

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

Before: **Court of Appeals Panel**
Judge Michèle Picard
Judge Emilio Gatti
Judge Kai Ambos

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 12 April 2021

Language: English

Classification: **Public**

Defence Submissions for Mr. Haradinaj on Appeal of Decision KSC-BC-2020-07/F00147

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I. INTRODUCTION

1. On 1 April 2021, the Pre-Trial Judge rendered his decision¹ on the **Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions**.²
2. In making his decision, the Pre-Trial Judge granted leave to appeal in respect of all five grounds, or ‘issues’ that were highlighted with the joined applications for leave, pursuant to Rule 77(3) of the Rules of Evidence and Procedure.
3. In accordance with Rule 170(2), the Appellant now seeks to file the substantive representations on appeal.

II. BACKGROUND

4. The background is as per that which is highlighted within the decision on leave, however, for the purposes of clarity, we repeat the same below.
5. On 8 March 2021, the Pre-Trial Judge issued a decision on the Defence Preliminary Motions (the “Impugned Decision”) finding, *inter alia*, that the indictment against Hysni Gucati (Mr. Gucati) and Nasim Haradinaj (Mr.

¹ KSC-BC-2020-07/F00169

² KSC-BC-2020-07/F00151 (Gucati), and KSC-BC-2020-07/F153 / KSC-BC-2020-07/F00156 (Haradinaj)

Haradinaj) as confirmed (Confirmed Indictment) set out with sufficient clarity and specificity the facts underpinning the charges and the crimes, including the modes of liability charged.³

6. On 15 March 2021, the Defence filed their respective applications for leave to appeal the Impugned Decision (Gucati Request, Haradinaj Request, collectively, Certification Requests).⁴
7. On 25 March 2021, the Specialist Prosecutor's Office (SPO) submitted a consolidated response to the Certification Requests.⁵
8. On 31 March 2021, the Defence for Mr. Gucati submitted a reply to the SPO's consolidated response to the Certification Requests.⁶

³ KSC-BC-2020-07, F00113, Defence for Mr Gucati, Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b), 2 February 2021 (incorrectly dated 30 January 2021), confidential. See also F00113/RED, Defence for Mr Gucati, Public Redacted Version of the Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b), 3 February 2021, public; F00116, Defence for Mr Haradinaj, Preliminary Motion on the Issue of the Indictment Being Defective, 4 February 2021 (incorrectly dated 3 February 2021), confidential; F00147, Pre-Trial Judge, Decision on Defence Preliminary Motions ("Impugned Decision"), 8 March 2021, public.

⁴ KSC-BC-2020-07, F00151, Defence for Mr Gucati, Application for Leave to Appeal Through Certification from Decision KSC-BC-2020-07/F00147 Pursuant to Article 45(2) and Rule 77(1) ("Gucati Request"), 15 March 2021, public; F00153/F00156, Defence for Mr Haradinaj, Application for Leave to Appeal Through Certification from Decision KSC-BC-2020-07/F00147 Pursuant to Article 45(2) and Rule 77(1) ("Haradinaj Request"), 15 March 2021, confidential.

⁵ KSC-BC-2020-07, F00161, Specialist Prosecutor, Prosecution Response to Applications for Leave to Appeal the Decision on Defence Preliminary Motions ("SPO Response"), 25 March 2021, public.

⁶ KSC-BC-2020-7, F00168, Defence for Mr Gucati, Reply to Prosecution Response to Applications for Leave to Appeal the Decision on Defence Preliminary Motions (F00161), 31 March 2021, public. The Pre-Trial Judge notes that this filing was submitted outside the time limit provided in Rule 76 of the Rules and contains no request for the extension of such time limit pursuant to Rule 9(5) of the Rules.

9. On 1 April 2021, the Pre-Trial Judge handed down his decision in respect of the Certification Requests,⁷ granting the aforementioned leave to appeal in respect of the five grounds or 'issues'.

III. THE GROUNDS OF APPEAL OR 'ISSUES'

10. The Certification Requests sought leave upon, and accordingly, were granted leave on the following 5 grounds or issues:

- a. Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars 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;⁸
- b. Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars to the identity of accomplices, given the requirement to provide in the indictment as much detail as possible regarding the identities of any alleged accomplices;⁹
- c. Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars to the identity of assisted or incited persons, given the requirement to provide in the

⁷ KSC-BC-2020-07/F00169 – Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions.

