

**In:** KSC-BC-2020-07

**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** Pre-Trial Judge,  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hysni Gucati

**Date:** 3<sup>rd</sup> June 2021

**Language:** English

**Classification:** Confidential

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**Application for Leave to Appeal through Certification**

**from Decision KSC-BC-2020-07/F00210**

**pursuant to Article 45(2) and Rule 77(1);**

**Alternative Request for Reconsideration under Rule 79(1)**

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**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. On 26<sup>th</sup> April 2021, the SPO submitted a request for the non-disclosure of material sought by the defence, labelled “Gucati Request B” and “Gucati Request C”, on the grounds that it was not material to the Defence (“Request”)<sup>1</sup>.
2. In a decision dated 26<sup>th</sup> May 2021 (“the Impugned Decision”), the Pre-Trial Judge acceded to that Request, finding that the information and material requested in Gucati Requests B and C went to an issue, namely the process through which alleged confidential material arrived to the KLA WVA premises, that fell “squarely outside the scope of the present case” and was accordingly “not relevant to the case”<sup>2</sup>.
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”)<sup>3</sup>, the defendant applies for leave to appeal from the Impugned Decision on the following two issues, namely:

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<sup>1</sup> *Prosecution Requests and Challenges Pursuant to KSC-BC-2020-07/F00172*, 26 April 2021, strictly confidential and *ex parte*, with Annexes 1-3, strictly confidential and *ex parte*. See also F00190/RED, Specialist Prosecutor, *Confidential Redacted Version of Prosecution Requests and Challenges Pursuant to KSC-BC-2020/F00172*, 28 April 2021, confidential at paragraphs 32 to 36 (notification of decision F00172 was received on 26<sup>th</sup> May 2021; Rule 77 provides 7 working days to request certification – Monday 31<sup>st</sup> May 2021 was a holiday)

<sup>2</sup> *Decision on Prosecution Requests and Challenges Pursuant to F00172*, KSC-BC-2020-07/F00210 at paragraphs 62-63

<sup>3</sup> The Pre-Trial Judge is asked to extend the time limit prescribed in Rule 77(1) by a day pursuant to Rule 9(5). Notification of decision F00172 was received on 26<sup>th</sup> May 2021 when the parties were in the middle of preparation for the Fourth Status Conference on 28<sup>th</sup> May 2021. The decision was received at the same time as late disclosure of 18000 plus pages of Rule 102(1) material by the Prosecution. Rule 77 provides 7 days to request certification. Falling within that period, Monday 31<sup>st</sup> May 2021 was an official holiday in the UK.

- (i) Whether the Pre-Trial Judge erred in finding that the issue of the process through which alleged confidential material arrived to the KLA WVA premises was not relevant to the case; and
  - (ii) Whether the Pre-Trial Judge erred in finding that the information and material requested in Gucati Requests B and C, which went to the issue of the process through which alleged confidential material arrived to the KLA WVA premises, was not relevant to the case.
4. Alternatively, the defence requests that the Pre-Trial Judge reconsiders his decision in relation to the above issues under Rule 79(1).

## II. APPLICABLE LAW

5. Article 45 of the Law empowers a Court of Appeals Panel to hear interlocutory appeals from decisions of the Pre-Trial Judge.
6. Article 45(2) of the Law provides that any interlocutory appeal, other than from decisions or orders relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers, must be granted leave to appeal through certification by the Pre-Trial Judge on the basis that it involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.
7. Rule 77(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”) provides that:

“The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals panel may materially advance the proceedings”.

8. The following specific requirements, therefore, apply<sup>4</sup>:

(1) Whether the matter is an “appealable issue” – that is, an identifiable subject or topic the resolution of which is essential for the determination of matters arising in the judicial cause under examination<sup>5</sup>;

(2) Whether the issue at hand would significantly affect:

- i. The fair and expeditious conduct of the proceedings, or
- ii. The outcome of the trial; and

(3) Whether, in the opinion of the Panel, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

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<sup>4</sup> *Decision on the Thaci Defence Application for Leave to Appeal*, KSC-BC-2020-06/F00172 at paragraph 10

<sup>5</sup> *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-75, Decision on the Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber III’s Decision on Disclosure (“*Bemba Decision on Prosecutor’s Application for Leave to Appeal*”), 25 August 2008, paragraph 10

9. The object is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial<sup>6</sup>.
10. Arguments on the merits or as to the substance of the appeal are *not* factors to be considered at the leave stage - they are factors to be considered and examined by the Court of Appeals Panel in the event that leave to appeal is granted<sup>7</sup>.
11. Where certification is granted, the appellant has 10 days from the date of certification to file an appeal<sup>8</sup>.
12. Rule 79(1) provides for the power of a Panel to reconsider its own decision ‘in exceptional circumstances and where a clear error of reasoning has been demonstrated’.

### III. SUBMISSIONS

#### Whether the matter is an “appealable issue” – that is, the issue emanates from the Impugned Decision

13. Each of the discrete issues identified in paragraph 3(i) and (ii) above emanate from the Impugned Decision and do not amount to abstract questions or hypothetical concerns.

