

In: KSC-BC-2020-07

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Court of Appeals Panel

Judge Michele Picard

Judge Emilio Gatti

Judge Kai Ambos

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 15th April 2021

Language: English

Classification: Public

**Notice of Interlocutory Appeal with Leave
from Decision KSC-BC-2020-07/F00147
pursuant to Article 45(2) and Rule 170(2)**

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 30th January 2021, the defendant, Hysni Gucati, applied for an order requiring the Confirmed Indictment¹ to be amended to provide further particulars or otherwise be dismissed².
2. In a decision dated 8th 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 crimes³.
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 applied for leave to appeal⁴ from the Impugned Decision on the following ‘Five 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-perpetrators⁵;

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

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

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

⁴ *Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(2) and Rule 77(1)*, KSC-BC-2020-07/F00151

⁵ 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

- (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 accomplice⁶;
- (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 person⁷;
- (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 accused⁸; and

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

⁶ 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

⁷ 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

⁸ See the Impugned Decision at paragraph 45; *Uwinkindi*, ICTR, 16 November 2011 at paragraph 48

(v) 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 charge are not permitted, unless they are exceptionally necessary which is not asserted⁹.

4. On 1st April 2021, the Pre-Trial Judge granted leave to appeal, certifying the ‘Five Issues’¹⁰.

II. GROUNDS OF APPEAL

CERTIFIED ISSUE 1 - 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

5. It is submitted that the Pre-Trial Judge was in error in finding that the Confirmed Indictment was not defective in the absence of further particulars as to the identity of alleged co-perpetrators.

6. In accordance with Articles 21(4) and 38(4) as well as Rule 86(3) of the Rules, an indictment must set forth with sufficient specificity and clarity the facts underpinning the charges and the crimes, including the modes of liability charged.

⁹ See the Impugned Decision at paragraph 44

¹⁰ *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/F00169

7. Where co-perpetration – the mode of liability¹¹ - is alleged, the facts thereof form part of “the facts underpinning the charges and the crimes, including the modes of liability”.
8. Accordingly, the learned judge correctly acknowledged that where the offences allegedly committed by an accused are, by their nature, directed against a group or collectivity of people, the accused must be provided with as much detailed information as possible regarding the identities of any alleged co-perpetrators, if known¹².
9. The learned judge found that the offences allegedly committed by the defendant were, by their nature, directed against a group or collectivity of people¹³.
10. The learned judge found also that the ‘nature of the purported events, such as 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’.
11. The learned judge did not find, and it was not open to him to find in any event, that it was impossible for the SPO to identify by name *any* alleged co-perpetrator. Indeed, the SPO has never claimed that it could not identify by name any alleged co-perpetrator¹⁴ (although not a single alleged co-perpetrator is named in the indictment).
12. It is uncontroversial, therefore, that:

¹¹Annex 1 to Submission of Confirmed Indictment, KSC-BC-2020-07/F00075/A01 at paragraphs 39 and 40

¹²The Impugned Decision at paragraph 41

¹³The Impugned Decision at paragraph 57

¹⁴Consolidated Prosecution Response to Preliminary Motions, KSC-BC-2020-07/F00120 at paragraphs 6 and 11 only claimed that it was unable to identify *every* co-perpetrator

- a. The offences alleged to have been committed by the defendant are, by their nature, directed against a group or collectivity of people;
 - b. The alleged offences involved co-perpetrators;
 - c. No alleged co-perpetrator is named in the indictment; and
 - d. The SPO is able to identify by name one or more alleged co-perpetrators.
13. In those circumstances, the learned judge's subsequent refusal to find that the indictment was defective, in the absence of further particulars as to the identity of those alleged co-perpetrators that the SPO could name, was contrary to his own earlier statement of the law that where the offences allegedly committed by an accused are, by their nature, directed against a group or collectivity of people, the accused must be provided with as much detailed information as possible regarding *inter alia* the identities of any alleged co-perpetrators, if known.
14. Accordingly, the learned judge was in error.

