

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 Hashim Thaçi

Specialist Counsel for Kadri Veseli

Specialist Counsel for Rexhep Selimi

Specialist Counsel for Jakup Krasniqi

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Public Redacted Version of Joint Defence Consolidated Request for Leave to Appeal Decisions on the Admission of Expert Evidence of Witnesses W04826 and W04874 (F03201 and F03203)

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law¹ and Rule 77(2) of the Rules,² the Defence for Messrs. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi (“Defence”) hereby files this request for leave to appeal the Panel’s Decision on the Admission of Expert Evidence of Witnesses W04826 and W04874 (“Impugned Decisions”).³
2. The SPO called two forensic pathologists, Marek Gasior (W04826) and John Clark (W04874). The purpose of calling pathological evidence in this case is clearly for the SPO to try prove the cause of death of alleged murder victims. Establishing cause of death is essential in order to prove an allegation of murder. Gasior himself performed a number of autopsies on the skeletal remains of alleged victims in this case; Clark performed none. Clark was provided with autopsies conducted by other forensic pathologists and was instructed by the SPO to provide answers to a set of narrow questions, some based upon these autopsies. Gasior was instructed to provide comment both on his own autopsies and autopsies conducted by other forensic pathologists.
3. The Defence objected to the SPO’s use of its two pathology experts as a mechanism by which to seek to unlawfully admit as “source material” third party expert reports in the form of autopsies by forensic pathologists in contravention of Rule 149 and in circumvention of the protections it affords the Defence. This caused identifiable prejudice to the Defence which the Panel failed to properly recognise.

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 F03201, Trial Panel, *Decision on the Admission of Expert Evidence of W04826*, 27 May 2025, public (“Impugned Decision 1”) and F03203, Trial Panel, *Decision on the Admission of Expert Evidence of W04874*, 27 May 2025, public (“Impugned Decision 2”); (collectively “Impugned Decisions”).

4. Admitting this underlying material is contrary to fact, law, and precedent, and requires appellate intervention. The Panel's wholly unreasoned findings in order to justify the admission of this material were irrational, including the finding that an autopsy report is not an expert report and forensic pathologists are not experts.
5. The Defence submits the following **Five Issues** for certification:
 - i. **Issue One:** The Panel erred in law and fact in finding that autopsies are not expert reports and that pathologists are not experts.
 - ii. **Issue Two:** The Panel applied the incorrect legal test for admission of "source material" with expert statements under Rule 149.
 - iii. **Issue Three:** The Panel erred in failing to deal with the Defence objection to the SPO tendering wholly contradictory evidence and not requiring the SPO to state which stream of evidence it intends to rely upon.
 - iv. **Issue Four:** The Panel erred in its assessment of the prejudice caused to the Defence by the admission of the "source material."
 - v. **Issue Five:** The Panel erred in admitting document SPOE00111910-SPOE00111913, as it was not referred to in W04874's report.

II. PROCEDURAL HISTORY

6. On 22 and 23 January 2025, Clark testified⁴ and the SPO tendered his proposed evidence for admission.⁵ On 27 January 2025, Gasior testified⁶ and the SPO tendered his proposed evidence for admission.⁷ On 29 and 30 January 2025, the Defence filed supplemental submissions on the admissibility of the Proposed Evidence.⁸ On 31 January and 3 February 2025, the SPO replied.⁹ On 27 May 2025, the Panel issued its Decisions.¹⁰

III. APPLICABLE LAW

7. The relevant laws governing application for certification to appeal are set out in Article 45(2) of the Law and Rule 77(2).

IV. SUBMISSIONS

A. The Issues Arise from the Impugned Decision

8. The **First Issue** arises directly from the Impugned Decisions in that the Panel erred in law and fact in finding that autopsies are not expert reports and that forensic pathologists (namely Slavisa Dobricanin, Dusan J. Dunjic, Branimir Aleksandric, Jose Pablo Baraybar, Dr Ananda Samarasekara, and Dr. Maria Dolores Morcillo) are not experts. In its Decision the Panel stated:

⁴ Transcript, 22 January 2025, T.24220-24328; Transcript, 23 January 2025, T.24357-24449.

