

In: KSC-BC-2020-07

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Trial Panel II

Judge Charles L. Smith III, Presiding Judge

Judge Christophe Barthe

Judge Guénaël Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 2 September 2021

Language: English

Classification: Public

**Public Redacted Version of Written Submissions on behalf of Hysni Gucati for
the Trial Preparation Conference and Related Matters with Confidential Annexes
1 and 2**

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I. INTRODUCTION

1. By order dated 21 July 2021 ('the Order')¹, the Trial Panel made the following orders in relation to the Defence:
 - a. That the Defence, if it so wishes, responds to any SPO request for protective measures for both of its witnesses in writing by 27 August 2021 or otherwise in oral submissions at the Trial Preparation Conference ('Protective measures and associated orders');
 - b. That the Defence, if it so wishes, responds to SPO submissions on the definition of 'witness', in writing by 27 August 2021 or otherwise in oral submissions at the Trial Preparation Conference ('SPO definition of witness');
 - c. That the Defence make additional written submissions by 27 August 2021 indicating: (a) the provisions of the Law or Rules relied upon in support of the argument that entrapment is a valid defence in the SC legal framework; (b) the conditions and requirements applicable to such a defence in the SC legal framework; (c) the type of evidence the Defence intends to adduce, if any, in support of such a defence; and (d) the specific relief the Defence intends to seek in furtherance of the entrapment defence ('Claims of entrapment/incitement');
 - d. That the Defence submit a summary of the facts or circumstances in relation to which each defence witness would testify, in particular in respect of the specific facts and circumstances said to be relevant to the

¹ *Order for Submissions and Scheduling the Trial Preparation Conference*, KSC-BC-2020-07/F00267, Trial Panel II, 21 July 2021, Public at paragraphs 7 to 14 and 34

issue identified by both Defence teams as “public interest” (‘Prospective Defence witnesses’); and

- e. That the Defence: (i) by 3 September 2021, raises any remaining translation or interpretation related concerns with the Registry directly and to identify specifically the relevant passage(s) of document(s) with which an issue is taken; and (ii) submits by 27 August 2021 a filing containing the translation of the document relied upon in footnote 47 of its Pre-Trial Brief (‘Translation and Interpretation’).
2. Additionally, the Defence were invited to submit by 27 August 2021 written observations on the Draft Order on the Conduct of Proceedings set out in Annex 1 to the Order².
 3. In relation to the orders and invitation set out above in paragraphs 1(a), 1(b), and 2 above, any submissions or observations on those matters will be made orally at the Trial Preparation Conference.
 4. In relation to the order set out at paragraph 1(d) above, see Annex 1 herewith.
 5. In relation to the order set out at paragraph 1(e)(ii) above, see Annex 2 herewith.
 6. In relation to the order set out at paragraph 1(e)(i) above, the Defence will comply by 3rd September 2021 as ordered.
 7. The Defence hereby sets out below its written submissions in relation to the order set out in paragraph 1(c) above.

² *Order for Submissions and Scheduling the Trial Preparation Conference*, KSC-BC-2020-07/F00267, Trial Panel II, 21 July 2021, Public at paragraph 13 and 34(g)

II. SUBMISSIONS

(a) the provisions of the Law or Rules relied upon in support of the argument that entrapment is a valid defence in the SC legal framework

8. Article 3(2)(a) of the Law on Specialist Chambers and Specialist Prosecutor's Office Law No.05/L-053 ('Law') requires the Specialist Chambers to adjudicate and function in accordance with the Constitution of the Republic of Kosovo ('Constitution').
9. Article 22(2) of the Constitution provides that: 'Human rights and fundamental freedoms guaranteed by the [European Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention on Human Rights') and its Protocols] are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions'.
10. Article 3(2)(e) specifically requires the Specialist Chambers to adjudicate and function in accordance with the European Convention on Human Rights. The legal framework of the European Convention on Human Rights is thus part of – and indeed takes priority over – the 'SC legal framework'.
11. The European Convention on Human Rights (and, accordingly, the Constitution and the Law also) guarantees the right to a fair trial (Article 6(1) of the European Convention on Human Rights).
12. It is established that where "police incitement" occurs (incitement by those responsible for the investigation of crime or persons acting on their

instructions) the Accused's right to a fair trial under Article 6(1) of the European Convention of Human Rights (and, thus, Articles 22(2) of the Constitution and Articles 3(2)(a) and (e) of the Law also) is violated³.

