

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: 30th April 2021

Language: English

Classification: Public

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

Specialist Prosecutor

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I. INTRODUCTION

1. On 23rd April 2021, the Accused received notification that the Specialist Prosecutor's Office ('SPO') had filed a submission ("the Response")¹ requesting that the Accused's "Appeal"² be dismissed.
2. The Accused hereby replies to the Response, pursuant to rules 9 and 76 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), without prejudice to the submissions made in the Appeal and acknowledging that the Panel shall only consider a reply or parts thereof addressing new issues arising from the response.

II. SUBMISSIONS

3. In arguing that the Court of Appeals Panel should summarily dismiss the Appeal without consideration of the merits, the SPO seeks inappropriately to undermine the decision of the Pre-Trial Judge who granted leave to appeal.
4. In granting leave, the Pre-Trial Judge rejected the arguments of the SPO that (i) there was insufficient specificity as to the alleged errors of law³; (ii) that the issues raised could have no impact on the fairness and expeditiousness of the proceedings or the outcome of the trial⁴; and (iii) that as any issues in understanding the Confirmed Indictment can be resolved in the course of the

¹ *Consolidated Prosecution Response to Interlocutory Appeals of Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/IA0004/F00004

² *Notice of Interlocutory Appeal with Leave from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(2) and Rule 170(2)*, KSC-BC-2020-07/IA004

³ *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/F000169 at paragraph 20

⁴ *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/F000169 at paragraph 26

trial, an interlocutory appeal on alleged defects therein is not necessary to ensure that the proceedings are on the right course⁵.

5. Having rejected those arguments, the Pre-Trial Judge ruled that the appeal raises issues that:
 - a. Are not mere disagreements with the Pre-Trial Judge's decision, nor are hypothetical or abstract questions⁶;
 - b. Identify discrete topics regarding the interpretation and application of the legal standards on specificity and clarity of indictments in respect of the learned judge's findings⁷;
 - c. Identify discrete topics the resolution of which is essential for determination of the matters arising in the judicial cause under examination, i.e. the specificity and clarity of the Confirmed Indictment⁸;
 - d. Implicate questions of adequate and timely notice of charges to the accused, as enshrined in Article 21(4) of the Law, which given that the Confirmed Indictment defines the scope of the trial, is required to provide the accused with a genuine opportunity to challenge the SPO's case and present his defence, as well as to be tried within a reasonable time, guarantees which are at the core of and significantly affect fair and expeditious proceedings⁹; and

⁵ *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/F000169 at paragraph 31

⁶ *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/F000169 at paragraph 22

⁷ *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/F000169 at paragraph 22

⁸ *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/F000169 at paragraph 22

⁹ *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/F000169 at paragraph 27

- e. Would benefit from an authoritative determination by the Court of Appeals Panel at the earliest opportunity in the proceedings for two reasons: (i) such a determination would provide legal certainty as to the discrete topics regarding the interpretation and application of the legal standards on specificity and clarity of indictments in respect of the relevant findings, and (ii) such a determination could minimise subsequent delays and the diverting of resources during trial and appeal proceedings¹⁰.
6. The Appeal, and its five certified questions, identify five discernible errors (the Pre-Trial Judge erroneously applying the referenced law)¹¹ and identifies the prejudice which flows from those errors¹². The Appeal should be determined on its merits.
 7. In keeping with its attempt to undermine the Pre-Trial Judge's decision on granting leave to appeal, it is noteworthy that the Response from the SPO does not attempt to address the five certified questions directly. Each of the five questions as certified by the Pre-Trial Judge sets out the relevant requirement, against which the Confirmed Indictment was to be assessed:
 - a. Issue 1 - Requirement to provide in the indictment as much detail as possible regarding the identities of any alleged co-perpetrators;

¹⁰ *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/F000169 at paragraph 32

¹¹ *Notice of Interlocutory Appeal with Leave from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(2) and Rule 170(2)*, KSC-BC-2020-07/IA004/F00003 at Part II