⁸ Gucati Request, para. 3(i).

⁹ Gucati Request, para. 3(ii).

indictment as much detail as possible regarding the identities of any assisted or incited persons;¹⁰

- d. 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;¹¹ and
- e. Whether the Confirmed Indictment is defective in that it pleads “unknown” actions which allegedly “may” have occurred next to “known” actions which allegedly “did” occur, given the requirement that open-ended statements in respect of the facts underpinning the charges are not permitted, unless they are exceptionally necessary, which is not asserted.¹²

IV. SUBMISSIONS

11. The submissions on appeal will deal with each ground or issue in the order as they appear above.

¹⁰ Gucati Request, para. 3(iii).

¹¹ Gucati Request, para. 3(iv).

¹² Gucati Request, para. 3(v).

12. As a preliminary submission however, the following general premise ought to be noted.
13. It is a basic, and most fundamental, rule, that the indictment must contain a concise statement of facts and the crime or crimes with which the accused/defendant is charged¹³ and by extension, that such language is clear and unambiguously stated.
14. The indictment must be “*sufficiently clear to enable the accused to understand the nature and cause of the charges brought against him*”.¹⁴
15. To phrase another way, the accused is entitled to ‘proper particularity’ when it comes to the ‘material facts’ of the case against him.¹⁵
16. As an extension to these principles, where an indictment fails to duly set forth the specific material facts that seek to underpin the charges contained within that indictment, then the indictment will be deemed defective.¹⁶

(a) *Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars to the identity of co-perpetrators.*

¹³ *Prosecutor v. Tadic* Decision on the Defence Motion on the Form of the Indictment, 14 November 1995

¹⁴ *Prosecutor v. Kanyabashi*, Decision on Defence Preliminary Motion for Defects in the Form of the Indictment, 31 May 2000, para 5.1

¹⁵ *Prosecutor v. Kunarac*, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, 21 October 1998

¹⁶ *Prosecutor v. Nahimana*, *Appeal Judgment*, 28 November 2007, ICTR-99-52-A, para. 322

17. The general premise, as per the original submissions on this point, is that where it is alleged that an individual has committed offences through, or with, others, those others ought to be sufficiently identified,¹⁷ including identification by name if their names are known.¹⁸
18. The indictment in its current form, as per the table submitting in the original submissions by the Gucati team, is littered with phrases such as '*and others*', or "*and at least one other representative of the KLA WVA*", or "*and/or others*' or "*and/or associates*", or "*witnesses and/or their family members*".
19. The indictment therefore makes a clear reference to alleged co-perpetrators, and yet does not specify who those co-perpetrators are, further, the use of '*and/or*' only adds further ambiguity to an indictment that is already replete in its lack of specificity. The fact that other persons have now been named in the SPO's Pre-Trial Brief is indicative of the state of knowledge.¹⁹
20. In the decision of the Pre-Trial Judge, at paragraph 45,²⁰ there would appear to be acceptance that certain phrases are not to be used if it is that they create ambiguity, noting "*Alternative formulations such as "and/or" are permitted as long as they pertain to*

¹⁷ *Prosecutor v. Nahimana*, Appeal Judgment, 28 November 2007, ICTR-99-52-A, para 323

¹⁸ *Prosecutor v. Ayyash*, Decision Relating to the Examination of the Indictment of 10 June 2011

¹⁹ KSC-BC-2020-07/F00181/A01

²⁰ KSC-BC-2020-07/F00147

evidentiary material to be determined at trial,²¹ and do not create ambiguity as regards the charged offences or modes of liability²² (emphasis added).

21. The Pre-Trial Judge at paragraph 51 of that same decision finds:

“The nature of the purported events, such as the holding of press conferences and broadcasted events, and the number of persons the two Accused allegedly involved in the events do not allow for the identification of each co-perpetrator or accomplice by name, as the Accused themselves refer to them in a generic way.”

22. This conclusion is fundamentally wrong when taken in the context of the case as a whole, considering the circumstances surrounding how the documents (the batches) subject to the indictment were disclosed, the alleged press conferences etc.

23. The SPO, contrary to its assertions, were quite able to identify the alleged co-perpetrators, as is now clear from the content of the Pre-Trial Brief, based on the state of knowledge that would have been known at the time; however, for reasons unknown, they have failed to do so.