13. It is further established that the Accused's right to a fair trial under Article 6(1) of the European Convention of Human Rights (and, thus, Articles 22(2) of the Constitution and Articles 3(2)(a) and (e) of the Law also) is violated where the Accused is not able to raise the issue of "police incitement" during trial⁴. Where the court does not adequately investigate the allegations of entrapment the Accused will be deprived of a fair trial under Article 6 of the Convention⁵.

14. Where there is a violation of the right to a fair trial under Article 6 of the Convention (and thus Articles 22(2) of the Constitution and Articles 3(2)(a) and (e) of the Law also), the court must demonstrate a capacity to deal with the violation, such as offering a substantive defence or the exclusion of evidence obtained as a result or other similar consequences⁶.

15. It is thus incumbent upon the Specialist Chambers to provide a remedy, whether that be a substantive defence, or the exclusion of evidence obtained as a result, or other similar consequence, where a violation of the right to a fair trial has occurred.

(b) the conditions and requirements applicable to such a defence in the SC legal framework

16. "Police incitement" occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine

³ *Teixeira de Castro v Portugal* (1999) 28 EHRR 101, ECtHR Chamber at paragraph 39

⁴ *Decision on the Appeals Against Disclosure Decision*, KSC-BC-2020-07/IA005/F0008, Panel of the Court of Appeals Chamber, Confidential at paragraphs 50 and 52

⁵ *Pătrașcu v Romania* (7600/09) ECtHR Chamber 14 February 2017 at paragraph 53

⁶ *Ramanauskas v Lithuania* (74420/02), (2010) 51 EHRR 11 (2008), ECtHR Grand Chamber at paragraph 60; *Ramanauskas v Lithuania (no 2)* (55146/14) ECtHR Chamber 20 February 2018 at paragraph 59

themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution⁷.

17. Provided the Accused's allegations are not wholly improbable, it falls to the prosecution to prove that there was no incitement⁸.

18. A simple denial by the authorities that there has not been any incitement is not sufficient⁹.

19. It is the task of the judicial authorities to take the necessary steps to uncover the truth in order to determine whether there was any incitement by the authorities¹⁰.

(c) the type of evidence the Defence intends to adduce, if any, in support of such a defence

20. The Accused will adduce oral and documentary evidence from both Prosecution and Defence witnesses to the effect that:

- a. The conduct complained of by the Specialist Prosecutor could not have occurred without the delivery to the KLA WVA HQ of Batches 1, 2 and 3;

⁷ *Ramanauskas v Lithuania*, ante at paragraph 55

⁸ *Pătrașcu v Romania*, ante at paragraph 38

⁹ *Ramanauskas v Lithuania*, ante at paragraph 72

¹⁰ *Ramanauskas v Lithuania*, ante at paragraph 70

- b. That those deliveries came with the express and implied incitement to make the contents thereof available to the media;
- c. That the circumstances *prima facie* lead to the inference that officers of the SPO, or persons acting on their instructions, were involved in that incitement of the Accused (and there is no evidence relied upon by the SPO to the contrary), including *inter alia* the following matters of fact:
 - i. The SPO has demonstrated that it will resort to leaking material contrary to the Law and the Rules of Procedure and Evidence for its own tactical purposes – on 24th June 2020 the Specialist Prosecutor revealed to the public the existence of an unconfirmed indictment charging Hashim Thaçi, Kadri Veseli and others with nearly 100 murders, contrary to Rules 85(4), 86(2) and 88;
 - ii. The material said by the SPO to be contained within Batches 1, 2 and 3 is also said to have been under the control of the SPO prior to the deliveries, and in relation to Batch 3 specifically, *only* under the control of the SPO prior to the deliveries – no other body had access to Batch 3, it is said, other than officers of the SPO;
 - iii. Batch 1 was delivered by an unknown male with the instruction that it be made available to the media;
 - iv. SPO officers subsequently invited the KLA WVA HQ to keep the documents from Batch 1 for up to one month;

