

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 Counsel for Kadri Veseli

Date: 6 February 2025

Language: English

Classification: Public

**Public Redacted Version of Veseli Defence Request for Certification to Appeal
First Oral Order of 30 January 2025**

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I. INTRODUCTION

1. In accordance with Article 45(2) of the Law¹ and Rule 77(2) of the Rules,² the Defence for Kadri Veseli (“Defence”) hereby files this request for certification to appeal the Trial Panel’s First Oral Order of 30 January 2025, in which it denied the Defence’s request to admit portions of the “Klecka” retrial judgment, which were marked for identification as 2D00043.³
2. The Defence submits two issues for certification:
 - (i) *First Issue:* Whether the Trial Panel erred by drawing an arbitrary distinction between the Impugned Decision and F01733.
 - (ii) *Second Issue:* Whether the Trial Panel erred by failing to consider the acute prejudice suffered by the Accused in circumstances where it cannot test the testimonial evidence at issue through cross-examination of the relevant witness.

II. PROCEDURAL BACKGROUND

3. On 9 June 2023, the Defence requested admission of extracts from the Gjakova Basic Court Verdict against the accused Fatmir Limaj, in case PKR. nr. 154/16 (“Bellanicë Trial Judgment”) and extracts of the Court of Appeals judgment in the same case (“Bellanicë Appeals Judgment”) as items relevant to assessing a Prosecution exhibit known as KLA Military Police Directorate Announcement No. 4 admitted through [REDACTED].⁴
4. On 23 August 2023, the Trial Panel granted the Defence request, admitting portions of each judgment into evidence as 2D00012 and 2D00013.⁵

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”).

³ Transcript, 30 January 2025, Page 24832, line 13 to Page 24833, line 9.

⁴ F01599, *Veseli Defence Request Regarding Items Associated with [REDACTED]’s Testimony*, 9 June 2023, confidential, with Annexes 1-2, confidential.

⁵ F01733, *Decision on Veseli Defence Request Regarding Items Associated with [REDACTED]’s*

5. On 29 January 2025 Counsel for Mr Veseli tendered for admission three pages from the Klecka retrial judgment that had been used with W04743 in cross-examination. These pages were marked for identification as 2D00043.⁶
6. On 30 January 2025, the Trial Panel rendered the Impugned Decision, denying admission of 2D00043.⁷

III. APPLICABLE LAW

7. Pursuant to Article 45(2) and Rule 77(2),⁸ a right to appeal only arises if the standard of certification set forth herein has been met.
8. Rule 77(2) states 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.⁹

9. The Defence recalls the legal test set for certification of appeal under Rule 77(2) has been developed in prior decisions issued by this Court, which are incorporated herein by reference.¹⁰

Testimony, 23 August 2023, confidential. The items were assigned exhibit numbers 2D00012 and 2D00013.

⁶ Transcript, 29 January 2025, Page 24797, line 18 to Page 24800, line 7.

⁷ Transcript, 30 January 2025, Page 24832, line 13 to Page 24833, line 9.

⁸ Rules, Rule 77.

⁹ Rules, Rule 77(2).

¹⁰ F02866, Decision on Veseli and Krasniqi Request for Certification to Appeal First Oral Order of 5 December 2024, 27 January 2025, public, para. 11 (citing 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. SUBMISSIONS

10. The identified Issues satisfy the requirements for leave to appeal. They arise from the Impugned Decision, do not merely disagree with the Impugned Decision, are liable to significantly affect the fair and expeditious conduct of the proceedings and requires immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

A. The Issue Arises from the Impugned Decision

11. In the Impugned Decision, the Trial Panel stated that it was exercising its discretion to exclude 2D00043 for the following reasons: (i) the relevant judgment excerpts were already read into the record; (ii) the Trial Panel has exclusive responsibility for assessing a witness's reliability; (iii) the evidential record before the EULEX court was different; and (iv) the precedent relied on by the Defence in F01733 admitting 2D00012 and 2D00013 was distinguishable because the latter concerned contextual matters.¹¹ The Panel did not address the Defence's submission that 2D00043 was particularly important information relevant to W04839's credibility, which was of heightened significance in the absence of an opportunity to cross-examine W04839 who is deceased and whose evidence has been admitted in these proceedings pursuant to Rule 155.¹²

12. The first issue considers whether the Trial Panel validly distinguished the circumstances of the Impugned Decision from those of F01733. The second issue considers whether the Trial Panel's failure to consider the Defence's submission, that admission particularly warranted given W04839's unavailability. Consequently, both issues arise from the Impugned Decision.

