

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

Before: The President

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 17 March 2021

Language: English

Classification: Confidential

Appeal in Respect of the Decision on Defence Preliminary Motion

Specialist Prosecutor

Jack Smith

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

I. CLASSIFICATION

1. **NOTE:** in an abundance of caution, this Appeal is filed as “Confidential” as per the classification of the impugned decision.
2. For the avoidance of doubt, the Defence do not seek a ‘Confidential’ or ‘Strictly Confidential’ classification, and would therefore seek that this filing to be categorised as ‘Public’.
3. Further, the Defence maintain that there is nothing within this submission that ought to require redaction and in the interest of transparency of proceedings should be a public filing.

II. INTRODUCTION

4. Counsel for Mr. Haradinaj, seek to appeal the ‘Decision on Defence Preliminary Motions’.¹
5. This appeal is grounded on Rule 97(1)(a) in that the Defence seek to “*challenge the jurisdiction of the Specialist Chambers*”, in that the Defence maintains the previous submissions per the original challenge,² and that those challenges

¹ KSC-BC-2020-07/F00147

²

result in the Chambers not having jurisdiction over the indictment given both its content, and the circumstances in which the same was confirmed.

6. As a consequence, this appeal is brought per Rule 97(3) of 'the Rules', in that:

"Appeals against decisions on preliminary motions under paragraph 1(a) shall lie as of right pursuant to Article 45(2) of the Law".

7. The relevant excerpt of Article 45 of the Law reading:

"Interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers".

III. BACKGROUND

8. The chronology is of specific relevance in terms of these submissions and therefore it is set out in full.

9. On 22 September 2020, the Specialist Prosecutor's Office ('SPO') requested the arrest of Hysni Gucati and Nasim Haradinaj, for alleged dissemination of confidential information relating to the work of the Special Investigative Task Force ('SITF') and/or the SPO at three press conferences held on 7, 16, and 22

September 2020, and sought their transfer to the detention facilities of the KSC.³

10. On 24 September 2020, the Single Judge issued arrest warrants for Mr. Gucati and Mr. Haradinaj in connection with allegations of attempted intimidation of witnesses, retaliation, and violation of secrecy proceedings, and ordered their transfer to the KSC detention facilities.⁴
11. On 25 September 2020, Mr. Haradinaj was arrested and held in detention in the Republic of Kosovo until the following day when he was transferred to the KSC detention facilities.
12. On 29 September 2020, Mr. Haradinaj filed a request for his immediate release from detention.⁵
13. On 27 October 2020, the Single Judge rendered a decision rejecting this request.⁶

³ Urgent Request for Arrest Warrants and Related Orders, KSC-BC-2018-01, F00125, Strictly Confidential and *ex parte*, with Strictly Confidential and *ex parte* Annexes 1-2, 22 September 2020. A supplement to the Request was submitted on 23 September 2020, Prosecution Notice and Related Request, KSC-BC-2018-01, F00126, Strictly Confidential and *ex parte*, 23 September 2020, with Annex 1, Strictly Confidential and *ex parte*.

⁴ Annex 2 - Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, KSC-BC-2020-07, F00012, Public, 24 September 2020.

⁵ Initial appearance, preliminary motion to dismiss the charges and motion for immediate release, KSC-BC-2020-07, F00030, Public, 29 September 2020.

⁶ Decision on Request for Immediate Release of Nasim Haradinaj, KSC-BC-2020-07, F00058, Public, 27 October 2020.

14. On 30 October 2020, the SPO submitted an indictment for confirmation against Mr. Haradinaj and Mr. Gucati.⁷
15. On 9 December 2020, the Pre-Trial Judge requested the Parties to file written submissions on Mr. Haradinaj's continued detention, the deadline being 18 December 2020.⁸
16. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the indictment, and ordered the SPO to submit a revised indictment as confirmed.⁹
17. On 14 December 2020, the SPO submitted the Confirmed Indictment with redactions.¹⁰
18. On 18 December 2020, Mr. Toby Cadman was appointed as new Specialist Counsel to Mr. Haradinaj.¹¹ On the same day, the withdrawal of previous Specialist Counsel was confirmed.¹²

⁷ Submission of Indictment for Confirmation and Related Requests, KSC-BC-2020-07, F00063, Strictly Confidential and *ex parte*, 30 October 2020.

