

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

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

**Before:** Pre-Trial Judge

**Registrar:** Dr Fidelma Donlon

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

**Date:** 14<sup>th</sup> June 2021

**Language:** English

**Classification:** Confidential

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**Reply to Consolidated Prosecution Response to Defence Applications F00216 and F00219 for Leave to Appeal and Reconsideration**

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**Specialist Prosecutor**

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## I. INTRODUCTION

1. On 10<sup>th</sup> June 2021, the Accused received notification that the Specialist Prosecutor's Office ('SPO') had filed a submission ("the Response")<sup>1</sup> requesting that the Accused's Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00210 and alternative Request for Reconsideration ("the Application for Leave to Appeal and Reconsideration")<sup>2</sup> be rejected.
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 Application for Leave to Appeal and Reconsideration and acknowledging that the Panel shall only consider a reply or parts thereof addressing new issues arising from the response.

## II. SUBMISSIONS

3. The Application for Leave to Appeal and Reconsideration requested an extension of the time limit prescribed in Rule 77(1) to apply for certification by one day pursuant to Rule 9(5)<sup>3</sup>. The grounds for the request are set out therein. In the event, the Application for Leave to Appeal and Reconsideration was submitted for filing at 14:05 hrs on 3<sup>rd</sup> June 2021, less than a day after the deadline of 2 June 2021. Rule 9(5) provides that the Panel may, *proprio motu* or upon showing of good cause: (a) extend or reduce any time limit prescribed by the Rule or set by the Panel; or (b) recognise as valid any act carried out after

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<sup>1</sup> "Consolidated Prosecution Response to Defence Applications F00216 and F00219 for leave to appeal and reconsideration", KSC-BC-2020-07/F00226

<sup>2</sup> "Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00210 pursuant to Article 45(2) and Rule 77(1)", KSC-BC-2020-07/F00216

<sup>3</sup> See footnote 3 to the Application for Leave to Appeal and Reconsideration

the expiration of the time limit. It is in the interests of justice, it is submitted, that the Pre-Trial Judge should exercise the power in Rule 9(5) to consider the applications for leave to appeal further and reject the invitation from the SPO to summarily dismiss.

4. The application for reconsideration has no requirement of time under the Rules.

#### *APPEALABLE ISSUES*

5. The 'First Issue' does not challenge the entirety of the Pre-Trial Judge's decision. Decision F00210 contained a number of rulings which are not challenged including:
  - a. The decision at paragraph 25, which was in the Accused's favour and is not challenged;
  - b. The decision at paragraph 31, which was in the Accused's favour and is not challenged;
  - c. The decision at paragraph 36, which was in the Accused's favour and is not challenged; and
  - d. The decision at paragraph 54, which was in the Accused's favour and is not challenged.
6. Accordingly, it is nonsense to allege, as the SPO does, that the First Issue 'merely challenges the entirety of the decision'.
7. On the contrary, the issue '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' is a discrete issue which

emanates from paragraphs 61 to 64 of the Impugned Decision, Decision F00210, and is neither abstract nor hypothetical.

8. In relation to the 'Second Issue', the Response does not assert that it amounts to an abstract question or hypothetical concerns. The Response does not assert that the Second Issue does not emanate from the Impugned Decision. It is also a discrete issue and therefore appealable.
9. The complaint made in paragraph 5 of the Response that 'with regards to the Second Issue, the Gucati Defence does not specify the nature of the alleged errors that it seeks to appeal' is irrelevant to the question whether the matter is a discrete issue, as are the arguments in paragraphs 6 to 8.
10. There is no requirement to identify an error in the Pre-Trial Judge's reasoning at the leave stage – if there were, there would be no purpose in an appeal.
11. In any event, the Application for Leave to Appeal and Reconsideration does identify the alleged error in the Pre-Trial Judge's reasoning that the Accused seeks to argue on appeal, namely, that the Pre-Trial Judge's findings at paragraphs 61 to 64 of the Impugned Decision are inherently contradictory. The SPO fully appreciates the argument that the Accused seeks leave to make on appeal, as is clear from its views in paragraphs 6 to 8 of the Response on the merits of that argument.
12. However, arguments on the merits or as to the substance of the appeal, as set out by the SPO in paragraphs 6 to 8 of its Response, 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>4</sup>.

*ISSUES SIGNIFICANTLY AFFECT THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR THE OUTCOME OF THE TRIAL*

13. The Response asserts at paragraphs 11 and 12 that ‘no allegation in the Indictment relates to any of the information covered by the First and Second Issues’ and that the requests relating to them are ‘disconnected ... from the charges against the Accused’.
14. Those assertions are not, of course, accepted and are the very matters sought to be appealed, namely:
  - a. ‘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’;
  - b. ‘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.
15. If the judge was in error in so finding, then the issue of the process through which alleged confidential material arrived to the KLA WVA premises is

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<sup>4</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

relevant to the case, as is the information and material requested in Gucati Requests B and C.