CERTIFIED ISSUE 2 - 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

15. Where accomplice liability is alleged, the facts thereof form part of “the facts underpinning the charges and the crimes, including the modes of liability”.
16. Accordingly, the indictment must inform the accused not only of his own alleged conduct giving rise to criminal responsibility but also of the acts and crimes of his alleged accomplices¹⁵. Information as to the acts of the alleged accomplice must encompass the accomplice’s identity, where known. The principle for accomplices and co-perpetrators, it is submitted, must be the same, namely, that the accused must be provided with as much detailed information as possible regarding the identities of any alleged accomplices, if known.
17. Accordingly, the learned judge was correct to approach the issue of co-perpetrators and accomplices on the same footing.
18. However, for the reasons set out in paragraphs 8 - 13 above, as they apply *mutatis mutandis* to accomplices, the learned judge erred in law when 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.

CERTIFIED ISSUE 3 - 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

¹⁵ *Prosecutor v Ntagerura, “Judgment and Sentence”, ICTR-99-46-T at paragraph 35*

19. Where liability through assistance or incitement is alleged, the facts thereof form part of “the facts underpinning the charges and the crimes, including the modes of liability”.
20. The Confirmed Indictment alleges liability on the part of the defendant in the form of both assistance and incitement to others to commit offences, and such offences were committed by the others or attempted.
21. The learned judge correctly acknowledged that in case of instigation, the instigated persons or group of persons must be described precisely¹⁶. That exhortation to provide a precise description is not to be taken to mean that it is sufficient to describe the group of instigated persons when it is also possible to describe the instigated person within that group precisely.
22. It is submitted that the principle for assisted persons and incited persons (and instigated persons) must be the same as that in relation to co-perpetrators, namely, that the accused must be provided with as much detailed information as possible regarding the identities of any alleged assisted persons and incited persons, if known.
23. In the present case, the learned judge did not find, and it was not open to him to find in any event, that it was impossible for the SPO to identify by name *any* person who it is alleged was assisted to commit an offence, or incited to commit an offence. Indeed, the SPO has never claimed that it could not identify by

¹⁶ The Impugned Decision at paragraph 42

name any alleged assisted or incited person¹⁷ (although not a single alleged assisted or incited person is named in the indictment).

24. As the learned judge correctly held, the charged offences and modes of liability do not depend solely on the conduct of the defendant and his co-accused – they depend also upon the conduct of others¹⁸.

25. It was an error in law for the learned judge not to order the SPO to name those others, where possible.

CERTIFIED ISSUE 4 - 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

26. The learned judge correctly acknowledged that alternative formulations which create ambiguity as regards the charged offences or modes of liability are not permitted¹⁹.

27. The learned judge stated that the formula “and/or” is used in the Confirmed Indictment to refer alternatively to the Accused, co-perpetrators or accomplices when describing a list of actions undertaken, or to identify alternative courses of conduct²⁰.

¹⁷ Consolidated Prosecution Response to Preliminary Motions, KSC-BC-2020-07/F00120 at paragraph 13 only claimed that it was unable to *exhaustively* identify assisted and incited persons

¹⁸ The Impugned Decision at paragraphs 51 and 52

¹⁹ The Impugned Decision at paragraph 45

²⁰ The Impugned Decision at paragraph 63

28. Additionally, however, some usages of the formula “and/or” in the Confirmed Indictment go directly to the alleged modes of liability, and do so in a manner which only creates ambiguity.
29. Consider, for example, paragraph 39 of the Confirmed Indictment, under the heading Modes of Liability, which alleges that “Hysni Gucati, Nasim Haradinaj, and/or Associates committed the crimes in co-perpetration...” The use of the alternative ‘or’ in paragraph 39 appears to provide for the criminal liability of the defendant on the sole basis that Associates of his committed the crimes in co-perpetration (with each other and not with the defendant) - “guilt by association”.
30. Consider also paragraph 47(i) of the Confirmed Indictment, under the heading Statement of Crimes, which alleges that Hysni Gucati and Nasim Haradinaj “committed, alone and/or in co-perpetration, the crimes of obstructing official persons in performing official duties...” The use of the conjunctive ‘and’ provides for an unknown mode of liability which is simultaneously both ‘alone and in co-perpetration’.
31. Of course, the formula “and/or” is used not solely to refer alternatively to different persons when describing a list of actions undertaken, or to identify alternative courses of conduct (as the learned judge found), but to simultaneously provide for the possibility of all at the same time. The formula ‘and/or’ is by definition ambiguous.
32. At paragraph 45 of the Impugned Decision, the learned judge referred to two authorities for prior approval of the use of the formula ‘and/or’, the first of

which contained little by way of reasoning²¹, and the second of which did not, in fact, approve the use of the formula 'and/or' at all²².