⁸ Order for Submissions on the Review of Detention, KSC-BC-2020-07, F00073, Public, 9 December 2020.

⁹ Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07, F00074/RED, Public, 11 December 2020.

¹⁰ Submission of confirmed Indictment with strictly confidential Annexes 1 and 2, KSC-BC-2020-07, F00075, Public, 14 December 2020.

¹¹ Notification of the Appointment of Counsel to Nasim Haradinaj with one confidential Annex, KSC-BC-2020-07, F00086, Public, 18 December 2020.

¹² Decision Approving the Withdrawal of Counsel, KSC-BC-2020-07, F00084, Public, 18 December 2020.

19. On 18 December 2020, Mr. Haradinaj was produced before the KSC where an 'initial appearance' was held.¹³
20. On 18 December 2020, Mr. Haradinaj filed 'Submissions on the Review of Detention by 27 December 2020',¹⁴ the SPO filing its 'consolidated submissions on review of detention' on the same day.¹⁵
21. On 23 December 2020, the appointment of Specialist Co-Counsel for Mr. Haradinaj, Mr. Carl James Buckley, was confirmed.¹⁶
22. On 24 December 2020, the Pre-Trial Judge refused Mr. Haradinaj's application for release.¹⁷
23. On 5 January 2021, the Defence for Mr. Haradinaj filed a Notice of Appeal of the Decision on Detention of 24 December 2020 before the Court of Appeals Panel.¹⁸
24. On 4 January 2021, the SPO claims to have made its Rule 102(1)(a) disclosure.¹⁹

¹³ Initial Appearance of Nasim Haradinaj, Transcript, KSC-BC-2020-07, 18 December 2020.

¹⁴ Submissions on the Review of Detention by 27 December 2020, KSC-BC-2020-07, F00090, Public, 18 December 2020.

¹⁵ Prosecution consolidated submissions on review of detention, KSC-BC-2020-07, F00088, Public, 18 December 2020.

¹⁶ Notification of Approval of Co-Counsel for Nasim Haradinaj with one confidential Annex, KSC-BC-2020-07, F00092, Public, 23 December 2020.

¹⁷ Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07, F00094, Public, 24 December 2020.

¹⁸ Notice of Interlocutory Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj, KSC-BC-2020-07/IA002/F00001, Public, 4 January 2021 (notified 5 January 2021).

¹⁹ Prosecution Submissions for first Status Conference, KSC-BC-2020-07, F00096, Public, 5 January 2021.

25. On 6 January 2021, the President of the KSC constituted an Appeals Panel for the Defence Appeal against the Decision on Detention.²⁰
26. On 6 January 2021, a Decision was made to order Mr. Haradinaj to attend the first part of the first Status Conference in order to enter a plea.²¹
27. On 7 January 2021, the Defence for Mr. Haradinaj filed its submissions for the Status Conference.²²
28. On 8 January 2021, the first Status Conference took place.²³
29. On 8 January 2021, the SPO reported on the seized material to the Pre-Trial Judge.²⁴
30. On 15 January 2021, the SPO filed its Response to the Defence Appeal against the Decision on Detention of Nasim Haradinaj.²⁵
31. On 20 January 2021, the Defence filed its Reply to the SPO Response regarding the Appeal against the Decision on Detention.²⁶

²⁰ Decision Assigning a Court of Appeals Panel, KSC-BC-2020-07, IA002-F00002, Public, 6 January 2021.

²¹ Decision on Defence Request to Hold Hearing in the Absence of the Accused, KSC-BC-2020-07, F00097, Public, 6 January 2021.

²² Defence Submissions for First Status Conference on Behalf of Nasim Haradinaj, KSC-BC-2020-07, F00099, Public, 7 January 2021.

²³ Status Conference, Transcript, KSC-BC-2020-07, 8 January 2021.

²⁴ Prosecution report pursuant to decisions KSC-BC-2020-07-F00005 and KSC-BC-2020-07-F00007, KSC-BC-2020-07, F00102, Public, 8 January 2021.