⁵ Transcript, 23 January 2025, T.24450.

⁶ Transcript, 27 January 2025, T.24503-24580.

⁷ *Ibid*, T.24582.

⁸ F02871/COR, Specialist Counsel, *Corrected Version of Joint Defence Response to Prosecution Request for Admission of the Expert Report and Source Material of W04874*, 29 January 2025, confidential; F02876, Specialist Counsel, *Joint Defence Response to Prosecution Request for Admission of Expert Report and Source Material of W04826*, 30 January 2025, confidential.

⁹ F02884, Specialist Prosecutor, *Prosecution Reply to 'Corrected Version of Joint Defence Response to Prosecution Request for Admission of the Expert Report and Source Material of W04874'* (F02871/COR), 31 January 2025, confidential; F02894, Specialist Prosecutor, *Prosecution Reply to 'Joint Defence Response to Prosecution Request for Admission of Expert Report and Source Material of W04826'* (F02876), 3 February 2025, confidential.

¹⁰ Impugned Decisions.

Regarding autopsy reports not having been carried out by W04874, the Panel recalls its findings regarding underlying information prepared by third-parties. The Panel does not consider that these reports are themselves “expert witness reports” within the meaning of Rule 149. Nor does the Panel consider their authors to be “third party experts”, as submitted by the Defence. Rather, these reports are source material [...]¹¹

9. The Panel has therefore found that (a) the forensic pathologists who conducted and drafted a number of autopsy reports in this case are not experts and (b) autopsies which set out the forensic pathologists’ findings and conclusions as to cause of death are not expert reports.
10. The Panel provides no reasoning as to why they do not deem an autopsy to be an expert report. They also fail to define “source material” or “autopsy document” and do not explain how they differentiate them from autopsies or expert reports. They also fail to explain how they consider Clark and Gasior to be experts in forensic pathology, but not Branimir Aleksandric or Dusan Dunjic¹² both of whom were relied upon as experts by the ICTY: no distinction has been drawn.
11. There can be no sensible dispute that forensic pathology is a recognised field of expertise. Domestic and international tribunals alike have deemed the work of forensic pathologists to be the work of experts. Forensic pathologists examine human remains, set out their findings and come to conclusions in relation to mechanism of injury/ cause of death. The Panel themselves acknowledge that Gasior and Clark are experts in the field of forensic pathology; thereby clearly accepting forensic pathology as a recognised field of expertise. Findings that these two pathologists are experts but not those who conducted the underlying autopsies is irrational and wrong in law and fact.

¹¹ Impugned Decision 2, para. 30; *similarly in* Impugned Decision 1, para. 30.

¹² ICTY, *Prosecutor v Ramush Haradinaj et al.*, Public Judgement with Confidential Annex 1, 29 November 2012, public, paras. 322-324.

12. An autopsy is a specialist medical examination of a body after death by a pathologist to find the cause or mechanism of death. As explained by Clark, autopsy reports are an examination of somebody's body after death; a pathologist will look at external and internal findings and produce a report listing all these findings, usually bringing in some sort of conclusion at the end.¹³ This is work that only an expert medical doctor with relevant specialist training and expertise can conduct. It is not work or analysis that can be done by a lay person and is far outside the knowledge of the Panel and Parties. A report is an account of a situation, event, etc., brought by one person to another, especially as the result of an investigation.¹⁴ An autopsy is an account of a pathologist's examination of human remains and investigation into the mechanism of death. It is written by an expert in forensic pathology. There can therefore be no rational question that these reports and the conclusions contained therein are the work and conclusions of persons who require specialised knowledge, skill or training in areas of science, who can assist the trier of fact to understand or determine an issue in dispute, namely cause of death. It is therefore unquestionably an expert report.
13. The notion that an autopsy is an expert report is wholly uncontroversial in criminal law. The Panel have provided no reasoning or justification for departing significantly from well-settled law. The Panel cannot redefine what an autopsy is, simply because the consequences of autopsies being expert reports in this case would cause inconvenient evidential issues for the SPO. It is not the job of a neutral Panel to facilitate the SPO unlawfully shoehorning

¹³ Transcript, 22 January 2025, T.24262, lines 16-20.

