessary and appropriate request, including for recall of W04846, depending on the ultimate outcome of the relief sought herein.⁶

II. SUBMISSIONS

4. The applicable criteria for leave to appeal⁷ are satisfied, as set out below.

A. THE ISSUES ARE APPEALABLE.

5. The Issues are discrete, identifiable, and arise from the Decision. While purportedly reached in the specific circumstances of W04846 and his anticipated evidence concerning the Second Allegation, the Panel's one paragraph reasoning to exclude it: (i) cannot be reconciled with the Panel's finding that the anticipated evidence on the Second Allegation is '*prima facie* relevant and sufficiently connected

⁶ While the SPO's position concerning the witness's evidence on the First Allegation remains unchanged and its exclusion limits the SPO's ability to fully present its case and the Panel's ability to assess the witness's evidence as a whole and in light of other evidence, the SPO, after careful consideration of the Panel's findings concerning the First Allegation, has decided not to seek leave to appeal this part of the Decision, considering the strict certification criteria.

⁷ See April 2024 Decision, KSC-BC-2020-06/F02241, para.9 (and sources cited therein).

to material facts in the Indictment’;⁸ (ii) failed to fully (or at all) account for the fact that the witness was proposed to and did testify live; and (iii) represents a significant departure from the Panel’s prior decisions concerning other testimonial evidence,⁹ as a direct result of the Issues.

6. All four, interconnected Issues should be certified, in light of their different scope and their combined effect on the Decision’s outcome. Only by considering all of the Issues would the Appeals Panel be able to engage with the full reasoning underpinning the Decision, which excluded relevant and first-hand evidence of a live witness on the Second Allegation.

1. First Issue: The Panel gave undue weight to purported inconsistencies and speculation in, and lack of corroboration of, the witness’s evidence concerning the Second Allegation.

7. When reaching its findings on reliability and probative value, the Panel ‘in particular, [...] note[d] that in W04846’s prior statements there are statements which are clearly inconsistent or appear speculative’ and observed that ‘[t]here appears to be little or no corroboration of the account.’¹⁰ However, considering that W04846 was

⁸ Decision, KSC-BC-2020-06/F02393, para.27.

⁹ As previously found by this Panel, inconsistencies, speculation, and lack of corroboration, including where the evidence relates to events and acts outside the scope of the Indictment, do not affect admissibility *per se* and are appropriately addressed, *inter alia*, during cross-examination and in the Panel’s holistic consideration of the evidence at the conclusion of the trial. In relation to inconsistencies and speculation, *see e.g.* Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F01603, 14 June 2023, Confidential (‘June 2023 Decision’), paras 50, 137; Decision on Prosecution Third Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020/F02013, 15 December 2023 (‘December 2023 Decision’), paras 13, 51. In relation to the lack of corroboration, *see e.g.* Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153, KSC-BC-2020-06/F02111, 8 February 2024, Confidential, para.31; June 2023 Decision, KSC-BC-2020-06/F01603, para.137; December 2023 Decision, KSC-BC-2020-06/F02013, para.33. *See also* Decision, KSC-BC-2020-06/F02393, para.22; ICTY, *Prosecutor v. Kordić and Čerkez*, IT-94-14/2-A, Judgement, 17 December 2004, para.274 (‘Corroboration is not a legal requirement, but rather concerns the weight to be attached to evidence. A Trial Chamber may [...] convict on the basis of a single witness, although such evidence must be assessed with appropriate caution’).

¹⁰ Decision, KSC-BC-2020-06/F02393, para.28.

proposed to testify entirely live, the Panel's assessment, which was based on statements not sought for admission, improperly pre-judged the reliability and probative value of the witness's anticipated live testimony before the Panel had the opportunity to hear it and observe the witness's demeanour.¹¹

8. The basis of the Panel's reliability assessment was also unclear. For example, as noted below in relation to the Fourth Issue,¹² the witness's prior statements concerning the Second Allegation are generally consistent, the Defence did not argue that such statements were inconsistent on the Second Allegation, and the Panel did not cite to or otherwise specify or explain which inconsistencies it considered when assessing the reliability of the witness's evidence on the Second Allegation.