24. It is therefore submitted that the issues surrounding ‘identification’ are as a consequence of a fundamentally flawed investigation on the part of the SPO rather than the issue being incapable of being determined. Based upon the complete absence of investigative actions and witness testimony being put forward in the

²¹ ICTY, *Kvočka et al.* 12 April 1999 Decision, para. 26.

²² ICTR, *Uwinkindi* 16 November 2011 Decision, para. 48.

prosecution case, it is most unclear as to why this information was conspicuously absent in the submitted indictment.

25. For instance, the SPO failed to seize CCTV evidence that was capable of seizure, further, the SPO failed to interview those present, further, the SPO failed to seize the media recordings of the disclosures and/or the alleged press-conferences.
26. Further, the SPO failed to take any witness statements of those said to have been present, some of whom are now cited in the Pre-Trial Brief as unindicted accomplices.
27. These are all steps that could have, and should have, been undertaken but for hitherto undisclosed reasons, they were not.
28. As a consequence of that flawed investigation, the Defendant(s) is/are now significantly disadvantaged given the ambiguity displayed.
29. The ambiguity therefore is an issue that has arisen as a direct result of the acts and/or omissions of the SPO.
30. The decision of the Pre-Trial Judge, it is submitted, is therefore wrong on this point, in that the Pre-Trial Judge erred in both the reasoning, and the conclusion at paragraph 51 that *“additional details as regards co-perpetrators or accomplices need not be pleaded further in the Confirmed Indictment...”*. This error is compounded by the submission of the Pre-Trial Brief that departs from the previously sparsity of information and sets out a substantially different narrative.

31. The fact remains that the SPO have deemed it appropriate to draft the indictment in the manner displayed, and therefore the SPO is responsible for its contents and lack thereof.
32. If it is, as per the decision of the Pre-Trial Judge that the details of these unnamed individuals is not required, then it ought to naturally follow that they ought not be contained within the indictment itself, however, they are, and therefore ought to be identified, as not to do so infringes the principles already established in law, as noted within the decision of the Pre-Trial Judge. The details have now been detailed in the Pre-Trial Brief, therefore the question must be raised as to why they were not considered to be relevant for the purpose of the indictment confirmation.
33. In its current form, the indictment is defective for the reasons already given.

(b) Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars to the identity of accomplices

34. The submissions above are re-affirmed in respect of the suggested defects within the indictment in terms of accomplices and/or assisted or incited persons.
35. The Pre-Trial Judge at paragraph 52 of the decision finds:

“[Since] the charged offences and modes of liability depend solely on the conduct of the two Accused and, as regards some modes of liability, on the resulting or attempted conduct, such as the publication of confidential material, additional

details as to the names of the assisted or incited persons need not be pleaded further in the Confirmed Indictment and can be addressed at trial."

36. With respect, this cannot be the case.
37. It has previously been held that where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation, or execution of the alleged crimes, the prosecution is required to identify the "*particular acts*" or "*the particular course of conduct*" on the part of the accused which forms the basis for the charges in question.²³
38. Similarly to the argument in respect of the first ground, the fact remains that the SPO have deemed it appropriate to refer to these hitherto unknown individuals within the indictment, and thus there is clear ambiguity, and ambiguity which prejudices the Defendant(s), and therefore the decision of the Pre-Trial Judge on this point is again, with respect, incorrect.
39. The conclusion of the Pre-Trial Judge at paragraph 53, that "*...the references in the Confirmed Indictment to co-perpetrators, accomplices and assisted or incited persons are sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability*" cannot be correct, as they are entirely unknown and thus cannot be said to be clear and/or specific.
40. Further, the determination at paragraph 52, that "*...the names of the assisted or incited persons need not be pleaded further in the Confirmed Indictment and can be addressed at*

²³ *Karera v. The Prosecutor*, Appeal Judgment, 2 February 2009, para.292

trial", similarly, for the reasons set out at paragraphs 19-21 above, and the fact that the SPO has already made clear that there is no intention on the part of the SPO to adduce any civilian witness evidence at trial, a matter which has now been confirmed by the submission of its Pre-Trial Brief and Annex 02,²⁴ cannot be correct, as there would appear to be no means by which these ambiguities and/or omissions can be properly determined at trial.