¹² *Consolidated Prosecution Response to Interlocutory Appeals of Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/IA0004/F00004 at paragraph 15

- b. Issue 2 – Requirement to provide in the indictment as much detail as possible regarding the identities of any alleged accomplices;
 - c. Issue 3 – Requirement to provide in the indictment as much detail as possible regarding the identities of any assisted or incited persons;
 - d. Issue 4 – Requirement that formulations should not be used which create ambiguity as to the alleged responsibility of the accused; and
 - e. Issue 5 – 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.
8. In relation to Issues 1, 2 and 3 the SPO does not argue that the Confirmed Indictment meets the requirements as certified – that is, the SPO does not argue that the Confirmed Indictment does indeed provide as much detail as possible regarding the identities of any alleged co-perpetrators, accomplices and assisted or incited persons. No explanation is given by the SPO as to why the Confirmed Indictment does not provide as much detail as possible regarding the identities of any alleged co-perpetrators, accomplices and assisted or incited persons.
9. Nor does the SPO argue that the requirements as set out in the five questions certified by the Pre-Trial Judge, and reflecting his analysis of the law in the Impugned Decision, are not in fact requirements.
10. The height of the SPO's response is simply to assert that the Pre-Trial Judge was correct to say that the Confirmed Indictment was nevertheless 'adequate'¹³,

¹³ *Consolidated Prosecution Response to Interlocutory Appeals of Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/IA0004/F00004 at paragraph 9

despite the indictment's shortcomings. On the contrary, for the reasons set out in paragraphs 38 to 46 of the Appeal, the Confirmed Indictment is defective and prejudicial, and should be amended or otherwise dismissed.

11. Contrary to what is asserted by the SPO, it is not conceded by the defence on behalf of Mr Gucati that 'the evidentiary details sought by the Defence – to the extent that they are available – have been or will be provided in accordance with the established framework under the Law and Rules'¹⁴. Nor is it asserted by the defence on behalf of Mr Gucati that the 'extra details it seeks to add to the Indictment are in the Pre-Trial Brief'¹⁵.
12. As the Pre-Trial Judge has stated, it is the Confirmed Indictment that defines the scope of the trial, not the Pre-Trial Brief or the evidence served by the Prosecution. The absence of further particulars as to the identity of co-perpetrators, accomplices and assisted or incited persons in the indictment means that the Accused has no way of measuring whether the evidence disclosed thus far provides as much detail as possible regarding the identities of any alleged co-perpetrators, accomplices and assisted or incited persons.
13. Although the Pre-Trial Brief names two additional alleged offenders¹⁶, who are inexplicably unnamed in the indictment, the SPO does not claim either in its Response or indeed in the Pre-Trial Brief that is it unable to identify any further alleged co-perpetrators, accomplices and assisted or incited persons.
14. The Pre-Trial Brief provides no further details as to the identities of the 'certain members of the public', 'certain members of the press', and 'certain others' [not

¹⁴ *Consolidated Prosecution Response to Interlocutory Appeals of Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/IA0004/F00004 at paragraph 15

¹⁵ *Consolidated Prosecution Response to Interlocutory Appeals of Decision on the Defence Preliminary Motions*, KSC-BC-2020-07/IA0004/F00004 at paragraph 15

¹⁶ *Submission of Pre-Trial Brief, witness and exhibit lists, and Rule 109(c) chart with confidential Annexes 1-4*, KSC-BC-2020-07/F00181 at Annex 1, paragraphs 97, 173, 178, 186, 193, 197, 208 and 212

‘Associates’] who the Indictment alleges were involved, with the Accused, in the commission, or attempted commission, of offences. Indeed, save for the identification of the two specific additional alleged offenders referred to above, the Pre-Trial Brief continues the deliberately vague and ambiguous approach of the Confirmed Indictment.