¹⁴As defined by the [Oxford English Dictionary](https://www.oed.com/dictionary/report_n?tab=meaning_and_use#25843505):
https://www.oed.com/dictionary/report_n?tab=meaning_and_use#25843505

expert reports into evidence by redefining something so fundamental in criminal law as the word autopsy.

14. Appellate intervention is required because, if this Impugned Decision of the Panel were to stand unchecked, it would create a dangerous precedent in ICL more broadly and have unintended far-reaching consequences for the admission of forensic pathology and autopsy reports in trials in the future.
15. The **Second Issue** concerns the Panel's misapplication of the legal test for admission of "source material" with expert statements under Rule 149. The Defence adopts by reference herein the same arguments as set out in their Joint Defence Request for Leave to Appeal Decision on the Admission of Expert Evidence of Witness W04875,¹⁵ as they apply equally to these admitted reports.
16. The **Third Issue** arises directly from the Impugned Decision concerning Clark¹⁶ in that the Panel erred in failing to deal with the Defence objections to the SPO's tender of contradictory evidence - Clark's testimony and underlying source material – while failing to state which it intended to rely on for truth. Lengthy submissions were made on this issue in the Defence's supplementary submissions.¹⁷ These went completely ignored in the Impugned Decision. The Panel erred by failing to deal with the Defence submissions and by failing to provide reasons for disregarding their substance.
17. This absence of reasoning was especially important because the Panel has failed to take a consistent approach in these proceedings to requiring a Party to state its case. The Panel has in the past required the Defence to state their case.¹⁸ The Panel has on occasion in the past declined to insist that the SPO state its case on

¹⁵ *Specialist Counsel*, Joint Defence Request for Leave to Appeal Decision on the Admission of Expert Evidence of Witness W04875, 3 June 2025, confidential, paras. 16-26.

¹⁶ Impugned Decision 2.

¹⁷ F02871/COR, paras. 15-21.

¹⁸ Transcript, 18 November 2024, T.22325, lines 3-4.

certain issues.¹⁹ However, significantly, the Panel has refused to admit documents tendered by the SPO for the truth of their contents in circumstances where the contents of the document tendered contradicted the facts relayed by the relevant live witness through which they wished to tender it.²⁰ This is indistinguishable from the present case, and it should not be permitted.

18. In this instance the SPO tendered documents through Clark as “underlying material” that are in contradiction to, and seriously undermined by, Clark’s own testimony.²¹ This is impermissible, as previously acknowledged in principle by the Panel. The SPO must be required to state their case on something so central as to how they say their alleged victims were killed. Firstly, it is relevant to admissibility. Secondly, and more fundamentally, it is nonsensical to suggest that, in a murder trial, the Defence is not entitled to know the SPO’s case as to the cause of death of alleged murder victims; especially when the SPO has called a pathologist on the issue. The SPO must be required to state their case at this stage on such a fundamental issue in terms of the murder charges on this indictment. The Defence cannot be left to operate in the dark until it receives the SPO’s final brief, **after** submitting its own. The prejudice caused to the Defence by not knowing the alleged cause of death in a murder trial is unacceptable.
19. As a result of this error, the Panel was also unable to properly assess the SPO’s application to admit this material without knowledge of the purpose for which it was being tendered or the nature of the SPO’s case. Absent this, the Panel was unable to properly apply the law or consider admissibility fairly or properly.
20. For completeness, the Defence maintains, as outlined above, that the SPO crucially is not entitled to rely upon source material for its substantive content, *i.e.*, for truth. Therefore, the SPO cannot rely on the conclusions in the

¹⁹ Transcript, 6 November 2024, T.22065, lines 18-22.

²⁰ Transcript, 18 September 2024, T.20018, line 25 -T.20019, line 2.

²¹ F02871/COR, paras. 15-21.

underlying third party autopsies on cause of death as proof of how these persons died.

