

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

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Language: English

Classification: Public

Reply to Prosecution Consolidated Response to Defence Admissibility Challenge

Specialist Prosecutor

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I. INTRODUCTION

1. On 17/09/2021, the Accused filed a Motion to Challenge the Admissibility of Evidence pursuant to Rule 138(1) ('Request')¹.
2. On 24/09/2021, the Accused received notification of the Prosecution Response ('Response')².
3. Prior to expiry of time for a reply, the Accused received notification of the Order on Rule 117 Defence Motions³.
4. Following an application for reconsideration thereof, the Accused received notification of the Order to the Defence to File Replies to F00322⁴ ('Order') directing the Accused to file a reply to the Response by 04/10/2021, 'for the purpose of deciding upon the [Request]'⁵.
5. The Accused replies accordingly.

II. SUBMISSIONS

Challenge premature?

¹ F00317, Motion to Challenge the Admissibility of Evidence Pursuant to Rule 138(1), Gucati, 17/09/2021, Confidential

² F00322, Prosecution Consolidated Response to Defence Admissibility Challenges, Prosecutor, 24/09/2021, Confidential

³ F00328, Order on Rule 117 Defence Motions, Trial Panel, 27/09/2021, Public

⁴ F00344, Order to the Defence to File Replies to F00322, Trial Panel, 30/09/2021, Public

⁵ Order at paragraphs 11 and 12

6. The challenge to admissibility in the Request is not premature.
7. The Accused objects to the *content* of the declarations (and annexes) of W04842 (ERN 084008-084010 and 090142-090143) and of W04841 (ERN 084015-084026, 091791-091792, 091927-091930, 093492-093590, 095162-095239, 095533-095602 and 095603-095653) being adduced in evidence in whatever form (whether through requests to adduce the declarations under Rule 154 or whether through oral evidence being given by W04842 and W04841 addressing the information provided in those declarations).
8. The declarations and annexes set out the ‘anticipated testimony’⁶ of the W04842 and W04841. It is not premature to raise objection to the admissibility of ‘anticipated testimony’ at this stage.
9. Indeed, the objection was first raised before transmission of the file to the Trial Panel pursuant to an order of the Pre-Trial Judge (to provide a list of objections to the admissibility of disclosed evidentiary material by way of a list or chart providing for each item the reasons for the objection *stated briefly*)⁷. Rule 95(5) itself does not contain such a requirement.
10. No direction or order to amplify that list⁸ was ever made, but the Trial Panel did make an order that any Rule 117 motion was to be filed by 17/09/2021⁹.
11. Rule 117 simply provides for the Panel to set a time limit for any further motions to be made prior to the opening of the case. Pursuant to, and in

⁶ Response at paragraph 5

⁷ F00224, Revised Calendar of the Remainder of the Pre-Trial Proceedings and Order Setting the Date for the Sixth Status Conference, Pre-Trial Judge, 09/06/2021, Public at paragraph 24

⁸ F00258/A02, List of Objections to the Admissibility of Disclosed Evidentiary Material, Gucati, 12/07/2021, Confidential

⁹ Transcript, 02/09/2021, Page 603 line 21 and page 604 line 1

accordance with, the Trial Panel's order, the Accused filed the Request on 17/09/2021.

12. Under Rule 117(2), such motions shall be determined prior to the opening of the case unless the Panel, for good cause, decides to defer determination.
13. It is acknowledged, accordingly, that it is open to the Trial Panel to *defer* determination of the Request for good cause.
14. However, the presumption is that the motion shall be determined before the opening of the case. Moreover, there is good reason in this case for the Request to be determined prior to the opening.
15. The direct examination of W04841 is estimated to last up to 10 hours. Together with cross-examination, the evidence of W04841 will consume, by some length, the greatest part of the Prosecution case.
16. The direct examination of W04842 is estimated to consume half of the remaining duration of the prosecution's direct examination.
17. In these circumstances, determination of the admissibility of their anticipated testimony will ensure that the Parties have adequate notice of the Panel's position, guaranteeing the fairness and expeditiousness of the proceedings. The relatively short duration of the trial process in this case strongly militates in favour of determination (including any potential interlocutory appeal under Rules 77 and 170) prior to opening of the case for the Prosecution (thereby avoiding delays to determine admissibility during trial).
18. Rule 138(1) provides a proper basis to challenge the admissibility of the anticipated testimony of Prosecution witnesses.

19. Rather than being premature, the Accused raised its objections, in the first instance, pursuant to and in accordance with the time limit set by the Pre-Trial Judge; and subsequently filed the Request itself pursuant to and in accordance with the time limit set by the Trial Panel.
20. Indeed, if the Accused had not so done the defence would have risked being precluded from raising such a request at a later stage, in accordance with Rule 117(2).
21. Accordingly, the Request can properly be determined on its merits at this stage.
22. If contrary to the above, the Trial Panel decides there is good reason not to determine the Request at this stage, it's determination should be simply deferred, without prejudice, and not dismissed on the basis that it is premature.
Request speculative?
23. The Request addresses the anticipated testimony of W04841 and W04842 as set out in their declarations and annexes thereto.
24. Such material was made available to the Accused pursuant to Rule 102(1) which requires the Prosecutor to make available to the Accused *inter alia* the statements of all witnesses whom the Specialist Prosecutor intends to call to testify at trial and all other witness statements that the Specialist Prosecutor intends to present at trial. In order to give adequate notice to the Defence, all such material is to be made available no later than 30 days prior to the opening of the Specialist Prosecutor's case.
25. The Request is not 'speculative' as it is based upon the anticipated testimony of W04841 and W04842, as set out in the material made available under Rule 102(1).