41. In sum therefore, the Pre-Trial Judge erred in his decision.

(c) *Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars to the identity of assisted or incited persons*

42. The Defendant re-affirms the submissions made in respect of the first two grounds and/or issues, in respect of this third ground and/or issue, and submits that the Pre-Trial Judge erred in his decision for the reasons already given.

(d) *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*

²⁴ KSC-BC-2020-07/F00181/A02

43. As has already been asserted, the use of 'and/or' is so ambiguous and evidences a distinct lack of specificity, and further, as has already been asserted, such phrases ought not to be used and have been rejected in previous cases before tribunals, unless such phrases pertain to evidentiary material to be determined at trial.
44. As has already been submitted, the Pre-Trial Judge has ruled that they pertain to evidentiary issues that **can** be determined at trial and therefore no ambiguity is created in respect of the charged offences or modes of liability.²⁵
45. It is submitted that the judge has erred on this point as it is so fundamental that it goes to the very notion of the defendant being aware of the substance and form of the allegations against him to be able to prepare an adequate defence. This goes to ensuring that the process is transparent and fair. It is the obligation of the court to not only *respect* such rights, but to *secure* the adherence to such rights.
46. In the first instance, the use of and/or relates to a fundamental element of the indictment, including the charged offences and co-perpetrators/witnesses etc and therefore, there is clear ambiguity in terms of the offences charged.
47. Secondly, these issues **cannot** and **will not** be determined at trial having regard to the evidence available and the position of the SPO in that there is no intention call witness evidence of any civilian witnesses.
48. It is therefore impossible to ascertain **how** those issues can be resolved given the evidence that will be submitted.

²⁵ KSC-BC-2020-07/F00147 at paragraph 45

49. For instance, at paragraph 25 of the indictment, it reads *“Hysni Gucati, Nasim Haradinaj, and certain others (Associates) by serious threat and/or common action, obstructed or attempted to obstruct SC proceedings. Hysni Gucati and Nasim Haradinaj organised and coordinated the group committing such acts”* (emphasis added).
50. The drafting of the indictment therefore would suggest that these hitherto unnamed individuals are an integral part of the offence, a matter now set out in the Pre-Trial Brief and known to the SPO at the time of filing the indictment, particularly as it is suggestive of the action taken together of the two named, and unnamed individuals that gives rise to the offence itself.
51. If the ‘group’ for instance, is not identified, the Defendant is effectively precluded from challenging the position as he is unaware as to what, or who, it is that is to be challenged.
52. Accordingly, these are not evidential issues to be determined at trial, but fundamental, not only to the offence indicted, but as important, if not more important, the Defendant(s) ability to prepare his defence.
53. The judge has erred in failing to rule that there is any prejudice to the Defendant.

(e) Whether the Confirmed Indictment is defective in that it pleads “unknown” actions which allegedly “may” have occurred next to “known” actions which allegedly “did” occur, given the requirement that open-ended statements in respect of the facts underpinning the charges are not permitted, unless they are exceptionally necessary, which is not asserted

54. Similar to the submissions on the previous grounds and/or issues, the specific actions of the Defendant(s) alleged conduct within the indictment are replete with ambiguities, and therefore the lack of specificity is not limited to perpetrators and/or other individuals.
55. It is not sufficient for an unknown action to be pleaded on the basis that such action had a 'consequence', when again, that particular consequence is not specified.
56. The indictment accuses the Defendant(s) of intimidation of witnesses and/or their family members.
57. However, the indictment does not specify the individuals that might be referred to as 'victims', nor does it specify the behaviour that constitutes the intimidation, nor does it specify the consequences suffered by the hitherto unnamed individuals.
58. It is further submitted that the SPO has now made clear that it will not be calling a single civilian witness - in fact it will only be calling two members of its own staff, to support its entire case. It is unclear how there can possibly be a proper basis for confirming the charges in that respect.
59. Accordingly, as was submitted in the original filings, the Defendant(s) are being required to defend an allegation when the specifics of that allegation have not been confirmed within the indictment.
60. It is wholly inappropriate, and further, unlawful, to expect a Defendant to defend a case that has only been pleaded in the abstract thus far.