¹¹ Transcript, 30 January 2025, Page 24833, line 4.

¹² Transcript, 29 January 2025, Page 24798, lines 5 to 7; F02013, *Decision on Prosecution Third Motion for Admission of Evidence pursuant to Rule 155*, 15 December 2023, public, para. 63.

(i) *First Issue*

13. The Defence submits that the purported distinction between F01733 and the Impugned Decision was arbitrary and erroneous. The error was material because none of the other grounds justified the exclusion of 2D00043.
14. The distinction between F01733 and the Impugned Decision that the Trial Panel drew was that the admitted exhibit in F01733 concerned contextual matters; by implication, those in the Impugned Decision were not contextual. The Defence submits that this distinction does not withstand scrutiny.
15. In F01733, the Trial Panel admitted judgment excerpts from the *Bellanica* case, tendered by the Defence, about the authenticity of a key document in the case, namely, Police Communique No. 4. In this document, the KLA ostensibly claims responsibility for the crimes at issue in the *Bellanica* case. Police Communique No. 4 has been admitted as a prosecution exhibit in the present case.¹³ Yet, its admission was rejected in the *Bellanica* case because of concerns about its authenticity. The excerpts of the judgment discussing those concerns were admitted by the Trial Panel as 2D00012 and 2D00013.¹⁴
16. In its decision admitting 2D00012 and 2D00013, this Trial Panel observed that they were being offered in connection with the Accused's knowledge of the charges.¹⁵ It held that the admission of such evidence would provide "context" to a contested item of evidence, Police Communique No. 4 without creating a rebuttable presumption of factual accuracy¹⁶. Indeed, it would retain exclusive authority to assess the document. In conclusion, it reasoned that "in order to

¹³ P00090.1.

¹⁴ 2D00012; 2D00013.

¹⁵ F01733, para. 9.

¹⁶ F01733, para. 10.

ensure equality of arms and to benefit from a record that is as complete as possible," it was right that the judgment portions should be admitted.¹⁷

17. The circumstances of 2D00043 are indistinguishable from those of 2D00012 and 2D00013. First, both provide important context to other evidence admitted in this case. Both Police Communique No 4 and W04839's testimony and associated exhibits are relied on by the SPO to demonstrate the Accused's knowledge of, and in the case of W04839's evidence, involvement in crimes on the indictment. If anything, the fact that W04839's evidence alleges direct involvement of the Accused renders admission of 2D00043 all the more important.
18. Second, 2D00012 and 2D00013 were not admitted with the intention or effect of usurping the Trial Panel's responsibility to make determinations about the evidence in this case; nor was 2D00043 tendered for this purpose. Indeed, Counsel for Mr Veseli was clear that "of course, you're not bound by the same findings of a EULEX court. But it's important as one of the contextual matters to take into account given that this witness has testified about this matter."¹⁸
19. Third, just as the admission of 2D00012 and 2D00013 helped to ensure equality of arms for the Defence by ensuring the admission of material relevant to the unreliability of the Prosecution's exhibit, so too would the admission of 2D00043 help to redress the disadvantage suffered by the Defence by its inability to cross-examine W04839 whose evidence, it submits, is seriously unreliable. While it is indisputable that the Defence is not bound by the EULEX court's decision in the *Klecka* case, it is highly relevant to the Panel's own assessment of the credibility and reliability of this witness that the last time he gave evidence before a court, that panel concluded that the inconsistencies in

¹⁷ F01733, para. 13.

