



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: 27 January 2025

Language: English

Classification: Public

Decision on Veseli and Krasniqi Request for Certification to Appeal First Oral Order of 5 December 2024

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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 4 December 2024, in the course of judicial questioning of W04401, the Defence for Kadri Veseli (“Veseli Defence”) objected to the Panel’s use of a portion of the transcript of a witness interview (“Witness” and “Witness Interview”, respectively) with the Specialist Prosecutor’s Office (“SPO”),¹ on the basis that the SPO no longer intends to call the Witness to testify.²
2. On 5 December 2024, the Panel issued an oral order dismissing the Veseli Defence’s objection (“Impugned Decision”).³
3. On 12 December 2024, the Veseli Defence and the Defence for Jakup Krasniqi (collectively “Defence”) filed a request for certification to appeal the Impugned Decision (“Request”).⁴
4. On 13 January 2025, upon authorisation by the Panel,⁵ the SPO responded to the Request (“Response”).⁶
5. On 20 January 2025, the Defence filed a reply to the Response (“Reply”).⁷

¹ See Transcript of Hearing, 4 December 2024, pp. 23411-23413, referring to 078019-TR-ET Part 3 RED, p. 17.

² Transcript of Hearing, 4 December 2024, pp. 23431-23432, confidential.

³ Transcript of Hearing, 5 December 2024, pp. 23435-23437, confidential.

⁴ F02777, Specialist Counsel, *Veseli and Krasniqi Request for Certification to Appeal First Oral Order of 5 December 2024*, 12 December 2024, confidential.

⁵ F02800, Panel, *Order on the Extension of Time for Filings and Private Session Transcript Reviews During Winter Recess Period*, 19 December 2024, paras 14-15(b).

⁶ F02825, Specialist Prosecutor, *Prosecution Consolidated Response to Defence Requests for Leave to Appeal Oral Orders of 4 and 5 December 2024*, 13 January 2025, confidential.

⁷ F02841, Specialist Counsel, *Veseli and Krasniqi Reply to SPO Response to F02777 (F02825)*, 20 January 2025, confidential.

II. SUBMISSIONS

6. The Defence requests leave to appeal the Impugned Decision in relation to the following two issues (collectively, “Issues”):

1. Whether the introduction of witness testimony that has been expressly excluded from the SPO’s Case onto the record through judicial questioning improperly and unfairly usurps the role of the SPO (“First Issue”); and
2. Whether the [Panel] erred by failing to consider the obvious and unavoidable prejudice which arises out of the Defences’ inability to cross-examine the maker of a witness statement who will not be called as a witness, but whose testimony (or a part thereof) forms part of the record as a result of its use in the course of judicial questions (“Second Issue”).⁸

7. The Defence submits that the Issues satisfy the requirements for leave to appeal insofar as they: (i) arise from the Impugned Decision and do not merely disagree therewith;⁹ (ii) are liable to significantly affect the fair and expeditious conduct of the proceedings by usurping the role of the Prosecution;¹⁰ and (iii) require immediate resolution by the Court of Appeals in order to materially advance the proceedings.¹¹

8. The SPO responds that the Request should be dismissed because it fails to meet the leave to appeal standard.¹² The SPO avers that the request should be dismissed on the basis alone that issues regarding the scope and manner of Judges’ questioning have extensively been addressed and already dismissed by the Panel and the Court of Appeals Panel.¹³ The SPO contends that the Issues are not appealable issues.¹⁴ The SPO further argues that the Defence fails to demonstrate that: (i) the Issues significantly would have any effect on the fairness and

⁸ Request, paras 2, 33.

⁹ Request, paras 10-27.

¹⁰ Request, paras 10, 28-30.

¹¹ Request, paras 10, 31.

¹² Response, paras 1, 7, 14, 16.

¹³ Response, paras 2, 7, footnotes 7, 9, 22-23.

¹⁴ Response, paras 8-9.

expeditiousness conduct of the proceedings;¹⁵ and (ii) an immediate resolution by the Court of Appeals Panel would materially advance the proceedings.¹⁶

9. The Defence replies that: (i) the impugned manner of judicial questioning breaches the limitations imposed thereupon by the Court of Appeals Panel;¹⁷ and (ii) the Panel's alleged misinterpretation can only be addressed by way of appellate review.¹⁸ The Defence therefore requests that the Panel grant leave to appeal the Issues.¹⁹

III. APPLICABLE LAW

10. 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.