²⁵ Prosecution response to Defence appeal of decision on review of detention of Nasim Haradinaj, KSC-BC-2020-07, IA002-F00003, Public, 15 January 2021.

²⁶ Defence Reply to Specialist Prosecutor's Response to Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj, KSC-BC-2020-07, IA002-F00004, Public, 20 January 2021.

32. On 22 January 2021, the Pre-Trial Judge handed down a Framework Decision on Disclosure of Evidence and other Matters.²⁷
33. On 29 January 2021, the SPO filed a confidential request for non-disclosure of certain information pertaining to contacts with witnesses.²⁸
34. On 1 February 2021, the SPO filed a confidential filing, Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association, with confidential annexes.²⁹
35. On 2 February 2021, Counsel for Mr. Gucati filed a Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b).³⁰
36. On 3 February 2021, the SPO filed the Prosecution Request for Reclassification of Filing KSC-BC-2020-07-F000113.³¹
37. On 3 February 2020, the Registry informed the Parties that the Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b) submitted by Counsel for Mr. Gucati had been reclassified as Strictly Confidential pending a decision by the Pre-Trial Judge.

²⁷ Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07, F00104, Public, 22 January 2021.

²⁸ Prosecution request for non-disclosure of certain information pertaining to contacts with witnesses, KSC-BC-2020-07, F00107, Confidential, 29 January 2021.

²⁹ Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSC-BC-2020-07, F00110, Confidential, 1 February 2021.

³⁰ KSC-BC-2020-07/F00113, Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b).

³¹ KSC-BC-2020-07/F00114, Prosecution Request for Re-Classification

38. On [...], Counsel for Mr. Haradinaj filed its Preliminary Motion challenging the indictment pursuant to Rule 97(1)(a) and 97(1)(b).³²
39. On 8 March 2021 the Pre-Trial Judge issued his decision in respect of those preliminary motions, 'Decision on Defence Preliminary Motions'.³³

IV. THE LAW

40. As per Rule 97(1) of the Rules of Evidence and Procedure:

(1) *The Accused may file preliminary motions before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which:*

- a. Challenge the jurisdiction of the Specialist Chambers;*
- b. Allege the defects in the form of the indictment; and*
- c. Seek the severance of indictments pursuant to Rule 89(2)*

41. Further, per Rule 97(2):

“Such motions shall be in writing and shall be brought within thirty (30) days from the disclosure of all material and statements referred to in Rule 102(1)”

³²

³³ KSC-BC-2020-07/F00147

42. The motion filed was done so in accordance with the law.
43. The SPO sought to submit that the “*jurisdictional challenges seek to impermissibly re-litigate already decided matters*”.³⁴
44. The Pre-Trial Judge rejected this position, and noted:
- “The Pre-Trial Judge accordingly finds that, despite some overlaps, this challenge is both broader than and distinct from the previous challenges and falls under the scope of Rule 97(1)(a) of the Rules”.*³⁵
45. Accordingly, the original challenge, and further, this appeal, are submitted to be correctly brought.

IV. THE APPEAL

46. These submissions on appeal centre on the jurisdiction of the Chamber per Rule 97(1)(a), in that it is respectfully submitted that in the current circumstances, the Chamber cannot exercise jurisdiction over the indicted charges.
47. This position is advanced on the following primary basis:

³⁴ *Ibid* at paragraph 26

³⁵ *Ibid* at paragraph 28

- a. That the Indictment has been confirmed otherwise than in accordance with the law, and therefore confirmed without a proper lawful and therefore jurisdictional basis to do so;
- b. That the preliminary motion is prematurely brought;
- c. That the indictment is insufficiently particularised and therefore prevents the Defendant from knowing or understanding the charges against him, which in turn violates his right to a fair trial.

The Indictment Confirmed Otherwise than in Accordance with the Law

48. The submissions made within the preliminary motion are maintained and further advanced on appeal.
49. At the risk of repeating those previous submission further, Rule 86(3) of the Rules requires the indictment to "*set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime(s) with which the suspect is charged, in particular the alleged mode of liability in relation to the crimes charged pursuant to Article 16 of the Law*", as observed by the Pre-Trial Judge within the impugned decision.³⁶

³⁶ *Ibid* at paragraph 38.

