

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 Nasim Haradinaj

Date: 8 July 2021

Language: English

Classification: Public

**Public Redacted Defence Response to ‘Confidential Redacted Version of
‘Prosecution Notification and Request to Provide Summary’ – KSC-BC-2020-07,
F00252/RED**

Specialist Prosecutor

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I. INTRODUCTION

1. On 5 July 2021 the Specialist Prosecutor's Office (SPO) filed a notification¹ in relation to a potential witness and a request to provide a summary of potentially exculpatory information.
2. Further on 5 July 2021, the Pre-Trial Judge ordered² that should the Defence seek to respond to that request that it should do so by 8 July 2021 at 16:00.
3. The Defence for Nasim Haradinaj confirms that it does seek to respond to that request and does so in the terms as outlined below.

II. The SPO Request

4. The SPO request notes that it *"conducted a further review of its collection for information related to the credibility of information provided by (potential) SPO witnesses relevant to the charge of intimidation or retaliation."*
5. That request goes on to raise a potential issue in respect of a potential witness who had made a statement that was later shown to be untrue, it being framed in the following terms at paragraph 3:

¹ KSC-BC-2020-07, F00252/RED, Specialist Prosecutor, Confidential Redacted Version of 'Prosecution Notification and Request to Provide Summary', 5 July 2021, confidential.

² KSC-BC-2020-07/F00253

“[REDACTED]. [REDACTED] [REDACTED]. During his SPO interview, [REDACTED] acknowledged that this claim was not true”

6. The SPO seeks to provide a “summary” of the potentially exculpatory information, suggesting that “No undue prejudice would be caused as: (i) the summary would provide all potentially exculpatory information; and (ii) [REDACTED] only plays a small role in this case – he is not being called as a witness and the evidence of his security concerns is cumulative in light of all other official notes disclosed”.

III. SUBMISSIONS

7. In the first instance, the Defence notes that the SPO have not acted in accordance with Rule 103, noting that Rule 103 reads:

“Subject to Rule 107 and Rule 108, the Specialist Prosecutor shall immediately disclose to the Defence any information as soon as it is in his or her custody, control or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist Prosecutor’s evidence”.

8. The SPO have summarily failed to do so.

9. It is noted that the SPO acknowledges that a potential witness confirmed that evidence given on [REDACTED] was untrue, accordingly, the witness accepted that he had lied.
10. The SPO have not disclosed upon what date the witness confirmed this position; however, it is assumed that it was some time ago, and therefore, the SPO have failed to disclose immediately. This fact alone, if established, would give real cause for concern.
11. The SPO should be directed to clarify the date in which the witness confirmed his statement was untrue.
12. It would appear that this fact has only been disclosed upon receipt of an *inter partes* request from the Defence requesting confirmation of certain matters involving credibility.
13. It is again noted that the SPO were not forthcoming with this information in their response to that request.
14. Accordingly, the request of the SPO is yet another example of the cavalier approach it takes to its disclosure obligations, and further, its fair trial obligations.

15. Further, it is noted that the SPO have not outlined under what rule³ they are seeking to disclose a summary rather than the evidence itself or to set out the grounds clearly as to why the statement cannot be disclosed in full.
16. Accordingly, it is respectfully submitted that the SPO application is in any event fundamentally flawed.
17. The Defence would submit that a summary is not acceptable as a summary is not evidence. Further, direct evidence in terms of the comments of the witness (Potential) in particular are available, noting that the SPO accept that the witness (Potential) was "*interviewed*", and therefore presumably a statement was taken, and if one was not taken it is reasonable to enquire as to why not and the SPO should be directed to respond in that regard.
18. There would appear to be no justifiable basis for the withholding of such a statement, regardless of whether the SPO intends to call that witness or not, in that the evidence goes to the credibility of the SPO's case against the Defendant.
19. If the SPO seeks to make redactions, provided there are legitimate grounds for doing so, then it should make the appropriate application and a response from the Defence can be submitted accordingly.

³ Rules of Evidence and Procedure

20. If the SPO maintain their position that they will not disclose the statement, the Pre-Trial Judge is requested to order that any such evidence cannot be relied upon by the SPO at trial and any charge that is supported by such evidence must be removed from the indictment before this matter goes forward.
21. The fundamental obligation of any trial is one of fairness to the accused, and thus appropriate steps must be taken to ensure that fairness.
22. If it is that the SPO refuse to disclose evidence so that it can be effectively used and/or challenged by the Defendant, then that evidence must not be adduced or referred to in evidence

IV. Conclusion

23. The application made by the SPO is opposed and ought to be refused on the any or all of the following grounds:
 - a. That the application is not appropriately formed or justified as per the Rules of Evidence and Procedure;
 - b. That the 'summary' proposed is meaningless in terms of its evidential value;
 - c. That without the statement as taken being disclosed, there is no guarantee that the summary is accurate or otherwise;

- d. That the SPO have not demonstrated why redactions are not sufficient protection.

- e. Where the application is deemed to be a 'proper' application, to grant would lead to its prejudicial effect outweighing its probative value.

Word Count: 1060 words



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