9. In any event, any minor inconsistencies or speculation in W04846's prior statements, or lack of corroboration of his primarily first-hand, eyewitness evidence concerning the Second Allegation could have been adequately addressed during testimony and at the conclusion of the trial.¹³ If the Defence considered that a question during direct examination called for speculation, it could object, and could ultimately cross-examine the witness on any speculative evidence elicited or volunteered, as well as any (purported) inconsistencies and lack of corroboration. As addressed below under the Third and Fourth Issues, the Panel did not give sufficient weight to, let alone refer to, such opportunities to challenge the evidence or the Panel's ability to assign it appropriate weight.

¹¹ The Panel has previously declined to assess reliability on the basis of evidence not offered for admission. *See* June 2023 Decision, KSC-BC-2020-06/F01603, para.50. The Panel has also previously considered that it cannot and will not pre-judge what use, if any, it will make of evidence in its final judgment. *See e.g.* Decision on Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F02357, 3 June 2024, para.14.

¹² *See* Section II(A)(4) below.

¹³ *See* fn.9 above.

10. Accordingly, the First Issue is concrete, identifiable, and arises from the Decision.

2. Second Issue: The Panel gave undue weight to the timing and nature of the Second Allegation.

11. After finding the evidence relevant, but of limited *prima face* reliability and probative value, the Panel considered that the evidence was ‘similar fact evidence’ and took place outside the Indictment period, when concluding that the evidence was ‘highly prejudicial’.¹⁴ In focusing exclusively on these aspects of the Second Allegation, the Panel gave them undue weight. In this respect, that evidence is or might be incriminating does not render it prejudicial for purposes of Rule 138.¹⁵

12. The witness’s evidence concerning the Second Allegation was not being proposed as ‘bad character’ evidence, but instead, to prove the elements of the offences and modes of liability pleaded in the Indictment.¹⁶ Moreover, in addition to constituting ‘similar fact evidence’ proposed to establish a pattern of conduct,¹⁷ the anticipated evidence on the Second Allegation was also relevant to and proposed to establish that, *inter alia*, the Accused shared a common criminal purpose.¹⁸ In the circumstances, by failing to acknowledge and consider the full nature and purpose of the evidence in its prejudice assessment, the Panel gave undue weight to one aspect.

13. Likewise, the Panel gave undue weight to the timing of the Second Allegation, without any acknowledgement of its close temporal connection the Indictment period [REDACTED] or its established connection to material facts in the Indictment.

¹⁴ Decision, KSC-BC-2020-06/F02393, para.28.

¹⁵ See e.g. Decision on Thaçi Defence’s Motion to Strike Part of the Record of Testimony of W02652, KSC-BC-2020-06/F01623, 23 June 2023, Confidential, para.36.

¹⁶ Compare Decision, KSC-BC-2020-06/F02393, para.28 with Decision, KSC-BC-2020-06/F02393, para.23. See also Prosecution response to Selimi Defence Motion for the Exclusion of Evidence of W04846, KSC-BC-2020-06/F02187, 18 March 2024, Confidential (‘Response’), para.17.

¹⁷ Decision, KSC-BC-2020-06/F02393, paras 17, 28.

¹⁸ Decision, KSC-BC-2020-06/F02393, para.26. See also Response, KSC-BC-2020-06/F02187, paras 7, 17.

14. Accordingly, the Second Issue is concrete, identifiable, and arises from the Decision.

3. Third Issue: The Panel failed to take into account relevant factors and/or afford them sufficient weight, in particular, that the witness would be available for cross-examination and that the trial is being conducted by professional Judges.