15. Without prejudice to the submission made at paragraph 39 of the Appeal that 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, the Pre-Trial Brief does not, in fact, ‘cure’ the defects identified in the indictment in any event.
16. In relation to certified questions 1, 2 and 3, the appeal should be allowed and the SPO required to amend the indictment by providing the further particulars sought or the indictment be otherwise dismissed.
17. In relation to certified question 4, the SPO wrongly asserts that the Appeal challenges the use of the term ‘and/or’ in paragraphs 39 and 47(i) of the Indictment only. In fact, the Appeal challenges the use of the term ‘and/or’ in each of the numerous occasions in the indictment where it creates ambiguity as to the alleged responsibility of the accused (a table identifying each occasion was provided with the original submissions made at first instance¹⁷).
18. At paragraphs 29 and 30 of the Appeal, two specific – indisputable - examples were provided to highlight the use of the phrase ‘and/or’ creating ambiguity as to the alleged mode of liability.

¹⁷ *Preliminary Motion Alleging Defects in the Form of the Indictment pursuant to Rule 97(1)(b)*, KSC-BC-2020-07/F00113 at pages 5 to 14

19. It is no answer to argue, as the SPO seeks to, that paragraph 39 of the indictment should read (or be read) to allege that:

- a. *Both Accused committed the crimes in co-perpetration or agreed to commit the crimes with one or more Associates;*
- b. *If no Associate is found to have committed the crimes in co-perpetration or agreed to commit the crimes with either of the Accused, then the Accused committed the crimes in co-perpetration or agreed to commit the crimes; or*
- c. *If one Accused is ultimately found to have not committed the crimes in co-perpetration or agreed to commit the crimes, then the other Accused did with one or more Associates.*

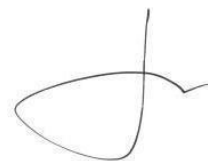
20. The indictment does not read in those terms. Leaving aside that there is nothing 'plain' whatsoever about the alternatives particularised in paragraph 21 of the Response, if that is what the SPO seeks to allege in the indictment, that it should delete the ambiguous term 'and/or' and precisely particularise the mode of liability in those terms.

21. Similarly, if the SPO intend paragraph 47(i) to read "that that Accused either: (i) physically committed the charged crimes; or (ii) committed the charged crimes in co-perpetration", then they should delete the ambiguous term 'and/or' and precisely particularise the mode of liability in those terms.

22. Despite the SPO's pleas, there is no excuse for poor drafting in an indictment. The parties and the Trial Panel are entitled to rely upon the terms of the indictment on their face, without having to 'second guess' what the SPO actually intended by inaccurate and ambiguous drafting.

23. In relation to certified question 4, the appeal should be allowed and the indictment accordingly or otherwise be dismissed.
24. In relation to certified question 5, the SPO does not accept that the allegation that unknown forms of further dissemination may have also occurred is meaningless in an indictment which charges the Accused with criminal offences that must be proved beyond reasonable doubt.
25. Presumably, the SPO assert that it is accordingly open to the Trial Panel to convict the Accused of any count where the alleged *actus reus* involves dissemination where it finds that an unknown form of dissemination may have occurred, even if it is not sure that any known form of dissemination did in fact occur.
26. That proposition is absurd, and contrary to the Pre-Trial Judge's finding that the 'the unknown forms of further dissemination do not impact on the charged offences or modes of liability'.
27. The fact that the SPO in its Response appears to maintain, despite the Pre-Trial Judge's finding, that the pleading of unknown forms of dissemination that may have occurred has some impact on the charged offences or modes of liability, albeit of an indefinite and indistinct nature, highlights the danger of leaving such meaningless verbiage in the indictment.
28. As stated at paragraph 37 of the Appeal, 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. In relation to certified question 5, the appeal should be allowed and the indictment amended accordingly or otherwise be dismissed.

Word count: 2224 words

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

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30th April 2021

Cardiff, UK