16. The Application for Leave to Appeal and Reconsideration rightly does not raise the hypothetical or abstract proposition that ‘any findings of the irrelevance of information under Rule 102(3) appealable as of right’. Such hypothetical or abstract propositions (as made in the Response at paragraph 12) have no place in the appeal process, and the Accused neither seeks to argue that hypothetical proposition nor respond to it.

17. Instead, the Application for Leave to Appeal and Reconsideration argues specifically why these disclosure requests justify granting leave to appeal: see paragraphs 18 to 20. In particular, these requests relate, as the Pre-Trial Judge recognised, to the issue of the availability of incitement/entrapment as a substantive defence, or as grounds for the exclusion of evidence or a stay or bar of proceedings – 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*

18. The SPO does not challenge the proposition that ‘timely disclosure is necessary for the expeditious preparation of the case for trial’, but simply asserts that there was no error in the decision of the Pre-Trial Judge. That is a matter to be determined on appeal.

In the event that the Pre-Trial Judge was in error, then appropriate disclosure will not happen in a timely fashion (and may not happen at all). The Rules specifically recognise the importance of disclosure being resolved during the Pre-Trial period. Rule 95(2) requires the Pre-Trial Judge to take any measure to

ensure timely disclosure, before the case passes to the Trial Panel, which ought to include certifying a decision on disclosure for appeal where there is an appealable issue which may significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

19. The observations made by the ICC Trial Chamber in *Prosecutor v Bemba et al*, Transcript of Hearing, ICC-01/05-01/13-T-10-Red-ENG, 29 September 2015, p.11 and referred to in the Response at footnote 33 were made when the case was already before the Trial Chamber (indeed, they were made on the day that the Prosecution was to open the case). Moreover, the remarks were made in the context of (i) requests for leave to appeal relating to rulings (including in relation to the admissibility of evidence) previously made by the Trial Chamber itself (not a Pre-Trial Judge); and (ii) requests for leave to appeal each of which were in any event refused for other reasons.
20. Unlike in *Bemba et al*, ante, the present proceedings remain in the Pre-Trial period. No defence pre-trial brief is yet due. There is an outstanding appeal in relation to the Indictment yet to be resolved. No decision has been made as to the composition of the Trial Panel as per the discretion in Article 25(2) of the Law<sup>5</sup>, and no assignment of the Trial Panel has taken place. The case file has a tentative date for the transmission of the case file under Rule 98(1) only. Once the case file has been transmitted to the Trial Panel, the Rules require (1) a Trial Preparation Conference to be held and (2) within 30 days thereafter or as directed, a Specialist Prosecutor's Preparation Conference at which the date for Opening will be set (to be within 30 days from the Specialist Prosecutor's Preparation Conference, subject to any postponements).

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<sup>5</sup> See "Written Submissions on behalf of Hysni Gucati for the Second Status Conference and Related Matters", KSC-BC-2020-07/F00137 at paragraphs 38 to 43 and Transcript 24<sup>th</sup> February 2021 page 170 lines 6-8, and page 171 line 9 to page 173 line 17

21. Accordingly, there are a number of significant steps yet to take before these proceedings will have reached the equivalent stage (i.e. to the stage reached in *Bemba et al*, ante). In these circumstances, it is presumptuous of the SPO to assert that 'in the amount of time it would take to resolve an interlocutory appeal, the trial proceedings will have advanced considerably' and it betrays, on the part of the SPO, an unwarranted lack of trust in the Court of Appeals Panel to deal with this discrete appeal (if certified) efficiently and expeditiously.
22. As stated above, these requests relate to the issue of the availability of incitement/entrapment as a substantive defence, or as grounds for the exclusion of evidence or a stay or bar of proceedings – matters which are fundamental to the outcome of the trial (indeed, potentially determinative). Whether disclosure should be made accordingly is a matter the immediate resolution of which by the Appeals Chamber may materially advance the proceedings. Leave to appeal should be granted accordingly.

#### *APPLICATION FOR RECONSIDERATION*

23. If, contrary to the above, the possible delay resulting from the granting of leave to appeal is nevertheless a concern for the Pre-Trial Judge, the Pre-Trial Judge has the power to exercise the *immediate* remedy of reconsideration. For the reasons set out in paragraphs 23 to 29 of the Application for Leave to Appeal and Reconsideration it is submitted that a clear error of reasoning is demonstrated. If that is not accepted by the Pre-Trial Judge, then leave to appeal should be granted to allow the matter to be argued before the Court of Appeals Panel.

### III. CONCLUSION



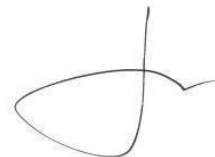
24. The Accused maintains the submissions within the Application for Leave to Appeal and Reconsideration.

25. For the reasons set out therein, and as supplemented by the matters contained above, leave to appeal as requested should be granted.

#### IV. CLASSIFICATION

26. This filing has been classified as confidential as decision F00210 was classified likewise. There is no objection to re-classification of this filing as public.

Word count: 1959 words



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14<sup>th</sup> June 2021

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