

In: KSC-BC-2020-06
The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi
and Jakup Krasniqi

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

Date: 27 August 2021

Language: English

Classification: Public

Krasniqi Defence Request

**for Certification to Appeal the “Decision on Defence Motions Alleging Defects in
the Form of the Indictment”**

Specialist Prosecutor

Jack Smith

Counsel for Victims

Simon Laws QC

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson QC

Counsel for Rexhep Selimi

David Young

Counsels for Jakup Krasniqi

Venkateswari Alagendra, Aidan Ellis

I. INTRODUCTION

1. On 22 July 2021, the Pre-Trial Judge issued the Decision on Defence Motions Alleging Defects in the Form of the Indictment.¹
2. The Defence for Jakup Krasniqi (“Defence”) hereby seek certification to appeal the following ten issues which arise from the Impugned Decision:-
 - a. Whether the Impugned Decision erred in finding that the Indictment defined the JCE members and tools with sufficient specificity and that it is for the Trial Panel to determine with more specificity who was a JCE member, who was a tool and through which JCE member crimes committed by a tool are to be imputed;²
 - b. Whether the Impugned Decision erred in finding that the Indictment pleaded Mr. Krasniqi’s alleged personal participation in the crimes identified in paragraphs 42 and 47 of the Indictment with sufficient specificity;³
 - c. Whether the Impugned Decision erred in finding that it was impractical for the Indictment to give all specific particulars of Mr. Krasniqi’s alleged contribution in the JCE, that Mr. Krasniqi’s contribution is alleged with sufficient clarity and specificity and that the pleading of contribution is in line with other international tribunals;⁴

¹ KSC-BC-2020-06, F00413, Pre-Trial Judge, *Decision on Defence Motions Alleging Defects in the Form of the Indictment* (“Impugned Decision”), 22 July 2021, confidential.

² *Ibid.*, paras 77, 81-83.

³ *Ibid.*, paras 94, 99-102.

⁴ *Ibid.*, paras 104, 107.

- d. Whether the Impugned Decision erred in finding that aiding and abetting was pleaded with sufficient specificity in the absence of any concrete pleading of acts of practical assistance or encouragement or any identification of the effect of the alleged acts and omissions on the perpetration of specific crimes;⁵
- e. Whether the Impugned Decision erred in finding that the alleged superior-subordinate relationship and alleged subordinates have been sufficiently identified or pleaded;⁶
- f. Whether the Impugned Decision erred in finding that the Indictment was not required to plead the material facts from which Mr. Krasniqi's state of mind for command responsibility is to be inferred;⁷
- g. Whether the Impugned Decision erred in finding that the replacement of the word "illustrative" with the word "demonstrative" and the deletion of the word "including" from paragraph 57 of the Indictment sufficed to cure the ambiguity in relation to the pleading of persecution;⁸
- h. Whether the Impugned Decision erred in finding that no further specificity in the Indictment was needed in the light of the nature and scale of the charges, in circumstances where the SPO is able to provide further details;⁹

⁵ Impugned Decision, paras 111-112.

⁶ *Ibid.*, paras 116-118.

⁷ *Ibid.*, paras 121-122.

⁸ *Ibid.*, paras 140-143.

⁹ *Ibid.*, paras 151-154, 156, 177.

- i. Whether the Impugned Decision erred in finding that the evidentiary facts from which the *mens rea* for enforced disappearance may be inferred are contained in the Indictment;¹⁰
- j. Whether the Impugned Decision erred in finding that the use of the words “including”¹¹ or “included”¹² in certain instances in the Indictment was not impermissibly open-ended but legitimately provided non-exhaustive examples of a previously defined category.¹³

II. APPLICABLE LAW

3. Article 45(2) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) provides:

Interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers. Any other interlocutory appeal must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel 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 or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

4. The Defence therefore require leave to appeal a decision relating to a preliminary motion challenging defects in the Indictment.
5. Rule 77(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”) further provides that a Panel “shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious

¹⁰ Impugned Decision, para. 172.

¹¹ KSC-BC-2020-06, F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public, paras 32(b), 35-37, 39, 42, 44, 48-51, 54, 55(e), 62-63, 65, 67, 72-75, 77-79, 84-85, 91, 95, 97-98, 102, 112, 114-116, 118, 120-121, 123, 125, 135-136, 147, 152, 164.

¹² *Ibid.*, paras 98-104, 106, 112, 115, 117, 122-123, 136, 152.

¹³ Impugned Decision, paras 39, 79, 105, 122, 126, 134-136, 161-163, 166.

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”.

6. The Pre-Trial Judge has previously expounded on the test for certifying interlocutory appeals:-

- a. The first requirement is to articulate an appealable issue, which is “an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion”.¹⁴ An appealable issue must emanate from the ruling concerned;¹⁵
- b. The second requirement may be satisfied in one of two ways. The appealable issue must have significant repercussions for either the “fair and expeditious conduct” of the proceedings or “the outcome of the trial”.¹⁶ In this context, the fair and expeditious conduct of proceedings refers to the norms of fair trial.¹⁷ The Pre-Trial Judge has previously found that issues relating to the specificity and clarity of a confirmed Indictment implicate questions of timely and adequate notice to the accused and hence do significantly affect the fair and expeditious conduct of proceedings;¹⁸

¹⁴ KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal* (“Thaçi Decision”), 11 January 2021, public, para. 11.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, para. 12.

¹⁷ *Ibid.*, para. 13.

¹⁸ KSC-BC-2020-07, F00169, Pre-Trial Judge, *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions* (“Gucati and Haradinaj Decision on Leave to Appeal”), 1 April 2021, public, para. 27.

