



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: 11 November 2024

Language: English

Classification: Public

**Decision on Joint Defence Request for Leave to Appeal the Decision on
Prosecution Motion for Admission of the Evidence of Witnesses W03808, W03812,
W03815, W03870, W04785, and W04786 Pursuant to Rule 153 (F02666)**

Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Article 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 21 October 2024, the Panel issued the “Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W03808, W03812, W03815, W03870, W04785, and W04786 Pursuant to Rule 153” (“Impugned Decision”).¹
2. On 25 October 2024, the Defence teams for Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi (collectively, “Defence” and “Accused”) filed a joint request for leave to appeal the Impugned Decision (“Request”).²
3. On 1 November 2024, the Specialist Prosecutor’s Office (“SPO”) filed a response (“SPO Response”) to the Defence Request.³
4. The Defence did not reply to the SPO Response.

II. SUBMISSIONS

5. The Defence requests leave to appeal the Impugned Decision in respect of the following two issues:
 1. Whether the Trial Panel erred in its Decision by applying the incorrect test under Rule 153 (“First Issue”);

¹ F02666, Panel, *Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W03808, W03812, W03815, W03870, W04785, and W04786 Pursuant to Rule 153*, 21 October 2024, confidential (a public redacted version was issued on the same day, F02666/RED).

² F02675, Specialist Counsel, *Joint Defence Request for Leave to Appeal Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W03808, W03812, W03815, W03870, W04785, and W04786 Pursuant to Rule 153 (F02666)*, 25 October 2024, confidential.

³ F02695, Specialist Prosecutor, *Prosecution Response to Defence Request for Leave to Appeal Decision F02666*, 1 November 2024, confidential.

2. Whether the Impugned Decision is defective for want of reasons (“Second 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;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

7. The SPO responds that the Defence has previously raised the same issues and supporting arguments in its February 2024 request, which the Panel denied.⁸ The SPO further argues that the issues and supporting arguments fail to meet the Rule 153 criteria.⁹ Accordingly, the SPO requests that the Request be dismissed.¹⁰

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.

⁴ Request, paras 2, 23.

⁵ Request, para. 6.

⁶ Request, paras 6, 16-19.

⁷ Request, paras 6, 20-21.

⁸ SPO Response, para. 2.

⁹ SPO Response, para. 3.

¹⁰ SPO Response, para. 1.

The Panel incorporates by reference the applicable law on the legal standard for certification to appeal set out in past decisions.¹¹

IV. DISCUSSION

9. In the Impugned Decision, the Panel found that W03812's and W03870's evidence, consisting of their Rule 153 statements and associated exhibits, is *prima facie* relevant,¹² authentic,¹³ and probative.¹⁴ The Panel also found that the admission of W03812's and W03870's evidence *in lieu* of oral testimony is not unduly prejudicial within the meaning of Rule 138(1),¹⁵ and that such evidence is suitable for admission pursuant to Rule 153 as it: (i) is cumulative of other witness and documentary evidence;¹⁶ (ii) is corroborated by witnesses whom the Defence has confronted or will be able to confront through cross-examination;¹⁷ and (iii) goes to facts pertaining to the alleged crimes, but does not address alleged acts and conduct of the Accused.¹⁸ In reaching such conclusion, the Panel was satisfied that the Defence's wish to question W03812 and W03870 do not warrant their attendance for cross-examination, as the Defence has the ability to cross-examine facts and circumstances identified by the Defence through other relevant witnesses.¹⁹

¹¹ 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 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.

¹² Impugned Decision, paras 18, 21, 38, 41.

¹³ Impugned Decision, paras 19, 21, 39.

¹⁴ Impugned Decision, paras 22, 42.

¹⁵ Impugned Decision, paras 24, 44.

¹⁶ Impugned Decision, paras 22, 24, 42, 44.

¹⁷ Impugned Decision, paras 22, 24, 42, 44.