- v. The attention of SPO Officers was drawn to the CCTV at the KLA WVA HQ, which may have assisted in identifying and tracing the deliverer of Batch 1, yet they were disinterested, leading to the inference that the SPO already knew the identity of the person making the delivery;
- vi. Although the SPO were alert to the potential of further deliveries being made after the delivery of Batch 1, and after the delivery of Batch 2, no attempts were made to physically prevent the further delivery of further Batches (such as the obvious tactic of placing the entrances to the KLA WVA HQ under observation, with officers in place to seize any further batches before delivery was effective, leading to the inference that the SPO wanted the delivery of Batches 2 and 3 (and, indeed Batch 1, also) to be effective);
- vii. Although the SPO seemingly made no attempt to keep watch, and certainly made no attempt to prevent a further delivery of documentation, the delivery of Batch 2 was observed and recorded by a journalist and cameraman from the media outlet Arbresh Info. The SPO has made no contact with that journalist in order to attempt to identify and trace the deliverer, leading to the inference that the SPO already knew the identity of the person making the delivery;
- viii. The Accused specifically invited the SPO Officer [REDACTED] to work with the KLA WVA to identify the person(s) making the deliveries to the KLA WVA HQ but the SPO officer was disinterested. [REDACTED] was given access to an image of the

vehicle in which the deliverer of Batch 2 attended but did not retain it. [REDACTED] was provided with the index number of the vehicle, but no attempt to trace it was undertaken by the SPO until 25th November 2020. A sham interview of the owner was conducted months later on 18th December 2020. The inference to be drawn is that the SPO knew the identity of the person making the delivery of Batch 2 all along and was not concerned about stopping a further delivery;

- ix. The Accused had noticed the same car following him in the days leading up to 16th September 2020. The Accused told [REDACTED] this but he was disinterested. The inference to be drawn is that the SPO were not watching the KLA WVA HQ to prevent a further delivery of documentation being made, but they were watching the Accused in the days between the delivery of Batch 1 and Batch 2;
- x. The Accused again noticed that he was under surveillance by car on 18th, 19th and 20th September 2020. The Accused again mentioned that fact to [REDACTED]. Again, [REDACTED] was disinterested. The inference to be drawn is that the SPO were not watching the KLA WVA HQ to prevent a further delivery of documentation being made, but they were watching the Accused in the days between the delivery of Batch 2 and Batch 3;
- xi. The delivery to the KLA WVA HQ of alleged '[REDACTED]' was foreseen by the SPO 13 days before delivery was alleged to have occurred within Batch 3, suggestive of planning on the part of the

SPO (the Order SPOE00220914-00220914 dated 9 September 2020 refers to '[REDACTED]' of the Specialist Prosecutor's Office);

- xii. That the SPO had the motive to carry out a 'sting operation, to use the label ascribed by the SPO itself. The KLA WVA had been lawfully vocal for some time regarding their concerns about the operation of the Kosovo Specialist Chambers and the Specialist Prosecutor's Office. Moreover, it is clear that the arrests of Hashim Thaçi, Kadri Veseli and others were imminent in September 2020. Despite stating unequivocally in the June 2020 leak that Mr Thaçi and Mr Veseli had made 'repeated efforts ... to obstruct and undermine the work of the KSC' and, even more remarkably, setting out the Specialist Prosecutor's *belief* that Mr Thaçi and Mr Veseli 'have carried out a secret campaign to overturn the law creating the Court and otherwise obstruct the work of the Court in an attempt to ensure that they do not face justice', it is clear now that the SPO had no evidence upon which to base those claims and no such charges appear on the confirmed indictment subsequently faced by Mr Thaçi and Mr Veseli (who, as First Deputy Prime Minister and President of the Assembly of the Republic of Kosovo respectively on the date that Law No.05/L-053 was signed, sponsored the law creating the Court in the first instance); and
- xiii. The SPO has used the circumstances surrounding Batches 1, 2 and 3 against Mr Thaçi, Mr Veseli and others as a ground to resist their interim release, even though they face no charges relating thereto.