- c. The third requirement is that the immediate resolution of the appealable issue will materially advance proceedings, in the sense that “prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the ‘judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial’ thereby moving the proceedings forward along the right course”.¹⁹ The Pre-Trial Judge has previously held that issues relating to the specificity and clarity of an Indictment would benefit from early resolution, first, for legal certainty and, second, to minimise subsequent delays and diverting of resources.²⁰

7. The Defence further note that certification is not concerned with the question of whether the Decision was correctly reasoned.²¹ Accordingly, the Defence refrain from submitting arguments on the merits of the appeal (if certified) at this stage.

III. THE TEST FOR CERTIFICATION IS MET

A. THE ISSUES ARE APPEALABLE ISSUES

8. All ten issues are appealable; they emanate from the Impugned Decision and they constitute identifiable topics or subjects which were essential to the determination of the Impugned Decision. The Defence have identified above the precise paragraphs of the Impugned Decision from which each issue arises.²² Each issue challenges the findings that the Indictment was pleaded with sufficient specificity and precision; had the Impugned Decision found that the Indictment was insufficiently specific on the ten issues then it follows that the Indictment would have

¹⁹ Thaçi Decision, para. 16.

²⁰ Gucati and Haradinaj Decision on Leave to Appeal, para. 32.

²¹ Thaçi Decision, para. 17.

²² See footnotes 2–10, 13 above.

been found to be defective on those issues. Accordingly, the issues were determinative of the outcome of the Impugned Decision.

B. THE ISSUES SIGNIFICANTLY AFFECT THE FAIR AND EXPEDITIOUS CONDUCT OF PROCEEDINGS

9. The issues all satisfy the first prong of the second requirement; they significantly affect the fair and expeditious conduct of proceedings. The Defence note that in relation to a similar application for certification regarding the determination of preliminary motions alleging defects in the Indictment, the Pre-Trial Judge found that issues surrounding the clarity and specificity of the Indictment do significantly affect the fair and expeditious conduct of proceedings because they go to the question of whether the accused have adequate and timely notice of the charges.²³ The Defence respectfully endorse this reasoning, which applies equally to the ten issues on which the Defence seek certification to appeal.

10. All ten issues relate to the specificity and clarity of the Indictment. They relate directly to the right to be informed promptly and in detail of the nature and cause of the charges and to have adequate time and facilities for the preparation of the defence.²⁴ Accordingly, the ten issues directly concern the norms of a fair trial. The repercussions are significant; if the Defence is correct that the Indictment is defective, time and resources will be wasted in the investigation and presentation of evidence in relation to overly broad and vague allegations. Accordingly, the first prong of the test for the second requirement for granting certification is granted.

C. THE ISSUES ALSO SIGNIFICANTLY AFFECT THE OUTCOME OF TRIAL

²³ Gucati and Haradinaj Decision on Leave to Appeal, para. 27.

²⁴ Article 21(4)(a) and (c) of the Law.

11. Although the two prongs of the second requirement of the test for certification are in the alternative and it is not therefore necessary for the Defence to also satisfy the second prong of the test, the ten issues also significantly affect the outcome of trial. The Indictment defines the scope of the evidence and submissions at trial. The specificity of information provided in the Indictment has a direct impact on the scope of the trial and therefore upon its outcome. More particularly, the Indictment informs the preparations that the Defence must make for trial and, if the Defence are correct that aspects of the Indictment are impermissibly open-ended, that will necessarily have an impact on the evidence that the SPO may lead at trial and in turn on the outcome of trial.

D. RESOLUTION OF THE ISSUES WILL MATERIALLY ADVANCE PROCEEDINGS

12. The third requirement is satisfied because the resolution of the ten issues will materially advance proceedings. The Defence note that the Pre-Trial Judge has previously held that early resolution of issues relating to the specificity and clarity of an Indictment will materially advance proceedings.²⁵ The Defence respectfully agree with and endorse that finding which applies equally to the ten issues on which the Defence seek certification to appeal.

13. Indeed, the Defence submit that issues relating to the specificity of an Indictment are paradigm examples of issues the early resolution of which will materially advance proceedings. The contents of the Indictment define the relevance of evidence and submissions throughout the trial process. If the Defence is correct that the Indictment is defective and the matter is not addressed on appeal at this stage, then all subsequent proceedings will set off down the wrong path and the parameters of relevance at trial will be wrongly defined. The fact that defects in the Indictment are capable of leading

²⁵ Gucati and Haradinaj Decision on Leave to Appeal, paras 32-33.

to a successful appeal at the end of the trial process²⁶ in itself indicates that it is better to grasp the nettle at this stage. The statutory materials recognise this by permitting challenges to the form of an Indictment being brought as a preliminary motion.²⁷ Challenges to the Indictment should be addressed as a preliminary motion precisely because these are issues best resolved at the outset of proceedings. Accordingly, early resolution of the issues defined above will materially advance the proceedings.

IV. RELIEF REQUESTED

14. The Defence therefore respectfully submit that the three-stage test for certification to appeal is satisfied and request certification to appeal on the ten issues identified in paragraph 2 above.

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Venkateswari Alagendra

Friday, 27 August 2021

Kuala Lumpur, Malaysia.



Aidan Ellis

Friday, 27 August 2021

London, United Kingdom.

²⁶ ICTY, *Prosecutor v. Martić*, IT-95-11-A, Appeals Chamber, *Judgment*, 8 October 2008, paras 162-164, 355; ICTR, *Renzaho v. Prosecutor*, ICTR-97-31-A, Appeals Chamber, *Judgment*, 1 April 2011, paras 122-129, 622.

²⁷ Article 39(1) of the Law; Rule 97(1)(b) of the Rules.