

**In:** KSC-BC-2020-07  
**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** Pre-Trial Judge,  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hysni Gucati

**Date:** 15<sup>th</sup> March 2021

**Language:** English

**Classification:** Public

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**Application for Leave to Appeal through Certification**  
**from Decision KSC-BC-2020-07/F00147**  
**pursuant to Article 45(2) and Rule 77(1)**

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**Specialist Prosecutor**

Jack Smith

**Counsel for Hysni Gucati**

Jonathan Elystan Rees QC

Huw Bowden

**Counsel for Nasim Haradinaj**

Toby Cadman

Carl Buckley

## I. INTRODUCTION

1. By way of preliminary motion dated 30<sup>th</sup> January 2021, the defendant, Hysni Gucati, applied for an order requiring the Confirmed Indictment<sup>1</sup> to be amended to provide further particulars or otherwise be dismissed<sup>2</sup>.
2. In a decision dated 8<sup>th</sup> March 2021 (“the Impugned Decision”), the Pre-Trial Judge rejected that request, finding that the Confirmed Indictment sets out with sufficient clarity and specificity the facts underpinning the charges and the crimes<sup>3</sup>.
3. In accordance with Article 45 of the Law on Specialist Chambers and Specialist Prosecutor’s Office Law No.05/L-053 (“Law”) and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), the defendant applies for leave to appeal from the Impugned Decision on the following issues, namely:
  - (i) Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars as to the identity of co-perpetrators, given the requirement to provide in the indictment as much detail as possible regarding the identities of any alleged co-perpetrators<sup>4</sup>;

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<sup>1</sup> *The Indictment*, KSC-BC-2020-07/F00075

<sup>2</sup> *Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b)*, KSC-BC-2020-07/F00113 at paragraph 20

<sup>3</sup> *Decision on Defence Preliminary Motions*, KSC-BC-2020-07/F00147 at paragraph 72

<sup>4</sup> See the Impugned Decision at paragraph 41; *Prosecutor v Nahimana*, Appeal Judgment, 28 November 2007, ICTR-99-52-A at paragraph 323; *Prosecutor v Ayyash*, Decision Relating to the Examination of the Indictment of 10 June 2011 issued against Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra, 28 June 2011, STL-11-01/I, para.96

- (ii) Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars as to the identity of accomplices, given the requirement to provide in the indictment as much detail as possible regarding the identities of any alleged accomplice<sup>5</sup>;
- (iii) Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars as to the identity of assisted or incited persons, given the requirement to provide in the indictment as much detail as possible regarding the identities of any assisted or incited person<sup>6</sup>;
- (iv) Whether the Pre-Trial Judge erred in finding that it was not a defect for the Confirmed Indictment to use the formula “and/or” to refer alternatively to the Accused, unnamed co-perpetrators or unnamed accomplices when attributing actions allegedly undertaken, given the requirement that formulations should not be used which create ambiguity as to the alleged responsibility of the accused<sup>7</sup>; and
- (v) Whether the Confirmed Indictment is defective in that it pleads “unknown” actions which allegedly “may” have occurred next to

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<sup>5</sup> See the Impugned Decision at paragraph 42; *Prosecutor v Nahimana*, Appeal Judgment, 28 November 2007, ICTR-99-52-A at paragraph 323; *Prosecutor v Ayyash*, Decision Relating to the Examination of the Indictment of 10 June 2011 issued against Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra, 28 June 2011, STL-11-01/I, para.96

<sup>6</sup> See the Impugned Decision at paragraph 42; *Prosecutor v Nahimana*, Appeal Judgment, 28 November 2007, ICTR-99-52-A at paragraph 323; *Prosecutor v Ayyash*, Decision Relating to the Examination of the Indictment of 10 June 2011 issued against Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra, 28 June 2011, STL-11-01/I, para.96

<sup>7</sup> See the Impugned Decision at paragraph 45; *Uwinkindi*, ICTR, 16 November 2011 at paragraph 48

“known” actions which allegedly “did” occur, given the requirement that open-ended statements in respect of the facts underpinning the charge are not permitted, unless they are exceptionally necessary which is not asserted<sup>8</sup>.

## II. APPLICABLE LAW

4. Article 45 of the Law empowers a Court of Appeals Panel to hear interlocutory appeals from decisions of the Pre-Trial Judge.
5. Article 45(2) of the Law provides that any interlocutory appeal, other than from decisions or orders relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers, must be granted leave to appeal through certification by the Pre-Trial Judge on the basis that it involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.
6. Rule 77(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”) 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

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<sup>8</sup> See the Impugned Decision at paragraph 44

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”.

7. The following specific requirements, therefore, apply<sup>9</sup>:

(1) Whether the matter is an “appealable issue” – that is, an identifiable subject or topic the resolution of which is essential for the determination of matters arising in the judicial cause under examination<sup>10</sup>;

(2) Whether the issue at hand would significantly affect:

- i. The fair and expeditious conduct of the proceedings, or
- ii. The outcome of the trial; and

(3) Whether, in the opinion of the Panel, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. The object is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial<sup>11</sup>.