33. For the reasons set out above, the use of the phrase 'and/or', by definition, creates ambiguity as to the alleged responsibility of the accused (alleging not simply one or the other, but both and, where more than one person is involved, neither, simultaneously).

34. Accordingly, the learned judge was in discernible error not to find that the use of the formula 'and/or' in the indictment was defective.

CERTIFIED ISSUE 5 - 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 charge are not permitted, unless they are exceptionally necessary which is not asserted

35. The learned judge found that the indictment used open-ended formulations which 'signify that, next to the pleaded and known forms of further dissemination, other, unknown forms, may have also occurred' but that 'the unknown forms of further dissemination do not impact on the charged offences of modes of liability'²³.

36. That may be another, more opaque way of stating that the allegation of possible 'unknown forms' is meaningless in the circumstances of the case, and that the

²¹ *Kvocka et al*, 12 April 1999 Decision, ICTY at paragraph 26

²² *Uwinkindi*, 16 November 2011, ICTY Decision at paragraph 48

²³ *The Impugned Decision* at paragraph 70

charges will be assessed only in relation to known forms of further dissemination²⁴.

37. Such meaningless allegations, which have no impact on the charged offences, should not appear in the indictment, which is required to be clear and specific. Accordingly, the learned judge was wrong not to order the SPO to amend the indictment by removing the same.

III. CONCLUSION

38. For the reasons set out above, it is submitted that the learned judge was in error in relation to each of the Five Issues by failing to acknowledge the defects referred to therein.

39. 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 Prosecution²⁵. Of course, the present appeal is an interlocutory appeal, concerned not with the safety of a conviction, but with the fairness and expeditious conduct of ongoing proceedings. 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 brief²⁶, while proceedings are ongoing an accused should not be required to wait for, and thereafter consult, other documents in order to piece together the information that should and could – indeed with ease - be contained within the indictment.

²⁴ *Prosecutor v Mbarushimana*, ICC-01/04-01/10, 16 December 2011 at paragraph 83

²⁵ *Prosecutor v Nahimana*, Appeal Judgment, 28 November 2007, ICTR-99-52-A at paragraph 327

²⁶ *Prosecutor v Nahimana*, Appeal Judgment, 28 November 2007, ICTR-99-52-A at paragraph 325

40. 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, and what the defendant himself is alleged to have specifically done.
41. 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 identify in the indictment, as far as possible, who they actually allege such persons to be.
42. Similarly, as long as the indictment remains in its present form 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, when the Prosecution might instead fairly acknowledge at this stage that it cannot prove such allegations to the criminal standard.
43. Ambiguous allegations of conduct which the defendant may or may not have undertaken²⁷, and allegations of unknown forms of dissemination which may or may not have occurred²⁸, have no 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).

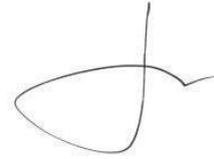
²⁷ The Impugned Decision at paragraph 6

²⁸ The Impugned Decision at paragraph 70

44. 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 Certified Issues 1 to 3 and to clarify by redaction the matters in Certified Issues 4 and 5. 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.
45. It is not permissible for the Prosecution to keep the parameters of its case as broad and general as possible, (i) without providing any reasons as to why it will not name a single known alleged co-perpetrator, accomplice, assisted person or incited person and, at the same time, (ii) pleading unknown forms of conduct which, putting it at its highest, the Prosecution can allege only that they *may* have occurred. The Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation of the indictment²⁹.
46. An imprecisement indictment, such as the Confirmed Indictment, which is not cured of its defects constitutes a prejudice to the accused.
47. The appeal should be granted.

Word count: 3302 words

²⁹*Prosecutor v Mbarushimana*, ICC-01/04-01/10, 16 December 2011 at paragraph 82



JONATHAN ELYSTAN REES QC

Specialist Counsel for Mr Gucati

HUW BOWDEN

Specialist Co-Counsel for Mr Gucati

15th April 2021

Cardiff, UK