¹⁸ Transcript, 29 January 2025, Page 24798, lines 2-4.

his evidence were “not discrepancies that might be the product of an honest but imperfect recollection” but were rather motivated by animus and malintent, ultimately, he was “not a credible witness and that in consequence it would be unsafe to rely upon his evidence.”¹⁹

20. The remaining reasons provided by the Trial Panel in the Impugned Decision do not justify the decision to deny admission. The first reason, that the portions were already read into the record, is not a reason not to admit the item. The second reason, that the Panel cannot delegate its decision-making function, is readily acknowledged by the Defence, and is not the purpose for which admission was sought. Nonetheless, the findings remain relevant and cannot be simply swept away. The third reason, that the evidential records of both cases differ, overlooks the fact that the EULEX court’s assessment of his credibility relied on factors equally applicable to this case - in-his animus towards Mr Limaj, internal inconsistencies in his account, and the fact that he lied, and admitted that he lied, to EULEX investigators.²⁰

21. In conclusion, the arbitrary distinction that the Panel drew between the circumstances of F01733 and the Impugned Decision was a material error, which should be subjected to appellate review.

(ii) *Second Issue*

22. The second issue arises from the Trial Panel’s failure to take into account W04839’s unavailability for cross-examination as a critical factor in determining whether 2D0043 should be admitted due to the acute prejudice to the Accused. In the absence of this witness, the judgment becomes more

¹⁹ MNA 2D00043, SITF00391921-SITF00391922.

²⁰ MNA 2D00043.

important to assessing the credibility and reliability of the Prosecution's case – which the Defence has the fundamental right to challenge.

23. If W04839 were available for cross-examination, the Defence would have put 2D00043 to the witness to test his credibility. It would have done so because, as set out above in paragraph 19, the document establishes that W04839 was found by a Kosovo court to have lied in legal proceedings. Were such evidence to be contained in a prior conviction for a crime of dishonesty, there would be no doubt as to its admissibility in criminal proceedings and the propriety of it being used in cross-examination. This is because, the Defence submits, a judicial finding of a person's dishonesty is highly relevant to their credibility.
24. The fact that the Defence cannot cross-examine W04839 due to his unavailability already infringes on the right of the Accused to test the case against him. 2D00043 is compelling evidence of W04839's dishonesty, on which the Defence is entitled to rely. The decision to exclude it failed to consider that in so-doing, the Trial Panel would be further compounding the prejudice to the Defence caused by W04839's unavailability.
25. As this Panel noted in F001733 (and as noted above), equality of arms is a relevant consideration in determining whether to admit evidence. By declining to admit 2D00043, the Panel fails to provide the necessary redress to ensure a balance between the rights of the Accused and the ability of the Prosecution to present its case.
26. In sum, the Panel's failure to consider whether it was necessary to admit 2D00043 in order to protect the rights of the Accused, is an error that ought to be subject to appellate review.

B. The Issue Significantly Affects the Fair and Expeditious Conduct of the Proceedings

27. The issues arising from the Impugned Decision significantly affect the fair and expeditious conduct of the proceedings. The Defence must be able to benefit from the predictable application of the Panel's prior ruling. Departure from prior precedent without a clear and reasonable basis for doing so, does not promote the fair and expeditious conduct of the proceedings. With respect to the second issue, the Panel's failure to consider the prejudice to the Accused in light of its prior Rule 155 decision, which admission would have helped to ameliorate, similarly impacts the fairness and expeditious conduct of these proceedings.

C. An Immediate Resolution by the Appeals Chambers Will Materially Advance the Proceedings


28. Immediate resolution of the Issues will materially advance the proceedings. The Defence – as any Party - is entitled to a settled expectation of the circumstances under which evidence is and is not admissible. The Prosecution case is ongoing. Numerous items of testimonial and documentary evidence have yet to be tendered and ruled upon. The Defence must be in a position to predict with greater certainty whether the evidence it seeks to rely on will be deemed admissible in these proceedings and to have confidence that unfair prejudice caused by the admission of Prosecution evidence will be redressed by the Panel.

V. CONCLUSION

29. In light of the foregoing, the Defence respectfully seeks leave to appeal the issues identified above.

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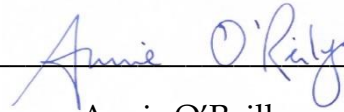
**Respectfully submitted on Thursday, 6 February 2025, at the Hague, the
Netherlands.**



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