

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 Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi
Specialist Counsel for Kadri Veseli
Specialist Counsel for Jakup Krasniqi

Date: 14 October 2024

Language: English

Classification: Public

**Public Redacted Version of Joint Defence Reply to Prosecution Response to
'Joint Defence Request for Leave to Appeal Decision of 18 September 2024'
(F02623)**

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Luka Misić

Counsel for Kadri Veseli

Rodney Dixon KC

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Defence for Messrs Thaci, Veseli and Krasniqi ("Defence") hereby file this reply to the SPO Response to the Defence's request¹ for leave to appeal the Trial Panel's Decision of 18 September 2024.²

II. SUBMISSIONS

A. The Four Issues are Appealable

2. The Defence submits that all four issues are appealable and do not "merely contest the correctness" of the Impugned Decision.³ While the SPO asserts that the Defence merely disagrees with the Impugned Decision, it fails to provide any veritable submissions to substantiate this assertion. Throughout the Response, the SPO misconstrues the Defence Request, the Panel's previous Decision regarding the [REDACTED] abductions and the suitability of W01129 as a vehicle through whom these uncharged and unindicted allegations may enter the evidentiary record. Indeed, such hollow assertions are of little value to a proper determination of the issues at stake.

i. First Issue

3. As regards the first issue, the SPO submits that the Defence "does not identify a clear or discrete issue arising from the Decision" arguing, instead, that the Defence merely reiterates arguments already heard by the Panel and incorrectly construes the Impugned Decision as "an unjustified departure from a previous ruling."⁴ However, it is precisely the issue of the Panel's departure

¹ F2598, *Joint Defence Request for Leave to Appeal Decision of 18 September 2024*, 25 September 2024 ("Defence Request").

² F02623, *Prosecution response to 'Joint Defence Request for Leave to Appeal Decision of 18 September 2024' (F02598)*, 7 October 2024, confidential ("SPO Response").

³ SPO Response, para. 2.

⁴ SPO Response, para. 4.

from its previous ruling that constitutes the discrete issue arising from the Impugned Decision.

4. It follows that the Defence has not conflated the Impugned Decision with that which was rendered in the context of [REDACTED]'s evidence.⁵ Indeed, the Defence submits that leave to appeal is sought based on a well-founded comparison between the Panel's handling of two materially similar, if not identical, situations. The Defence recalls that on both occasions the SPO sought to do the same thing – use media articles to lead evidence from witnesses with no personal knowledge of the underlying events.
5. Whereas the SPO seeks to characterise W01129 as an individual with “personal knowledge of the events and individuals involved” in the [REDACTED] abductions,⁶ his evidence suggests the opposite. Although W01129 may know persons involved in a personal capacity, he has no personal knowledge of the events in question. He was not present when the abductions allegedly occurred; he simply heard about them from others.⁷ In similar fashion to [REDACTED], W01129 is *not* a witness to the events at issue.
6. In sum, the Defence reiterates the submissions made in its Request. The first issue identifies an appealable error in the Impugned Decision and, therefore, is appealable.

ii. Second Issue

7. In response to the second issue, the SPO argues that the Panel did not conflate evidence related to [REDACTED]'s abduction with the [REDACTED] abductions. Indeed, it argues that the Panel clearly considered both incidents

⁵ SPO Response, para. 6.

⁶ SPO Response, para. 7.

⁷ Transcript, 18 September 2024, p. 20000.

within the broader context of the [REDACTED] abductions when concluding that the evidence at issue could be led.⁸

8. Upon closer inspection, however, it is abundantly clear that there was no reasoning set out in the Impugned Decision which evidenced consideration by the Panel of the unique issues attaching to each instance of abduction. To the contrary, the Impugned Decision presented clear evidence of conflation of these two issues and obvious resultant errors of reasoning.
9. In this regard, the Defence submits that W01129's [REDACTED] at the [REDACTED] is entirely irrelevant to, and does not support, "the Decision to allow leading evidence on both incidents."⁹ To suggest that W01129's [REDACTED] somehow provides "valuable context" for allowing the leading of evidence on both incidents is erroneous.
10. The Defence observes that the Indictment in this case is comprised of several individual incidents, all of which require individual consideration by the Panel and, indeed, the SPO. The SPO, in bringing its case, is bound to select which crimes to charge and the evidence it seeks to present in support thereof.¹⁰ Where the SPO seeks to present or elicit evidence in relation to instances of uncharged acts of criminality, the Panel should exercise caution prior to authorising the SPO to proceed with presenting or eliciting such evidence. In doing so, the Panel is obliged to consider the specifics of the allegations sought to be adduced.
11. The Defence submits that the second issue is an appealable issue for which leave to appeal should be granted.

⁸ SPO Response, para. 9.

⁹ SPO Response, para. 10.