15. The grounds which led the Panel to conclude that the witness's anticipated evidence concerning the Second Allegation was of limited *prima facie* reliability and probative value could have been adequately addressed during testimony, including during cross-examination.¹⁹ Further, the Panel, composed of professional Judges, is well-placed to assign evidence – including incriminating evidence that falls outside the temporal scope of the Indictment and 'similar fact evidence' – appropriate weight in its holistic assessment of the evidence at the conclusion of the trial.²⁰ However, these factors were absent from the Panel's reasoning, and given no or inadequate weight when assessing what, if any, prejudice would be caused to the Defence.

16. Accordingly, the Third Issue is concrete, identifiable, and arises from the Decision.

4. Fourth Issue: The Panel failed to provide adequate reasoning to support its findings on reliability, probative value, and/or prejudice.

17. While the Panel is not obliged to address all arguments raised by the Parties or every item of evidence relevant to a particular finding, it failed to set forth the

¹⁹ See fn.9 above.

²⁰ See fn.9 above.

Decision's basis with sufficient clarity.²¹ Indeed, the Panel's reasoning did not adequately address any of the Issues discussed above.

18. In relation to reliability, the Panel did not provide any citation, discussion, or explanation of which inconsistencies or speculations in the witness's evidence it considered, or address the corroborative and complementary evidence cited in the Response,²² thereby preventing a fair and reasonable opportunity to understand and as appropriate, challenge the Decision. Indeed, the impact of this absence of reasoning underlying the Panel's findings concerning, in particular, purported inconsistencies and speculations must be considered in light of: (i) the general consistency of W04846's prior statements on the Second Allegation;²³ (ii) that the Defence did not argue that W04846's prior statements were inconsistent in relation to the Second Allegation;²⁴ and (iii) that the core of W04846's evidence concerning the Second Allegation, upon which the SPO intended to rely, was not speculative, but based on the witness's first-hand, eyewitness account.²⁵

19. Likewise, as noted above,²⁶ the Panel's reasoning on prejudice: (i) did not adequately explain why the nature and timing of the Second Allegation was 'highly prejudicial', notwithstanding the multi-layered relevance of the evidence (which was not limited to proof of 'similar acts'), its connection to material facts in the Indictment, and its close proximity to the Indictment period; and (ii) did not adequately balance any purported reliability issues or prejudice with the Accused's ability to cross-examine the witness and the Panel's ability to appropriately assess and assign weight

²¹ *Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023, para.33.

²² Response, KSC-BC-2020-06/F02187, para.14.

²³ The witness's 2005 (SPOE00347362-SPOE00347368-ET), April 2021 (095407-095413 RED), and August 2021 (102761-TR-AT Parts 1-3 Revised-ET) statements address the Second Allegation and are generally consistent. *See also* Response, KSC-BC-2020-06/F02187, para.12.

²⁴ Selimi Defence Motion for the Exclusion of Evidence of W04846, KSC-BC-2020-06/F02166, 6 March 2024, Confidential, paras 37-45. Rather, Defence submissions on the Second Allegation focussed on purported inconsistencies with [REDACTED] that are not part of this case or record.

²⁵ Decision, KSC-BC-2020-06/F02393, paras 25-26. *See also* Response, KSC-BC-2020-06/F02187, para.5.

²⁶ *See* paras 12-13, 15 above.

to the evidence after having the opportunity to hear the witness's live evidence and observe his demeanour. Instead, the Panel opted for exclusion, an extreme and exceptional remedy for potential prejudice.

20. Accordingly, the Fourth Issue is concrete, identifiable, and arises from the Decision.

B. THE ISSUES SIGNIFICANTLY AFFECT THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS, AND THE OUTCOME OF THE TRIAL

21. The Issues, individually and/or collectively, significantly impact on the ability of the SPO to present and prove its case, as the Decision deprived it of the opportunity to elicit and rely on evidence relevant and probative of, *inter alia*, the charged joint criminal enterprise and the Accused's state of mind. Considering that a witness's evidence is ultimately assessed on the basis of its coherence and integrity as a whole,²⁷ and in light of the entire body of evidence at the conclusion of the trial, excluding relevant parts thereof – in particular, first-hand, eyewitness evidence relevant to the charged crimes and modes of liability, inextricably linked to other parts of the witness's evidence²⁸ – undermines not only the Panel's ability to assess the portions of W04846's evidence that he was permitted to give,²⁹ but its truth-seeking function overall.