11. The Panel incorporates by reference the applicable law on the legal standard for certification to appeal set out in past decisions.²⁰

¹⁵ Response, paras 10, 12.

¹⁶ Response, para. 13.

¹⁷ Reply, paras 2-7.

¹⁸ Reply, paras 7-10.

¹⁹ Reply, para. 11.

²⁰ 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* ("Decision on the Thaçi Defence Application for Leave to Appeal"), 11 January 2021, paras 6-7, 9-17.

IV. DISCUSSION

12. In the Impugned Decision, the Panel found that no prejudice arose to the Defence or the Accused's rights from the Panel's use of the Witness Interview during judicial questioning, considering that: (i) the Specialist Chambers' legal framework, as interpreted by the Court of Appeals Panel, places no limitation on the subject matter of the Panel's questions to the witnesses;²¹ (ii) in accordance with the Order on the Conduct of the Proceedings,²² the SPO has appropriately given notice to the Parties and participants about its intention not to call the Witness to testify;²³ (iii) the Witness Interview had been in the possession of the Defence for a long time and the Defence is therefore acquainted with it;²⁴ and (iv) the Defence was in a position to conduct further cross-examination of W04401 on issues directly arising from the Panel's use of the Witness Interview.²⁵ At the time, a decision of the Panel on the SPO's application to withdraw the witness in question was still pending.

13. The Panel preliminarily recalls that, as found by the Court of Appeals Panel²⁶ and in accordance with established international criminal jurisprudence,²⁷ decisions concerning trial management issues and the conduct of proceedings, including the modalities of the examination of witnesses, are to be generally

²¹ Transcript of Hearing, 5 December 2024, pp. 23435-23436, confidential, referring to IA028/F00011, Court of Appeals Panel, *Decision on Thiçi, Selemi and Krasniqi Appeal against Oral Order on Trial Panel Questioning* ("CoA Decision on Panel's Questioning"), 4 July 2023, confidential (a public redacted version was filed on the same day, IA028/F00011/RED).

²² Transcript of Hearing, 5 December 2024, p. 23436, confidential, referring to F01226/A01, *Order on the Conduct of Proceedings*, 25 January 2023, para. 48.

²³ Transcript of Hearing, 5 December 2024, p. 23436, confidential.

²⁴ Transcript of Hearing, 5 December 2024, p. 23436, confidential.

²⁵ Transcript of Hearing, 5 December 2024, p. 23436, confidential.

²⁶ CoA Decision on Panel's Questioning, para. 10.

²⁷ See e.g. ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, *Judgment* ("[Popović Judgment](#)"), 30 January 2015, para. 205; *Prosecutor v. Popović et al.*, IT-05-88-AR73.3, Appeals Chamber, *Decision on Appeals Against Decision on Impeachment of a Party's Own Witness*, 1 February 2008, para. 12; *Prosecutor v. Prlić et al.*, IT-04-74-AR73.4, Appeals Chamber, *Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case*, 6 February 2007, para. 8, with further references; ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Appeals Chamber, *Judgment* ("[Nahimana Judgment](#)"), 28 November 2007, para. 182.

treated as discretionary.²⁸ The Panel further notes that the Court of Appeals Panel has specifically stated that a Trial Panel is not bound by Rule 143(3) of the Rules, which applies to the examination of witnesses by the parties.²⁹ The Court of Appeals Panel has also pointed to the Trial Panel's broad discretionary power to put to witnesses *any* questions deemed necessary for the clarification of their testimony or the discovery of the truth.³⁰ Finally, the Panel notes that, addressing an earlier Defence complaint that the Panel had used for judicial questioning a document not admitted, the Court of Appeals Panel made it clear that "while the documents used by the Trial Panel during its questioning had not been tendered for admission into evidence by the Parties, the Panel notes that, in light of the Trial Panel's power to admit any evidence deemed necessary, such questioning may be relevant to its consideration of the reliability and admissibility of the documents".³¹

A. FIRST ISSUE

14. The Defence submits that: (i) the Court of Appeals Panel's decision on the Panel's questioning does place limits on judicial questioning insofar as it must not lead to the apprehension of bias, suffering of prejudice, or otherwise encroach upon the rights of the Accused;³² (ii) the objection raised by the Veseli Defence related to the use of inadmissible witness statements in the course of judicial questioning and not the subject matter of the questions;³³ (iii) the re-introduction of excluded witness testimony through another witness amounts to a serious breach of the Accused's fundamental rights and usurps the role of the SPO;³⁴

²⁸ See, in particular, [Popović Judgment](#), para. 205; [Nahimana Judgment](#), para. 182.