¹⁰ *See*, Rule 86(3) of the Rules.

iii. *Third Issue*

12. In addressing the third issue, the SPO fails to grapple with the central issue raised by the Defence – namely, that the Panel erred when it determined that the evidence of the [REDACTED] abductions be “evidence of uncharged acts and conduct of the accused.”¹¹ The Defence reiterates that the evidence at issue *does not* constitute evidence of acts and conduct of the accused. Indeed, it does not even constitute evidence of criminal acts attributable to the KLA or indeed other members of the JCE or tools. Absent evidence attributing the [REDACTED] abductions to the Accused, other JCE Members or tools, there simply is no basis upon which the Panel could have allowed the evidence to be admitted. Contrary to the SPO submissions,¹² the evidence admitted through W01129 is irrelevant to the crimes charged in the Indictment.
13. While the SPO asserts that the evidence is relevant “for the purposes of clarifying a given context and demonstrating a deliberate pattern of conduct,” no such context was specified by the SPO or the Panel. To suggest that the evidence is relevant to “demonstrating a deliberate pattern of conduct” is insufficient, given that the nature and extent of the so-called “deliberate pattern of conduct” is vague and undefined.¹³
14. Additionally, the SPO’s contention that it need not establish the identity of those individuals responsible for the [REDACTED] abductions before it introduces evidence probative of the abductions is dubious.¹⁴ The Defence in a criminal trial is entitled to know the evidence against them. The fact remains that the SPO was, and is, incapable of identifying the exact purpose for which it seeks to use the evidence at issue. In this respect, the Defence reiterates the

¹¹ Transcript, 18 September 2024, p. 19982.

¹² SPO Response, paras 12-14.

¹³ Transcript, 18 September 2024, p. 19982.

¹⁴ SPO Response, para. 14.

submissions made in its Request – namely, that the evidence of the [REDACTED] abductions appears to be presented both to establish a pattern of conduct and to prove notice of the Accused of the underlying alleged crimes.¹⁵ The adoption of what can only be described as a “wait and see” approach to the evidence, runs contrary to the basic principle of notice outlined above.

15. It follows that the Impugned Decision is unsafe and baseless. The Defence has in fact identified an appealable issue for which leave to appeal should be granted.

iv. Fourth Issue

16. As regards the fourth issue, the SPO submissions evidence a misunderstanding of the Defence’s argument. Despite assertions to the contrary, the Defence does not seek to relitigate the issue of prejudice, nor does it merely disagree with the Impugned Decision.¹⁶ The Defence identified clear errors made by the Panel in its determinations on the reliability of the evidence and the balancing of the prejudice that flowed therefrom.¹⁷ The SPO has made no attempt to contest the nature and substance of the evidence at issue – namely, multiple hearsay in the form of media articles and rumour.
17. As to the issue of burden shifting, the Defence did not suggest that the Impugned Decision imposed an obligation on it to investigate the [REDACTED] abductions.¹⁸ The Impugned Decision did, however, impermissibly find that to cure the prejudice caused by the admission of evidence of an incident which the SPO has failed to investigate or lead reliable evidence upon, was for the Defence to carry out actions the SPO otherwise should have. That is, for all intents and purposes, impermissible burden

¹⁵ Defence Request, paras. 15-18.

¹⁶ SPO Response, para. 15.

¹⁷ Defence Request, paras 21-24.

¹⁸ SPO Response, para. 17.

shifting. The Defence should not be forced to conduct investigations and call evidence to rebut wholly unreliable material that is admitted into evidence absent proper scrutiny by the Panel.

18. The fourth issue is appealable and should be certified.

B. The Four Issues Would Have a Significant Impact on or Materially Advance The Proceedings

19. The assertion that the Defence has failed to demonstrate prejudice relating to any of the four issues is fallible.¹⁹ The prejudice arising from the Impugned Decision has been made abundantly clear in the original Request and again in this Reply. The admission of unreliable hearsay evidence of uncharged crimes, for a wholly unclear purpose, is liable to prejudice the Accused, thus constituting a significant impact on the proceedings. The fact that the weight to be accorded to the evidence will be determined at the deliberation phase does not sufficiently safeguard the Accused's fair trial rights. The Rules are designed to exclude evidence of the type at issue from the Panel's deliberations precisely because it is unreliable, irrelevant and prejudicial.
20. Lastly, to assert that appellate intervention "would obviate the risk of any prejudice" is *not* speculative. The prejudice caused is obvious and acknowledged (to a degree) by the Panel.²⁰ Moreover, it is unclear how the prevention of prejudice can ever be "premature." The integrity and fairness of the proceedings dictate that prejudice and fairness is, at all times, a foremost consideration of the Panel and Parties.

¹⁹ SPO Response, para. 19.

²⁰ Transcript, 18 September 2024, pp. 19981-19982

III. CLASSIFICATION

21. This filing is classified as confidential pursuant to Rule 82 (4) of the Rules, as it replies to a filing bearing the same classification.

IV. CONCLUSION

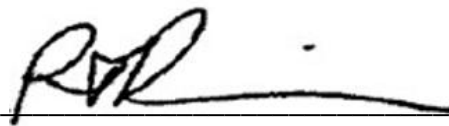
22. In light of the foregoing, the Defence requests that the four issues be certified for leave to appeal.

Word Count: 1,678

**Respectfully submitted on Monday, 14 October 2024, at the Hague, the
Netherlands.**



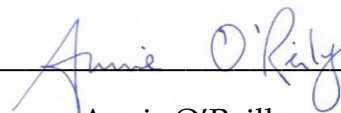
Luka Misetić
Lead Counsel for Hashim Thaçi



Rodney Dixon KC
Lead Counsel for Kadri Veseli



Kerrie Ann Rowan




Annie O'Reilly

Co-Counsel for Kadri Veseli

Co-Counsel for Kadri Veseli



Venkateswari Alagendra
Lead Counsel for Jakup Krasniqi



Aidan Ellis
Co-Counsel for Jakup Krasniqi



Shyamala Alagendra Khan
Co-Counsel for Jakup Krasniqi



Viçtor Băieșu
Co-Counsel for Jakup Krasniqi