22. Further, there are other potential repercussions beyond the evidence of W04846. If the Issues are not resolved now, the Defence will – as has already been the case this week, including in relation to certain other parts of W04846's evidence that

²⁷ See e.g. Rule 139(2), (4)-(6); *Specialist Prosecutor v. Mustafa*, Appeal Judgment, KSC-CA-2023-02/F00038, 14 December 2023, Confidential, fn.562, para.266.

²⁸ Response, KSC-BC-2020-06/F02187, paras 1, 5-6.

²⁹ Indeed, on the terms of the Decision, the witness was not able to even refer to the First Allegation or Second Allegation, which are significant to the witness's experiences during the Indictment period overall, to, for example, date, orient, or otherwise contextualise facts and events that he was permitted to give evidence about, thereby threatening his ability to give structured, accurate, and coherent evidence.

were not excluded in the Decision – make further requests to artificially segment and exclude relevant testimony based on the same grounds concerned by the Issues. Any further Decisions to exclude relevant evidence of *viva voce* or Rule 154 witnesses in such circumstances will further limit the truth-seeking function of this trial. Finally, as with W04846,³⁰ decisions to exclude relevant parts of a witness's evidence can make the difference as to whether a witness will testify and their evidence is heard at all. On balance, when weighed against the Defence's ability to cross-examine live witnesses and the Panel's ability to assign evidence appropriate weight, exclusion should be the last resort to address any prejudice.³¹

23. Consequently, if the Panel erred and such errors are rectified on appeal now, the SPO may yet be able to present and rely upon W04846's excluded evidence, the Panel may be able to consider it in assessing the testimony that he will give this week and when weighing the totality of the evidence at the conclusion of the trial, and future, unjustified limitations on the scope of live witness testimony can be avoided.

24. The Issues therefore significantly affect the fair and expeditious conduct of the proceedings, and the outcome of the trial.

C. IMMEDIATE APPELLATE RESOLUTION OF THE ISSUES WILL MATERIALLY ADVANCE THE PROCEEDINGS.

25. Interlocutory, appellate resolution of the Issues will ensure that the trial proceeds on the correct path with respect to the permissible scope of the evidence of W04846 and similarly situated witnesses. Exclusion of relevant, live witness evidence is not easily remedied during an appeal against final judgment, when witnesses may no longer be available or willing. Even if the Issues could be effectively remedied on final appeal, the Panel's failures to consider and assign appropriate weight to relevant factors, and provide adequate reasons for the Decision impede the SPO's ability to, as

³⁰ W04846 Preparation Note, 121715-121728, paras 9-24.

³¹ See para.1 above.

appropriate and necessary, challenge the decision at the conclusion of the trial and the Court of Appeal's ability to assess any such challenge.³² Immediate appellate resolution of the Issues will therefore materially advance the proceedings.

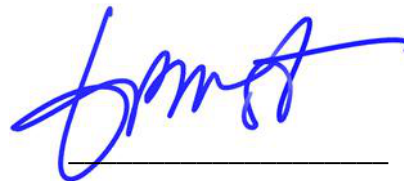
III. CLASSIFICATION

26. This filing is confidential pursuant to Rule 82(4).

IV. RELIEF REQUESTED

27. For the foregoing reasons, the Panel should grant the SPO leave to appeal the Issues.

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Kimberly P. West

Specialist Prosecutor

Wednesday, 26 June 2024

At The Hague, the Netherlands.

³² See e.g. ICTR, *Nchamihigo v. Prosecutor*, ICTR-2001-63-A, Judgement, 18 March 2010, para.165.