61. There is clear prejudice to the Defendant and it is most unclear how any alternative interpretation can be reached. The failings are so fundamental and so grave that the appeal must succeed.
62. Further, and as has been consistently referred to within this appeal, the Pre-Trial Judge has erred further in finding that any and all issues raised in the preliminary motion submissions are those that can be rectified at trial.
63. With respect, it is not enough to make this assertion, and in any event, given the position of the SPO, it is clear that these issues **will not** and **cannot** be rectified at trial, considering the already confirmed position regarding what evidence is to be adduced.
64. It remains the position of the Defence for Mr. Haradinaj that the failings are so fundamental and the consequences so great that it impacts on the very notion of whether Mr. Haradinaj can now receive a fair trial.

V. CONCLUSION

65. All of the above grounds, or issues, that have been raised on appeal, centre on the ambiguity and/or the lack of specificity in the indictment and thus as a consequence, the indictment is defective and must be determined as such.
66. It is submitted to be abundantly clear that the ambiguity and therefore the lack of specificity exists within the indictment.

67. Further, it is as clear that the Pre-Trial Judge erred in ruling that such deficiencies did not constitute defects within the indictment, and further or in the alternative, that any issues raised are those that can be dealt with at trial on the basis they are evidential issues.

68. Any indictment must *“articulate each charge specifically and separately, and identify the particular acts in a satisfactory manner in order to inform the accused of the charges against which he has to defend himself.”*²⁶

69. Further, for an indictment to be sustainable, the facts that are admitted in support, must demonstrate the **specific conduct of the accused** constituting the offence,²⁷ particularly:

“The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the indictment in order to provide clear notice to the accused.”

70. In the instant case, the indictment fails to adhere to these principles, and the Pre-Trial Judge was wrong to find to the contrary.

²⁶ *Prosecutor v. Delalic*, Decision on Motion by the Avvysed Delalic based on Defects in the Form of the Indictment, 15 November 1996, para. 14.

²⁷ *Prosecutor v. Nsengiyumva*, Decision on the Defence Motion Raising Objections on Defects in the Form of the Indictment and to the Personal Jurisdiction on the Amended Indictment, 12 May 2000.

71. Any determination as to whether a fact is material or otherwise is not one that can be determined in the abstract, and whether such a fact is considered 'material' or otherwise, depends on the nature of the prosecution case.²⁸
72. The issues raised in this appeal and therefore, in the context of the Defendant(s) case, concern what the Defence will say are material facts *i.e.* those individuals involved the alleged offences themselves, those individuals said to have been affected by it.
73. Accordingly, those material facts must be specified, clear and unambiguous.
74. As a clear and obvious consequence of the failure of the SPO to specify those material facts and points referred to within the body of these submissions the Defendant(s) is prejudiced in the preparation of his case.
75. It is a requirement, in its most simplistic form, that the Defendant **must** know the specifics of the charge against him, and the conduct that is alleged to have given rise to that charge.
76. In its current form, the indictment fails to adhere to those very basic and most fundamental requirements.
77. The Defendant(s) do not know who the 'other' individuals are that they are suggested to have acted in conjunction with, nor are they aware of the specific

²⁸ *Prosecutor v. Nahimana*, Appeal Judgment, 28 November 2007, para. 322

acts that constitute intimidation, who the individual victims were whom experienced the alleged intimidation, or the form of that intimidation.

78. The Defendant(s) is simply not in a position to identify with any certainty the precise acts and/or behaviour and/or individual and/or consequence of the aforesaid behaviour and/or act, that forms the allegation against him as a Defendant.
79. Therefore, where, as is the case submitted in the context of the Defendant(s), an indictment fails to set out with sufficient specificity, the material aspects of the prosecution case, it will suffer from a material defect.²⁹
80. The position in the instant case is not as per *Prosecutor v. Kunarac*, in that it is not a challenge to the 'facts' in the indictment, for instance, whether or not the actions of an individual can be said to have formed part of a widespread or systematic attack against a civilian population. The cited scenario is quite evidently a 'factual' issue, and therefore one to be determined at trial having heard the evidence adduced.
81. In the instant case, the issues raised are material to the offences and the Defendant's understanding of those offences, rather than facts that demonstrate the commission of those offences.

²⁹ *Prosecutor v. Dordevic*, Decision on Form of Indictment, 3 April 2008, para.8

82. Accordingly, the Defendant(s) are in effect, being required to defend themselves in the abstract, and thus will suffer the inevitable prejudice as a consequence.

83. With the above background, the Pre-Trial Judge erred in his determination that there was no material defect within the indictment, and therefore, this appeal must be allowed.

Word Count: 4281 words



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