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<sup>6</sup> Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 at paragraph 19

<sup>7</sup> *Prosecutor v Kony*, Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20, 19 August 2005, paragraph 22

<sup>8</sup> Rule 170(2) of the Rules

14. They relate to the identifiable subject or topics of disclosure and the issue of incitement (the process through which alleged confidential material arrived to the KLA WVA premises)<sup>9</sup>.

Whether the issue at hand would significantly affect: (i) The fair and expeditious conduct of the proceedings

15. At paragraph 15 of the Impugned Decision, the Pre-Trial Judge acknowledged that ‘the extent to which the Defence’s submissions regarding incitement or entrapment may constitute a permissible substantive defence or a ground for the exclusion of evidence are matters to be addressed at trial’.

16. However, those matters can only be properly addressed where appropriate disclosure has taken place, so as to ensure the rights to adversarial proceedings and to equality of arms. The procedure to determine a complaint of incitement must be adversarial, thorough, comprehensive and conclusive and the procedural guarantees related to the disclosure of evidence are indispensable thereto.

17. Appropriate and timely disclosure is both fair and, as specifically identified in Rule 95(2), necessary for the expeditious preparation of the case (prior to preparation of the disclosure report by the Pre-Trial Judge for the Trial Panel).

Whether the issue at hand would significantly affect: (ii) The outcome of the trial

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<sup>9</sup> *Decision on Prosecution Requests and Challenges Pursuant to F00172*, KSC-BC-2020-07/F00210 at paragraphs 58 and 63

18. As stated above, the Pre-Trial Judge acknowledged that 'the extent to which the Defence's submissions regarding incitement or entrapment may constitute a permissible substantive defence or a ground for the exclusion of evidence are matters to be addressed at trial' (indeed, the potential necessary remedies for incitement or entrapment may be wider, and may include a stay or bar of proceedings).

19. As submitted above, however, those matters can only be properly addressed where appropriate disclosure has taken place, so as to ensure the rights to adversarial proceedings and to equality of arms. The procedure to determine a complaint of incitement must be adversarial, thorough comprehensive and conclusive and the procedural guarantees related to the disclosure of evidence are indispensable thereto.

20. The availability of incitement/entrapment as a substantive defence, or as grounds for the exclusion of evidence or for a stay or bar of proceedings, and appropriate disclosure in relation to the same, are matters which are fundamental to the outcome of the trial (indeed, potentially determinative).

Whether an immediate resolution by the Appeals Chamber may materially advance the proceedings

21. Timely disclosure is necessary for the expeditious preparation of the case for trial (see Rule 95(2)).

22. Accordingly, leave to appeal should be granted to permit the Court of Appeals Panel to consider whether the decision on disclosure in relation to Gucati Requests B and C is in error and, if so, to order disclosure at this stage.

Application for Reconsideration under Rule 79(1)

23. Alternatively, the Pre-Trial Judge is requested to reconsider decision F00210 in this regard.

24. It is submitted that a clear error of reasoning is demonstrated within paragraphs 62 and 63 of decision F00201.

25. Within paragraph 63, the Pre-Trial Judge acknowledges that:

- a. Incitement or entrapment is an issue to be addressed at trial; and
- b. That the SPO is required to disclosure exculpatory material under Rule 103 of the Rules which falls within that issue.

26. It is wholly inconsistent therewith to find that the 'process through which the information arrived to the KLA WVA premises' does not fall under the scope of the case.

27. If the process through which information arrived to the KLA WVA premises was irrelevant (that is, outside the scope of the case), then the fact of incitement or entrapment would be irrelevant (as a process through which information arrived to the KLA WVA premises) and the SPO would not be required to disclose as exculpatory material any material or information in its custody or



control or actual knowledge as regards any purported incitement or entrapment of the Accused under Rule 103.

28. Material in the possession of the SPO relating to the issue as to how the alleged confidential information arrived at the KLA WVA premises can be:

- a. relevant and inculpatory (excludes incitement or entrapment); or
- b. relevant and exculpatory (might reasonably be capable of supporting the plea of incitement or entrapment); or
- c. relevant and material to the preparation of the defence (for example, where the SPO does not accept that it might reasonably be capable of supporting the plea of incitement or entrapment but it may otherwise be material to the preparation of the defence by, for example, pointing towards other material that might reasonably be capable of supporting the plea of incitement or entrapment); or
- d. relevant and neither incriminating or exculpatory, nor material to the preparation of the defence, in which case it must nevertheless be listed on the Rule 102(3) Notice.

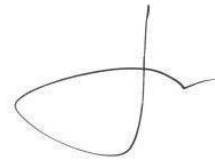
29. However, material in the possession of the SPO relating to the issue as to how the alleged confidential information arrived at the KLA WVA premises cannot be both irrelevant and exculpatory as enigmatically contemplated by paragraphs 62 and 63 of F00210 (nor, for that matter, irrelevant and inculpatory).

30. Accordingly, the Pre-Trial Judge is requested to reconsider F00210 in this regard, in the alternative to certification for appeal.

#### IV. CLASSIFICATION

31. This filing has been classified as confidential as the Impugned Decision was classified likewise. There is no objection to re-classification of this filing as public.

Word count: 1906 words



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3<sup>rd</sup> June 2021

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