

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 Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 4 August 2021

Language: English

Classification: Public

**Public Redacted Version of Reply to Prosecution Response to Defence Appeals of
Disclosure Decision**

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 8th July 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. The Accused agrees with the SPO that the ultimate resolution of the Defence's arguments on incitement or entrapment is to be at trial³.
4. Timely disclosure, however, is necessary for the expeditious preparation of the case for trial and should not await it.

¹ *Response to Defence Appeals of Disclosure Decision with one confidential annex*, KSC-BC-2020-07/IA005/F00005, 8 July 2021, Confidential

² *Notice of Interlocutory Appeal with Leave from Decision KSC-BC-2020-07/F00210 pursuant to Article 45(2) and Rule 170(2)*, KSC-BC-2020-07/IA005/F0002, 25 June 2021, Confidential

³ The Response at paragraph 23, footnote 51

5. In accordance with the order of the Pre-Trial Judge⁴, the Accused has now filed the Defence Pre-Trial Brief⁵. Within the Defence Pre-Trial Brief, the Accused has indicated in paragraphs 36 to 50, 89, 107, 116 to 119, 134 to 136, 164, 175, 176, 179, 310, 341 to 343, 349, 393 to 395, and 397 to 404 thereof some of the matters that the Accused will raise at trial in relation to the plea of incitement⁶.
6. The suggestion from the SPO that the issue of incitement is baseless is rejected accordingly. In any event, as the SPO acknowledge, the ultimate resolution of the Defence's arguments on incitement or entrapment is to be at trial⁷.
7. In relation to paragraph 19 of the Response, the assertion by the SPO that there is no information in the SPO's possession that any person affiliated with the SPO 'released' or, in any other manner, provided the Batches to any person is simply incorrect.
8. The SPO is in possession of ERN 091815-091816 and ERN 091830-091831 [REDACTED].
9. The SPO is also in possession of ERN 081381-081391 which indicates that a journalist received a copy of the 'internal work product' allegedly within Batch 3 'from a source in the Specialist Prosecution Office in the Hague'.
10. The making of cavalier assertions, by way of submission not evidence, is an inappropriate means to conduct the disclosure exercise.

⁴ KSC-BC-2020-07/F00244, Pre-Trial Judge, "Order for the Submission of a Corrected Indictment and for a Second Revised Calendar for the Remainder of the Pre-Trial Proceedings", 23 June 2021, Public at paragraphs 17 and 22(b)

⁵ KSC-BC-2020-07/F00258, "Defence Pre-Trial Brief on behalf of Hysni Gucati", and Annexes A01, A02 and A03, 12th July 2021, Confidential

⁶ See also KSC-BC-2020-07/F00199, "Response to Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', KSC-BC-2020-07/F00190 dated 26 April 2020", 10 May 2021, Confidential at paragraphs 34 to 47

⁷ The Response at paragraph 23, footnote 51

11. Either the SPO made the above assertion (i) unaware of ERN 091815-09186, ERN 091830-091831 and ERN 081381-081391 in its possession or (ii) it rejects the inference placed upon those documents by the defence (even though such inferences are plain on their face) and, thus, ignores them. Either approach causes real and obvious concern.
12. Questions as to the weight to be attached to evidence, and the proper inferences to be drawn therefrom, are for the Trial Panel and not for the SPO.
13. The proposition in paragraph 29 of the Response that 'listing items in the Rule 102(3) Notice is without object where it is already apparent that they are not material to the preparation of the defence' is directly contrary to the requirements of Rule 102(3) (which provides for no such exception) and seeks to improperly go behind the ruling of the Pre-Trial Judge (which is not appealed by the SPO) that the detailed notice must include not only information the SPO assesses to be potentially material to the Defence preparation, but *any* material and evidence in the SPO's possession, which has not been disclosed under Rule 102(1)(a)-(b) and 130 and which is relevant to the case (subject to Rule 106)⁸.
14. The SPO seemingly refuses to acknowledge the purpose of the Rule 102(3) Notice, that is, 'to inform the Defence of material and evidence in the possession of the SPO, which has not been disclosed, in order to assist the Defence in requesting information *they* deem material for their preparation'⁹.