50. In circumstances where an indictment proffered and/or confirmed fails to provide a Defendant with a specific statement of facts and the crimes that the Defendant is said to have committed, it will be held to defective.³⁷
51. It is however submitted to go beyond mere defects in terms of the instant case, but rather, renders the entirety of jurisdiction void, that jurisdiction having been exercised unlawfully.
52. The Defence notes that following previous submissions on the point, the Pre-Trial Judge has made certain orders in respect of evidence that the Defence submits to underpin the entire indictment, namely that evidence contained within what is referred to as the '3 batches'.³⁸
53. Further, the Defence notes the position of the Pre-Trial Judge that "*Rule 97 submissions are not the appropriate avenue for extensively litigating disclosure matters that are subject to other requests*".³⁹
54. It is respectfully submitted that this misinterprets the issue being raised.
55. The issue raised by the Defence is not one that is merely an issue of disclosure, it is respectfully submitted that the issue is one that goes to the very heart of

³⁷ *Prosecutor v. Tadic*, Decision on Defence Motion on the Form of the Indictment, 14 November 1996, at paragraph 12.

³⁸ [.....]

³⁹ KSC-BC-2020-07/F00147 at paragraph 21

the legitimacy of the indictment or otherwise, and therefore by natural extension, the jurisdiction of the Chamber in respect of the instant case.

56. The Pre-Trial Judge has clarified the position, in that it is now confirmed that:

*“the SPO did not submit these documents to the Pre-Trial Judge as supporting material for the indictment under Rule 86(3) of the Rules. Neither did the Pre-Trial Judge find it necessary to request the SPO, under Rule 86(4)(a) of the Rules, to present the Batches as additional material in support of the charges”.*⁴⁰

57. The position therefore, is that the indictment has been confirmed without anyone other than the SPO having had sight of the evidence that underpins the underlying allegations set out in the indictment.

58. The Pre-Trial Judge has ruled that he was satisfied that there was a ‘*well-grounded suspicion*’ without having sight of any of the actual documentary evidence that forms the basis of the charges.

59. Further, and having regard to the submitted intention of the SPO not to call any witness of fact in respect of the alleged intimidation offences as a minimum, it is respectfully submitted that the Pre-Trial Judge has failed to confirm the indictment in accordance with the law.

⁴⁰ *Ibid* at paragraph 22

60. As a consequence, the indictment is not merely defective in its form, but rather the Chamber has no jurisdiction over the indictment in that that indictment has not been confirmed in accordance with the law.
61. It is respectfully submitted to not be enough to rely on a purported statement of an investigator, when the evidence itself is available and capable of consideration. The very clear position being that no independent evidence has been submitted or considered.
62. It is anticipated that the SPO will seek to challenge the above submission on the basis that this issue was not raised as a Rule 97(1) in the original motion. However, not only were the issues very clearly raised and set out within that motion, but further, the impugned decision is the decision that clarifies the position as to whether the documents within 'the batches' were considered or otherwise, and therefore, now is the first occasion upon which the submission could be made with appropriate certainty.
63. In the current circumstances, the Defence are left in the position where they cannot mount an effective challenge to whether the Chamber has jurisdiction over the offences, whether the offences are substantiated for the purposes of the indictment, or indeed whether there exists any defect in the indictment, as, as has already been argued, the basis upon the indictment is brought, has not been disclosed.

That the Preliminary Motion is Prematurely Brought

64. It is submitted that the Pre-Trial Judge has erred when determining that disclosure under Rule 102(1)(a) has been completed and therefore dismissing the submission that the preliminary motions, although brought within the appropriate timescale, were in fact premature.
65. The Pre-Trial Judge finds that as the Batches have not been submitted as supporting material to the indictment, they do not constitute material to be disclosed⁴¹ under Rule 102(1)(a).
66. With respect, this cannot be an appropriate determination.
67. As has already been submitted before the Pre-Trial Chamber, the very foundation of the charges contained within the indictment is premised on what the batches are said to contain, and therefore that evidence cannot be said to be anything other than supporting material to the indictment.
68. Further, the Pre-Trial Judge remains clear that he has not seen the evidence within the batches, as the same was not provided to him, nor did he request that they be so.