21. There can be no issue of fact as to whether (i) incitement occurred and (ii) that the conduct complained of could not have occurred without it. The only issue of fact is who was involved in that incitement of the Accused.
22. As set out above, such evidence as has been disclosed suggests *prima facie* that officers of the SPO, or persons acting on their instructions, were so involved (and there is no evidence relied upon by the SPO to the contrary). It will be submitted at trial that, on the evidence, a 'sting operation' designed to make it possible to establish the offence, that is, to provide evidence and institute a prosecution' against the leadership of the KLA WVA, in the circumstances set out above, is far from wholly improbable. Indeed, it is not wholly improbable that the ultimate target of a 'sting operation' in those circumstances might have been Mr Thaçi and Mr Veseli themselves, with the person(s) responsible for the deliveries of Batches 1-3 hoping that Mr Thaçi and Mr Veseli would become indirectly ensnared. Certainly, as stated above, the SPO has as a matter of fact used the circumstances surrounding Batches 1 to 3 against Mr Thaçi, Mr Veseli and others as a ground to resist their interim release, even though they face no charges relating thereto.

(d) the specific relief the Defence intends to seek in furtherance of the entrapment defence

23. It is incumbent upon the Specialist Chambers to offer a remedy, whether that be a substantive defence, or the exclusion of evidence obtained as a result, or other similar consequence, where a violation of the right to a fair trial has occurred.

24. In either event that (a) the Defence is unable to effectively raise the issue of incitement at trial, or (b) at trial the SPO fails to prove that there was no "police

incitement”, the Accused submits in the Defence Pre-Trial Brief at paragraph 50 thereof that the Trial Panel can (indeed, must) dismiss the indictment by ruling, or pronounce judgment rejecting the charges, on the ground that there are circumstances which bar prosecution, namely that the Accused cannot have a fair trial¹¹; or otherwise, the Prosecution evidence in its entirety can (indeed, must) be excluded under Rule 138(2) of the Rules (as it all results from the delivery of the three Batches to the KLA WVA HQ) and a judgment of acquittal be pronounced.

III. OTHER MATTERS

25. In light of the findings of the Panel of the Court of Appeals Chamber in the *Decision on the Appeals Against Disclosure Decision*, 29 July 2021¹² at paragraphs 44, 45, 46, 47, 52 and 55, the Accused will raise outstanding disclosure issues at the Trial Preparation Hearing.

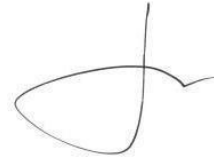
IV. CLASSIFICATION

26. In accordance with Rule 82(4) of the Rules, this filing and its annexes have been classified as confidential as they refer to material similarly classified as confidential previously. There is no objection to this filing and its annexes being reclassified as public.

Word count: 2939 words

¹¹ See Rules 4(1), 130, 158 and 159 of the Rules and Articles 358 and 363 of the Kosovo Criminal Procedure Code Law No.04/L-123; see also the *Guide to the Criminal Procedure Code of Kosovo (2013)*, Jon Smibert, Resident Legal Advisor, US Dept of Justice at page 9: “At the end of the main trial, the court can either dismiss the indictment under Article 358 or issue a judgment under Chapter XX. The judgment can reject the charge under Article 363, acquit the defendant under Article 364 or adjudge the defendant guilty under Article 365”

¹² *Decision on the Appeals Against Disclosure Decision*, KSC-BC-2020-07/IA005/F0008, Panel of the Court of Appeals Chamber, Confidential



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2 September 2021

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