

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: 27 April 2021

Language: English

Classification: Confidential

**Defence Reply to Consolidated Prosecution Response to Interlocutory Appeals of
Decision on the Defence Preliminary Motions**

Specialist Prosecutor

Jack Smith

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

I. INTRODUCTION

1. On 23 April 2021, the Specialist Prosecutor's Office ('SPO') filed its 'Consolidated prosecution response to interlocutory appeals of Decision on the Defence Preliminary Motions', along with a 'Public Annex'.¹
2. The Defence for Mr. Haradinaj now seeks to reply to that response.

II. BACKGROUND AND PROCEDURAL HISTORY

3. The background and procedural history in respect of this matter has already been illustrated both in the application/grounds of appeal, and further, the SPO Consolidated Response; as a consequence, there is no intention to repeat the same here in this reply, but rather, that which has already been outlined is adopted.

III. SUBMISSIONS

4. The Defence for Mr. Haradinaj note that the purpose of a reply is to address specific issues raised within any response, rather than seek to raise new

¹ KSC-BC-2020-07/IA004/F00004

points, and therefore, this response is limited to that which has been submitted by the SPO.

5. References to sub-headings and paragraph numbers are references to those set out within the SPO consolidated response.

Grounds 1-3

6. The SPO submits that co-perpetrators and accomplices are adequately identified; however, it is abundantly clear from any reading of the indictment and the supporting material that they are not.
7. It is of note that the SPO has now disclosed its pre-trial brief, where those that are inferred to be uncharged co-perpetrators are now named.
8. No explanation is provided as to why individuals are named within the pre-trial brief and not the indictment, this is of further relevance particularly when one considers that such information was previously known and it is abundantly clear the identities of these individuals were 'known' at the time of submitting the indictment, and thus there would be appear to be no good reason for the opacity displayed on the part of the SPO.
9. In any event, as per submissions already filed, the SPO has failed to identify accomplices and/or co-perpetrators and their purported involvement, if any, in the allegations.

10. The same can be said to those individuals who are said to have been incited.
11. The SPO response does not address the lack of specificity of the indictment, it merely states that the impugned decision was the correct one in the circumstances.
12. The SPO at paragraph 12 of the response demonstrates a distinct misunderstanding of the argument raised.
13. The SPO seeks to suggest that the Defence submissions on the point of identify of co-perpetrators etc "*are made in the abstract*".
14. There is no basis for this submission.
15. The SPO does know the identities of those that it deems to be co-perpetrators, and did at the relevant time, as demonstrated by the contents of the pre-trial brief, and yet for reasons only it knows, the SPO failed to name these individuals in the indictment. Accordingly, as has already been submitted, the Defendant(s) were unaware of the certain specific elements of the case being presented against them.
16. That which the Defence submit as being an error in terms of the impugned decision is therefore clear, and not in the abstract. Further, the submission to engage with the specifics of the case and demonstrate what the Defence say is a clear error in terms of the impugned decision.

17. The fact remains that the SPO have in terms of the indictment, and further in its consolidated reply, summarily failed to engage with the fact that it is fully aware of those it deems to be co-perpetrators etc as inferred from the pre-trial brief, and yet these individuals are not named within the indictment.
18. The Defendant(s) therefore are still unaware as to who these purported co-perpetrators are, instead, having to rely on their own inference from the evidence before them.
19. Contrary to the argument raised at paragraph 15 of the SPO consolidated response, all material facts have not been pleaded, and continue to not be pleaded, a fact that is prejudicing the Defendant(s) in the preparation of his defence in that he is being asked to defend against an ambiguous count(s) on the indictment.
20. Accordingly, the indictment is deficient in that it lacks the required specificity, and further, the impugned decision fails to acknowledge this fact, and is therefore deficient.

Ground 4

21. The submissions made by the Defence in respect of Ground 4 are maintained, and contrary to the submission of the SPO, those submissions do engage with the impugned decision, nor are those submissions general and/or underdeveloped in that they refer specifically to the indictment.

22. In fact, it is the SPO that has failed to engage with the fundamentals of the arguments being raised simply rehearsing its oft used position that the Defence submissions are a mere disagreement with the impugned decision rather than a demonstration of an error of law etc.
23. The SPO repeatedly adopts the position that it is no way required to engage in responding to specific requests it considers not to be relevant to its case and this approach is not conducive to the expeditious progress of this case.
24. The SPO fails to engage with the fact that the issues it suggests will be demonstrated by the evidence and/or at trial, cannot be determined at trial given the SPO already stated intention to not call any witnesses of fact at trial, but instead, only seeking to call two 'investigators' to give evidence, witnesses that cannot be considered objectively independent of the party calling them to give evidence and cannot establish the very points that it asserts will be demonstrated by the evidence.
25. Accordingly, the already submitted position is maintained, in that, the issues are not evidential issues to be determined at trial, but rather, fundamental, not only in terms of the offences within the indictment, but also, fundamental to the Defendant being able to prepare his defence, preparation that his being hindered, and thus, it is respectfully submitted that the Pre-Trial Judge has erred in failing to acknowledge the prejudice to the Defendant.

Ground 5

26. The substantive submissions are maintained, the consolidated response of the SPO adds nothing to that which has already been submitted.

IV. CONCLUSION

27. The central thrust of the SPO response, is that the position advanced on appeal is simply a disagreement with the decision of the Pre-Trial Judge.

28. This is fundamentally wrong.

29. Leave to appeal has been granted, and therefore at its most simplistic, there is an acknowledgment that the test has been satisfied, as if the grounds submitted were merely a disagreement with the decision of the pre-trial judge, leave would have been refused.

30. The submission of the SPO on this point is therefore without foundation.

31. Further, the SPO in its consolidated response merely rehearses the submissions previously made, and fails to engage with the issues identified in terms of the impugned decision.

32. Still further, the SPO fails to explain why it has framed the indictment in the manner confirmed, and failed to explain why the deficiencies within the

indictment are apparent, when the information not included is clearly known to them.

33. The substantive submissions are maintained, in that the indictment is deficient for the reasons already given, that those deficiencies are preventing the Defendant(s) from preparing their defence, and thus prejudice is apparent.

34. The submissions of the SPO do not change this fact.

Word Count: 1302 words



Toby Cadman

Specialist Counsel



Carl Buckley

Specialist Co-Counsel