²⁹ CoA Decision on Panel's Questioning, para. 32.

³⁰ Ibid, emphasis added.

³¹ Ibid, para. 47.

³² Request, para. 11, referring to CoA Decision on Panel's Questioning, para. 32.

³³ Request, para. 11.

³⁴ Request, paras 12-15, 17-18.

(iv) the use of witness testimony is distinct from the use of other evidence, such as newspaper articles;³⁵ and (v) the Panel should not be permitted to do what the SPO would be prohibited from doing.³⁶

15. The SPO responds that the First Issue reiterates arguments already raised before the Panel and restricts the Judges' power to question witnesses in contravention of the plain language of the Rules.³⁷

16. The Defence replies that the Response mischaracterises the arguments raised in the Request.³⁸ In particular, the Defence avers that the Issues: (i) arise from misinterpretation and misapplication by the Panel of the Court of Appeals Chamber's decision;³⁹ (ii) result in irreparable prejudice to the Defence, which the law prohibits the SPO from causing;⁴⁰ (iii) result in the risk that a reasonable onlooker would apprehend bias on the part of the Panel;⁴¹ and (iv) should be determined by an impartial tribunal.⁴²

17. The Panel recalls its findings in the Impugned Decision.⁴³ In particular, the Panel stated that, "in the exercise of its broad discretionary power to ask witnesses any question, the Panel is not barred from using documents or statements pertaining to individuals that are no longer on the parties' witness list, provided that no party suffers prejudice from the use of the document and that the rights of the accused are respected".⁴⁴ In this regard, the Panel is of the view that, contrary to the SPO's submissions,⁴⁵ whether the introduction onto the record through judicial questioning of information contained in an interview with a witness that

³⁵ Request, para. 16.

³⁶ Request, para. 19.

³⁷ Response, para. 8, *referring to* Rule 127(3).

³⁸ Reply, para. 2.

³⁹ Reply, para. 3. *See also* Reply, paras 7, 9.

⁴⁰ Reply, para. 4. *See also* Reply, para. 9.

⁴¹ Reply, para. 5. *See also* Reply, para. 8.

⁴² Reply, para. 10.

⁴³ *See above* para. 12.

⁴⁴ Transcript of Hearing, 5 December 2024, p. 23436, confidential.

⁴⁵ Response, paras 1-2, 7-9, 14-16.

the SPO no longer intends to call to testify amounted to a serious breach of the Accused's fundamental rights and usurped the role of the SPO constitutes a discrete topic emanating from the Impugned Decision. The Panel accordingly finds that the Defence's First Issue arises from the Impugned Decision.

18. As to the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial, the Panel notes that the question of whether the Panel is limited in terms of the type of material that can be relied upon in judicial questioning and, if so, whether the Panel's use of the Witness Interview amounted to a serious breach of the Accused's fundamental rights and usurped the role of the SPO, in light of the fact that the SPO no longer intends to call the Witness to testify, might significantly affect the Accused's fair trial rights. The Panel is therefore satisfied that, contrary to the SPO's submissions,⁴⁶ the Defence has demonstrated that the First Issue would impact the fair and expeditious conduct of the proceedings.

19. As to whether an immediate resolution on the issue by the Court of Appeals Panel may materially advance the proceedings, the Panel considers it important to the fair conduct of the proceedings and the rights of the Accused that there be clarity on the question of whether the Panel is limited in terms of the type of material that can be relied upon in judicial questioning and, if so, whether the Panel's use of the Witness Interview amounted to a serious breach of the Accused's fundamental rights and usurped the role of the SPO, in light of the fact that the SPO no longer intends to call the Witness to testify. The Panel is therefore satisfied that, contrary to the SPO's submissions,⁴⁷ immediate resolution of the First Issue by the Court of Appeals Panel will materially advance the proceedings.

20. In light of the above, the Panel grants leave to appeal the First Issue.

⁴⁶ Response, paras 10, 12.

⁴⁷ Response, para. 13.