¹⁸ Impugned Decision, paras 22, 24, 42, 44.

¹⁹ Impugned Decision, paras 24, 25, 44.

A. DEFENCE'S FIRST ISSUE

10. The Defence submits that the legal test for admission of evidence under Rule 153, as set out in the Impugned Decision, is incorrect.²⁰ According to the Defence, the Panel applied the incorrect test of “that no undue prejudice would result from the admission of W03812’s evidence pursuant to Rule 153”.²¹ The Defence submits that undue prejudice is not the ultimate determining factor and is not found in Rule 153.²² According to the Defence, the correct legal standard to be applied is whether the requirement of a fair and expeditious trial exceptionally warrants the admission of the statement or transcript, with considerations for the non-exhaustive factors outlined in Rule 153(1)(a) and (b).²³ The Defence argues that Rule 153 should only be resorted to exceptionally by the SPO and not simply as a time saving or procedural mechanism.²⁴ Finally, the Defence argues that Rule 153 does not require the Defence to establish that the admission of a statement through Rule 153 would cause “undue prejudice”, this would impermissibly shift the burden onto the Defence.²⁵

11. The SPO responds that the issues are not specific, discrete or identifiable and fail to identify one or more concrete errors.²⁶ According to the SPO, the Request misinterprets the Specialist Chambers’ (“SC”) legal framework, mischaracterises the Panel’s findings, and ultimately expresses only disagreement with the Decision.²⁷ The SPO further contends that the Panel applied the correct legal test based on the plain language of the Rules in determining that W03812’s and

²⁰ Request, para. 7.

²¹ Request, para. 8.

²² Request, para. 9.

²³ Request, para. 10.

²⁴ Request, para. 11.

²⁵ Request, para. 14.

²⁶ SPO Response, para. 4.

²⁷ SPO Response, para. 5.

W03870's evidence is admissible pursuant to Rules 138 and 153.²⁸ The Panel's assessment of prejudice under Rule 138(1) is only one aspect of the Panel's evaluation and is not, in and of itself, the legal test the Panel applied.²⁹ Further, the SPO submits that the test proposed by the Defence is based on an incorrect interpretation of Rule 153 and the SC's legal framework for the admissibility of testimonial evidence.³⁰ Lastly, the SPO submits that the purported exceptional nature of Rule 153 and the Defence's right to confront evidence ignore the Panel's careful assessment of the evidence of W03812, W03870 and other witnesses in light of the arguments raised by the Defence.³¹

12. The Panel was satisfied that the Defence's wish to question W03812 and W03870 do not warrant their attendance for cross-examination, as the Defence has the ability to cross-examine other relevant witnesses in respect of the facts and circumstances said to be relevant to W03812 and W03870.³² These findings relate to the factors militating against admission under Rule 153(1)(b) and whether cross-examination was therefore necessary under Rule 153(1)(b)(iii) and (3).

13. Therefore, the Panel assessed the suitability of the admission of W03812's and W03870's evidence *in lieu* of oral testimony, as prescribed under both Rules 138(1) and 153(1)-(3), including by assessing factors militating for and against such admission.³³ Contrary to the Defence's submissions,³⁴ the Panel is mindful of the exceptional nature of Rule 153. The Panel has already noted that Rule 153 falls within the exception to the principle of orality of proceedings and to the right of the accused to examine a witness, where *viva voce* testimony is deemed

²⁸ SPO Response, para. 6.

²⁹ SPO Response, para. 6.

³⁰ SPO Response, para. 6.

³¹ SPO Response, para. 7.

³² *See above* para. 9.

³³ *See above* para. 9.

³⁴ *Contra* Request, paras 7-11.

unnecessary by the Panel.³⁵ If the Panel assesses the suitability of evidence under both Rules 138(1) and 153(1)-(3), evidence can be exceptionally admitted *in lieu* of oral testimony.