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<sup>9</sup> *Decision on the Thaci Defence Application for Leave to Appeal*, KSC-BC-2020-06/F00172 at paragraph 10

<sup>10</sup> *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-75, Decision on the Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber III’s Decision on Disclosure (“*Bemba* Decision on Prosecutor’s Application for Leave to Appeal”), 25 August 2008, paragraph 10

<sup>11</sup> Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 at paragraph 19

9. Arguments on the merits or as to the substance of the appeal are *not* factors to be considered at the leave stage - they are factors to be considered and examined by the Court of Appeals Panel in the event that leave to appeal is granted<sup>12</sup>.
10. Where certification is granted, the appellant has 10 days from the date of certification to file an appeal<sup>13</sup>.

### III. SUBMISSIONS

#### Whether the matter is an “appealable issue” – that is, the issue emanates from the Impugned Decision

11. Each of the discrete issues identified in paragraph 3(i) to (vi) above emanate from the Impugned Decision and do not amount to abstract questions or hypothetical concerns.
12. They relate to the identifiable subject or topic of the indictment and whether it is defective.

#### Whether the issue at hand would significantly affect: (i) The fair and expeditious conduct of the proceedings

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<sup>12</sup> *Prosecutor v Kony*, Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20, 19 August 2005, paragraph 22

<sup>13</sup> Rule 170(2) of the Rules

13. The issues at hand relate directly to the Confirmed Indictment and the extent to which it is pleaded with enough detail to inform the defendant clearly of the charges against him so that he may prepare his defence. Whether or not the Indictment is sufficient goes directly to the fair and expeditious conduct of the proceedings. Indeed, where a defect in the indictment is raised, on appeal after conviction impairment to the ability of the accused to prepare his defence will be presumed unless rebutted by the Prosecution<sup>14</sup>.
14. The fairness and expeditious conduct of the proceedings can only be enhanced significantly if it is made certain in the indictment, as far as possible, who the defendant is alleged to have committed offences through or with (see paragraphs 3(i) to (iii) above), and what the defendant himself is alleged to have specifically done (see paragraphs 3(iv) and (v) above).
15. In the absence of further particulars being provided, the trial process (including defence preparation but also the trial itself) runs the risk of being diverted by having to explore in an unfocussed manner the widest possible candidacy for allegations of co-perpetrators, accomplices, assisted or incited persons, when the Prosecution could simply assist at this early stage and identify, as far as possible, who they actually allege such persons to be.
16. Similarly, as long as such the approach complained of in paragraphs 3(iv) and (v) above remains in the Indictment, the trial process (including, defence preparation but also the trial itself) runs the risk of being diverted by having to explore in an unfocussed manner allegations of conduct which may or may not have taken place, and which may or may not be attributable to the defendant,

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<sup>14</sup> *Prosecutor v Nahimana*, Appeal Judgment, 28 November 2007, ICTR-99-52-A at paragraph 327

when the Prosecution might instead fairly acknowledge at this stage that it cannot prove such allegations to the criminal standard.

17. It should be stressed that the remedy sought is only that the Prosecution be required to provide in the Indictment such detail that it has in relation to the matters in paragraph 3 above<sup>15</sup>. That remedy will involve placing no unreasonable fresh burden upon the Prosecution, and yet it will provide assistance to not only the defendant but also *the Trial Panel* in due course in the fair and expeditious conduct of these proceedings.

Whether the issue at hand would significantly affect: (ii) The outcome of the trial

18. As stated above, the extent to which the indictment sufficiently informs the defendant clearly of the charges against him is a matter which directly informs the preparation of the defence and, thereafter, the outcome of the trial.

19. At present the Confirmed Indictment contains ambiguous allegations of conduct which the defendant may or may not have undertaken<sup>16</sup>, and allegations of unknown forms of dissemination which may or may not have occurred<sup>17</sup>.

20. Such ambiguous allegations ought not to have a place on an indictment, and carry the risk of a finding of guilt in circumstances where there is a lack of certainty inconsistent with the criminal standard of proof in Rule 158(3).

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<sup>15</sup> It has never been suggested that the Prosecution identify exhaustively in the indictment every person within a specific category – only those persons who the Prosecution can identify

<sup>16</sup> The Impugned Decision at paragraph 6

<sup>17</sup> The Impugned Decision at paragraph 70



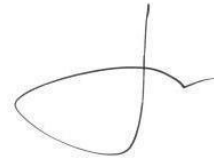
Whether an immediate resolution by the Appeals Chamber may materially advance the proceedings

21. Whereas on appeal post-conviction, a defective indictment might be found to have been cured, depending on the circumstances, by providing further timely, clear and consistent information, for example, in the Prosecutor's pre-trial brief<sup>18</sup>, an accused should not be required to wait for, and thereafter consult, other documents in order to piece together the information that should be contained within the indictment.
22. It is repeated that the remedy sought is only that the Prosecution be required to provide in the Indictment such detail that it has in relation to the matters set out in paragraph 3 above. That remedy will involve placing no unreasonable fresh burden upon the Prosecution, and yet it will provide assistance to not only the defendant but also *the Trial Panel* in the fair and expeditious conduct of these proceedings.
23. A vague or imprecisement indictment which is not cured of its defects constitutes a prejudice to the accused.
24. Leave to appeal should be granted to permit the Court of Appeals Panel to consider whether the Confirmed Indictment is defective and, if so, to order that it is cured at this stage.

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<sup>18</sup> *Prosecutor v Nahimana*, Appeal Judgment, 28 November 2007, ICTR-99-52-A at paragraph 325

Word count: 2010 words

A handwritten signature in black ink, appearing to be 'J. E. Rees', written in a cursive style.

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HUW BOWDEN

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15<sup>th</sup> March 2021

Cardiff, UK