B. SECOND ISSUE

21. The Defence contends that, in the Impugned Decision, the Panel failed in its assessment of the prejudice which arises out of the Defences' inability to cross-examine the maker of a statement in circumstances where that person's evidence is read into the record and a third party has been asked to comment upon it.⁴⁸ The Defence submits that: (i) the Panel failed to apply its own reasoning by permitting documents to be put to a witness where a clear and incurable prejudice is caused to the Defence;⁴⁹ (ii) in its role as neutral arbitrators, the Panel should not engage in conduct which would cause a party prejudice;⁵⁰ and (iii) the Defence's long possession of the witness statement and the possibility to cross-examine W04401 do not cure the prejudice caused to the Defence by the inability to cross-examine the Witness.⁵¹

22. The SPO responds that the Defence fails to demonstrate that the Second Issue is appealable as: (i) the Defence arguments concerning its inability to examine the witness in question conflate the Panel's use of his witness statement to elicit evidence from W04401 with the statement's purported independent evidential value;⁵² (ii) the Panel duly considered the Defence's submissions and assessed them to be unfounded;⁵³ and (iii) the Defence merely disagrees with the Panel's assessment and does not show any actual error.⁵⁴

23. The Defence replies that the Defence's right to confront the evidence against the Accused is infringed, as the suggestion that it can cross-examine a third party

⁴⁸ Request, para. 20.

⁴⁹ Request, para. 21.

⁵⁰ Request, para. 22. *See also* Request, paras 23-24.

⁵¹ Request, paras 26-27. *See also* Request, para. 25.

⁵² Response, para. 9.

⁵³ Response, para. 9.

⁵⁴ Response, para. 9.

about the words of another witness misunderstands and misstates the nature of the prejudice.⁵⁵

24. The Panel recalls that, in the Impugned Decision, it found that no prejudice arose to the Defence or the Accused's rights from the Panel's use of the Witness Interview during judicial questioning.⁵⁶ In reaching such finding, the Panel considered, *inter alia*, the facts that: (i) the SPO has given notice of its intention not to call the Witness to testify, and the Panel has not yet ruled upon this matter; (ii) the Witness Interview had been in the possession of the Defence for a long time; and (iii) the Defence was in a position to conduct further cross-examination of W04401 on issues directly arising from the Panel's use of the Witness Interview.⁵⁷ In this regard, the Panel is of the view that, contrary to the SPO's submissions,⁵⁸ whether the Panel erred in assessing the prejudice arising out of the Defence's inability to cross-examine the maker of a witness statement who may no longer be called as a witness, but whose recorded testimony was used in the course of judicial questioning, constitutes a discrete topic emanating from the Impugned Decision. The Panel accordingly finds that the Second Issue arises from the Impugned Decision.

25. As to the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial, the Panel notes that the question of whether the Panel erred in assessing the prejudice arising out of the Defence's inability to cross-examine the maker of a witness statement who may no longer be called as a witness, but whose recorded testimony was used during judicial questioning, might significantly affect the Accused's fair trial rights. The Panel is therefore satisfied that, contrary to the SPO's submissions,⁵⁹ the Defence has

⁵⁵ Reply, para. 6. *See also* Reply, para. 9.

⁵⁶ *See above* para. 12.

⁵⁷ *See above* para. 12.

⁵⁸ Response, paras 1-2, 7-9, 14-16.

⁵⁹ Response, paras 10, 12.

demonstrated that the Second Issue would impact the fair and expeditious conduct of the proceedings.

26. As to whether an immediate resolution on the issue by the Court of Appeals Panel may materially advance the proceedings, the Panel considers it beneficial for the fair conduct of the proceedings and the rights of the Accused that there be clarity on whether the Panel erred in assessing the prejudice said to have arisen. The Panel is therefore satisfied that, contrary to the SPO's submissions,⁶⁰ immediate resolution of the Second Issue by the Court of Appeals Panel will materially advance the proceedings.

27. In light of the above, the Panel grants leave to appeal the Second Issue.

V. CLASSIFICATION


28. The Panel notes that the Request, the Response and the Reply were filed confidentially. The Panel also notes that the SPO Response was reclassified as public. The Panel therefore orders the Defence to request the reclassification or submit a public redacted version of the Request and the Reply by **Friday, 31 January 2025**.

⁶⁰ Response, para. 13.

VI. DISPOSITION

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

- a) **GRANTS** leave to appeal the First and Second Issue; and
- b) **ORDERS** the Defence to request the reclassification or submit a public redacted version of the Request and the Reply by **Friday, 31 January 2025**.



Judge Charles L. Smith, III

Presiding Judge

Dated this Monday, 27 January 2025

At The Hague, the Netherlands.