21. The **Fourth Issue** concerns the Panel's flawed assessment of the prejudice caused to the Defence by the admission of Clark's "source material." The Panel found that "the Remaining Items are probative, and their probative value is not outweighed by their prejudicial effect, considering that the Defence was able to cross-examine W04874 extensively on these documents."²²
22. The "source material" comprised numerous autopsies conducted by third party forensic pathologists. Importantly, Clark did not adopt the underlying conclusions as his own.²³ Some exhibit serious issues and irregularities such as inexplicable recordings of gunshot trajectories²⁴ and assertions of haematomas caused by heavy blunt mechanical objects on numerous bodies which Clark regarded as highly questionable and he did not accept.²⁵
23. The fact, therefore, that the Defence had the ability to cross-examine Clark does not make up for the prejudice caused to the Defence by not being able to challenge the authors of the underlying reports, upon which the SPO unlawfully seeks to rely. On the contrary, it is highly prejudicial to admit these items when their authors cannot be questioned about this and the reason for these irregularities remains unknown.
24. The Panel fell into error in the same fashion as it did when considering the prejudice involved in the admission of the underlying materials for W04875, Dr Goodwin.

²² Impugned Decision 2, para. 35.

²³ Transcript, 23 January 2025, T.24371, lines 10-13; T.24373, lines 6-9; T.24399, lines 16-18.

²⁴ Transcript, 23 January 2025, T.24367, line 6 – T.24368, line 19.

²⁵ Transcript, 22 January 2025, T.24297, line 16 – T.24299, line 3.

25. Finally, the **Fifth Issue** also arises directly from the Impugned Decision²⁶ as the Panel erred in law in admitting a document through Clark contained within the “source material.” The Panel found in relation to this document that;

[T]hey are referenced in the Expert Report or are directly related to documents which are referred to therein. The Panel therefore finds that the Remaining Items are necessary to the understanding of W04874’s Expert Report.²⁷

26. Clark did not provide any commentary on SPOE00111910-SPOE00111913 in his Report and therefore it cannot be deemed “an indispensable and inseparable part of the expert report.” Admission of this item is not necessary to the understanding of Clark’s Report and Clark did not give evidence to contextualise the document.
27. SPOE00111910-SPOE00111913 is a record of an investigation, compiled by Investigating Judge [REDACTED]. It does not concern matters of pathology; it records the description of a crime scene by an investigate judge. The Panel failed to identify any document to which this Record is directly related, or which refers to it directly in a manner warranting its admission.
28. The Panel therefore erred in law in the admission of this document.

B. The Issues Significantly Affect the Fair and Expeditious Conduct of the Proceedings

29. All **Issues** for which certification is sought significantly affect the fair conduct of the proceedings. The Issues concern the erroneous decisions by the Panel to admit third party expert reports and witness statements through Gasior and Clark, in contravention of the protections of the Rules and contrary to well established precedent. In doing so, the Panel erred in law and in fact in a number of fundamental respects and deprived the Defence of its procedural

²⁶ Impugned Decision 2.

²⁷ *Ibid*, para. 34.

rights under the law. These errors directly impinge the fair conduct of proceedings.

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

30. Immediate resolution by the Appeals Chambers is necessary and will materially advance proceedings. The Prosecution case has closed, the Defence in the near future need to make decisions about whether to call a Defence case, and must begin to prepare its closing submissions. It is therefore imperative the Defence understand the nature and scope of the SPO's case to which they are required to respond. Fundamental issues are raised in this application as to the correct interpretation of the Rules and precedent as they apply to the admission of forensic pathology and other evidence. Decisions such as those impugned here, which erroneously interpret the law and admit expert evidence, in contravention to the Law and settled international precedent, must be fully ventilated and resolved expeditiously by the Appeal Chamber.

V. CONCLUSION

31. For the reasons set out above, the Panel should grant leave to appeal on each of the identified issues.

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Respectfully submitted on Tuesday, 3 June 2025.



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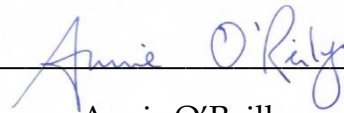
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