14. Having found that W03812's and W03870's evidence meets the requirements under Rules 138 and 153, and in the absence of any factors militating against the admission of W03812's and W03870's evidence, the Panel admitted it into evidence *in lieu* of oral testimony without cross-examination.

15. The Panel further notes that, contrary to the Defence's submissions,³⁶ Rule 153 does not shift the burden onto the Defence to show "undue prejudice". Rather, the Panel retains the discretionary power to decide whether cross-examination is appropriate under the circumstances regardless of any particular showing from the Party seeking to cross-examine. The Panel's ability to exercise that discretion in an informed manner depends in part on the relevance of the issue(s) for which cross-examination is sought and upon the witness's ability to provide relevant evidence in relation to such issue(s).³⁷

16. The Panel is of the view that the Defence's First Issue misrepresent the Panel's findings and constitutes a mere disagreement with them. The Panel therefore finds that the Defence has failed to establish that the First Issue constitutes a discrete topic arising from the Impugned Decision.

17. 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.

³⁵ Impugned Decision, para. 9; see also F01904, *Panel, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153* ("First Rule 153 Decision"), 3 November 2023, confidential, para. 13 (a public redacted version was filed on 27 November 2023, F01904/RED).

³⁶ *Contra* Request, para. 14.

³⁷ First Rule 153 Decision, paras 34-35.

B. DEFENCE'S SECOND ISSUE

18. The Defence submits that Rule 153(3) requires that the Panel provide reasons as to the basis for its determination that the requirements of a fair and expeditious trial exceptionally warrant admission of the evidence.³⁸ The Defence further argues that the Panel did not deal with how the evidence of W03812 and W03870 is exceptional and/or how a fair and expeditious trial requires their admission via Rule 153.³⁹ In their view, the decision is therefore defective for want of proper reasons.⁴⁰

19. The SPO responds that the Second Issue essentially rephrases the First Issue.⁴¹ The SPO further argues that the Second Issue departs from an incorrect interpretation of Rule 153 and mischaracterises the Panel's findings and reasoning.⁴² According to the SPO, the Second Issue is internally inconsistent where it alleges that the Panel's reasons that no "undue prejudice" is caused, while at the same time asserting that the Decision fails to explain the basis for this conclusion.⁴³ Finally, the SPO argues that the Defence ignores the Panel's findings, which are part of a fully reasoned Decision in which the Panel carefully considered the Defence arguments and established that the admissibility criteria were met.⁴⁴

20. The Panel notes that, contrary to the Defence's submissions,⁴⁵ it provided detailed reasons as to why W03812's and W03870's evidence can be admitted pursuant to Rule 153.⁴⁶ The Panel is of the view that the Defence's Second Issue constitutes a mere disagreement with the Panel's decision to admit said evidence.

³⁸ Request, para. 15.

³⁹ Request, para. 15.

⁴⁰ Request, para. 15.

⁴¹ SPO Response, para. 8.

⁴² SPO Response, para. 8.

⁴³ SPO Response, para. 8.

⁴⁴ SPO Response, para. 8.

⁴⁵ *Contra* Request, para. 15.

⁴⁶ *See above* paras 13-14, and references to the Impugned Decision cited therein.

The Panel therefore finds that the Defence has failed to establish that the Second Issue constitutes a discrete topic arising from 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.

V. CLASSIFICATION

22. The Panel notes that the Request and Response are filed confidentially. The Panel also notes that both Parties submit that no reference is made to confidential information.⁴⁷ The Panel, therefore, instructs the Registry to reclassify the Request and the Response as public.

VI. DISPOSITION

23. For these reasons, the Panel:

- a) **REJECTS** the Request; and
- b) **INSTRUCTS** the Registry to reclassify the Request and Response as public.



Judge Charles L. Smith, III

Presiding Judge

Dated this Monday, 11 November 2024

At The Hague, the Netherlands.

⁴⁷ Request, para. 22; SPO Response, para. 11.