⁸ KSC-BC-2020-07/F00172, Pre-Trial Judge, *Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 1 April 2021, Confidential at paragraph 23

⁹ KSC-BC-2020-07/F00172, Pre-Trial Judge, *Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 1 April 2021, Confidential at paragraph 23

15. The assertion by the SPO that it sees no point in adhering to the requirements of Rule 102(3) and the ruling of the Pre-Trial Judge causes real and obvious concern.
16. Contrary to the assertion in paragraph 32 of the Response, it was not 'impossible' for the Pre-Trial Judge to review the materials sought.
17. The Accused sought any material held by the SPO which relates to the origin and provenance of the material contained within the Three Batches, including material as to the authorship and chain of custody from creation to its arrival at the KLA WVA ("Gucati Request B"). It has never been suggested by the SPO that they hold no such material (it would be absurd to do so).
18. The Accused sought any material held by the SPO which relates to attempts made by the SPO to identify and trace the individual(s) making disclosure of the Three Batches to the KLA WVA ("Gucati Request C"). Although possible, it has never been suggested by the SPO that they hold no such material.
19. Concentrating on the "the material relating to Batch 3 [REDACTED]", the Accused sought the following specific information¹⁰:
- a. Which current or former SPO staff members (including investigators and counsel) contributed to its creation?
 - b. Which current or former SPO staff members (including investigators and counsel) had access to the document electronically?

¹⁰ KSC-BC-2020-07/F00199, "Response to Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', KSC-BC-2020-07/F00190 dated 26 April 2020", 10 May 2021, Confidential at paragraph 49

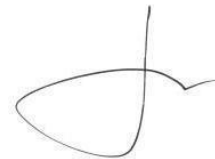
- c. Which current or former SPO staff members (including investigators and counsel) had access to the document in hard copy form?
- d. Was the document password protected? If so, which current or former SPO staff members (including investigators and counsel) had the password?
- e. Are all such SPO staff members who had access to the document (of had any password) still SPO staff members?
- f. Does the SPO still retain an electronic copy of the document?
- g. Has the metadata on the document been checked for evidence as to the last person to access the document? If so, who was that person?
- h. Has the SPO identified the computer(s) upon which that document was created? Who is/are the regular user(s) of that/those computers? Where were such devices located?
- i. Have any current or former SPO staff members been interviewed about the disclosure of the document?
- j. Have any current or former SPO staff members been interviewed about the disclosure of the document?
- k. Have any electronic devices used/controlled by current or former SPO staff members been interrogated for evidence of disclosure of the document?

- l. Have any email accounts or other remote communication facilities used/controlled by current or former SPO staff members been interrogated for evidence of disclosure of the document?
 - m. Were any hard copies of the document stored on SPO premises? If so, was there any CCTV coverage of the area(s) of storage, or the access routes to said area(s)? If so, has such CCTV been examined for evidence of access to and from said area(s)?
20. It has never been suggested by the SPO that they hold no such information.
21. It was perfectly possible for the Pre-Trial Judge to view the material and information sought. To suggest that such a review was impossible is wholly misleading.
22. The making of misleading assertions by the SPO causes real and obvious concerns (even more so when they are made repeatedly).
23. Rather than engaging in the hyperbole and hysteria of the submissions in paragraphs 35 to 236 of the Response, the SPO should instead engage constructively in disclosure exercise so as to ensure the expeditious preparation of the case for trial.
24. For the reasons set out in the Appeal, the Court of Appeals Panel is requested to allow the appeal, in whole or in part, and:
- a. Order the disclosure of all material falling within Gucati Requests B-C;
or
 - b. Order that all material falling within Gucati Requests B-C be listed on the detailed Rule 102(3) Notice.

III. CLASSIFICATION

25. Pursuant to Rule 82(4) of the Rules, this reply is classified as confidential. There is no objection to the reclassification of this reply as public.

Word count: 1557 words



JONATHAN ELYSTAN REES QC

Specialist Counsel for Mr Gucati

HUW BOWDEN

Specialist Co-Counsel for Mr Gucati

13th July 2021

Cardiff, UK