⁴¹ *Ibid* at paragraph 23

69. Accordingly, it is respectfully submitted that the indictment has been confirmed otherwise than in accordance with Rule 86, and therefore undermining the jurisdiction of the Chamber.

70. In the alternative, if it is that the batches are not supporting the indictment, the indictment is fundamentally flawed in that is not based on evidence, and therefore the Chamber is seeking to exercise its jurisdiction over something that it cannot confirm exists or otherwise.

Insufficient Particularisation

71. The Defence maintains its previous submissions per the original motion, specifically in terms of the failure to particularise the counts on the indictment relating to the intimidation of or threats made to, witnesses, family members etc.

72. The Pre-Trial Judge has erred at paragraph 60 of the impugned decision where he finds:

"...that the references in the Confirmed Indictment to witnesses and/or their family members as well as the serious consequences therefor are sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability".

73. The position remains that the Defendant is asked to defend himself against allegations of intimidation of an individual who is a witness, when he does not know who that individual is and who the SPO has now confirmed will not be giving evidence at trial.
74. Accordingly, the position arises were the Defendant is precluded from challenging whether an individual was intimidated, as no evidence has, or will, be adduced from any such alleged victim.
75. Further, it has not been established, given the ambiguity of the indictment, that any individual in the mind of the SPO that this charge relates to, is in fact an actual witness.
76. This is an extension of the previous points in respect of the failure to disclose the batches of evidence, or at least have those batches reviewed upon confirmation of the indictment.
77. As it stands, it cannot be established that an individual is a witness, nor can it be established that any specific individual has been intimidated and/or threatened etc.
78. It is anticipated that the SPO has interviewed at least one individual who has complained of being intimidated and/or threatened etc so as to lead to the respective allegations within the indictment, and therefore it would appear

clear that the Prosecution “*could, and should, have been more specific in setting out the allegations in the Amended Indictment*”, per Kupreskic,⁴²

79. Further, that per *Prosecutor v. Blaskic*,⁴³ the indictment ought to contain the identity of any victim where that victim is known, and further, where possible, the Prosecutor ought to clearly indicate the precise line of conduct and mental elements satisfied.

80. The Pre-Trial Judge, has, in the impugned decision wrongly determined that:

“the references in the Confirmed Indictment to witnesses and/or their family members as well as the serious consequences therefor are sufficiently clear and specific and do not create ambiguity as regard the charged offences or modes of liability”.⁴⁴

81. This is not simply a matter of ‘evidence’ that is to be considered at trial, but rather, is fundamental to the legitimacy of the indictment confirmed, and therefore goes to the heart of the jurisdiction of the Chamber over those counts on the indictment.

82. This is particularly the case where, as per the procedures under the applicable legal framework of the Kosovo Specialist Chambers, the confirmation process

⁴² *Prosecutor v. Kupreskic*, Appeal Judgment, 23 October 2001,

⁴³ Decision on the Defence Motion to Dismiss the Indictment based Upon Defects in the Form thereof, 4 April 1997, IT-95-14, para.20.2

⁴⁴ KSC-BC-2020-07/F00147 at paragraph 60.

is undertaken *ex parte* without the participation of the Defence and without any scrutiny by the Defence of the evidence, or absence thereof.

VII. CONCLUSION

83. The original submissions are maintained for the purposes of the appeal.
84. In short, the Chamber cannot exercise jurisdiction over an indictment where that indictment is invalid.
85. The indictment is invalid on the basis that it has been confirmed otherwise than in accordance with the Law and/or the Rules of Evidence and Procedure, and therefore lacks legitimacy for the aforesaid reasons.
86. Further, contrary to the position advanced by the SPO and the findings of the Pre-Trial Judge, the indictment is not sufficiently particularised in terms of individual victims.
87. Finally, the Pre-Trial Judge was wrong to rule that the motion was not premature, on the basis that Rule 102(1)(a) disclosure had been completed, when the contrary is apparent.
88. Accordingly, the Chamber, having regard to the fundamental deficits in both the procedure adopted and the indictment itself, has undermined its own

legitimacy to the extent that it cannot exercise jurisdiction over the procedure
and offences as indicted.

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