W04842

26. Since filing the Request, the Trial Panel has now ruled, in relation to a separate application by the Prosecution to adduce items through the bar table, that¹⁰:

- a. The probative value of the content of the witness contact notes, if any, is outweighed by their prejudicial effect;
- b. W04842 can only provide direct evidence of the process by which the information was recorded; and
- c. That ruling is without prejudice to the possibility of the SPO to use and request admission of certain contact notes (i) through the testimony of a witness who authored the notes; (ii) for the limited purpose of describing the procedures followed by the SPO in interviewing these witnesses as well as the resources used and time spent on such interviews, to the extent that such witness(es) have knowledge of such matters; and (iii) provided that any redactions in the notes allow for effective confrontation of their content and meaningful inferences on the aforementioned SPO procedures.

27. The Prosecution cannot circumvent that ruling, denying admission of the proposed contact notes to establish the truth of the matters asserted in those notes by the witnesses with whom the SPO spoke¹¹, by calling W04842 to give oral evidence summarising the matters asserted by the witnesses in those

¹⁰ F00334, Decision on the Prosecution Request for Admission of Items Through the Bar Table, Trial Panel, Public, 29/09/2021 at paragraphs 91-94 ('Decision on Bar Table')

¹¹ Decision on Bar Table at paragraph 93

contact notes (as the witness' declarations made available under Rule 102(1), ERN 084008-084010 and 090142-09143, purport to do)¹².

28. Although in the Response, it is asserted that W04842 is in a position to testify 'on the institutional tasks carried out by the [Witness Security Team]' and 'provide examples of measure [sic] undertaken by the SPO to address concerns raised by (potential) witnesses in relation to their safety and well-being', the declarations of W04842 made available under Rule 102(1) do not contain any information on those matters.
29. The present content of the declarations of W04842 (to provide 'some information concerning evidence that witnesses were intimidated or frightened'¹³) is inadmissible and should be ruled to be so.
30. In the event that: (a) the Prosecution seek to make available a further declaration(s) of W04842, accompanied by reasons for late disclosure under Rule 102(2), and/or (b) there is a request by the Prosecution within the terms of paragraph 94 of the Decision on the Prosecution Request for Admission of Items Through the Bar Table in relation to W04842, the Accused will respond to such matters at that late stage.

W04841

31. Whereas W04841 is competent to speak to the chain of custody of the 'Batches' within the limits of her knowledge¹⁴, the limits of her knowledge are confined

¹² See also F00347/A01, Annex 1 to Prosecution Submission of List of Anticipated Witnesses, Prosecutor, 01/10/2021, Public at page 3 of 4 paragraph 3 which proposes that 'W04842 will testify ... whether witnesses felt worried, stressed, unsafe, threatened and/or intimidated in the wake of the publications'

¹³ ERN 084008 at paragraph 5

¹⁴ Response at paragraph 11

to the single investigator report that she authored¹⁵ (and even therein, she refers to information from third parties who are not being called to testify).

32. The investigator reports that W04841 did not author are not to be admitted through the bar table¹⁶ and their truth and reliability cannot be examined through W04841.
33. In the absence of the authors as witnesses, the Defence cannot effectively confront the evidence and challenge the truth and reliability of the accounts recorded in ERN 082010-082013 RED, 082014-082016, 083988-083991 RED, and 083999-083999. W04841 should not be permitted to adduce the content of their reports during her testimony and rely thereupon to establish chain of custody.
34. In relation to W04841's summary of the contents of undisclosed parts of the Batches, it is accepted that it falls within the discretion of the SPO not to present the entirety of the Batches as exhibits.
35. It also fell within the SPO's discretion to apply for an order withholding disclosure of parts of the Batches under Rule 108.
36. It does not, however, fall within the discretion of the SPO to choose not to present the entirety of the Batches as exhibits, withhold disclosure thereof at the same time, and then call an SPO investigator to make assertions as to the contents of the undisclosed material in evidence which the Defence cannot verify by comparison with the Batches themselves (contrary to paragraph 12 of the Response, no witness can 'contextualise' a factual description about a document without referring to the document itself - the document is an essential part of the context).

¹⁵ ERN 091909-091911 RED

¹⁶ Decision on Bar Table at paragraph 56

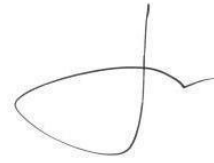
37. It remains within the SPO's discretion: (i) to apply to withdraw the indictment against the Accused; or otherwise (ii) to confine the Prosecution case to those 'pages of the Batches' that the Prosecution will present in evidence 'through the testimony of W04841 and various media articles'¹⁷. It chooses not to do so.
38. Where such choices made by the SPO impact on the fairness of the trial, the Trial Panel should intervene.
39. For the reasons set out at paragraphs 21 to 49 of the Request, the anticipated testimony of W04841, making assertions about the contents of undisclosed parts of the 'Batches' which cannot be tested in cross-examination against the actual documents as long as they are withheld by the Prosecution, is grossly prejudicial and outweighs whatever probative value is claimed.

III. CONCLUSION

40. The Accused does not object to W04841 and W04842 being called to give evidence *per se*. Indeed, there is no specific provision in the Rules for a Party to apply to 'strike off' witnesses that another Party proposes to call.
41. The Accused does object to W04841 and W04842 giving evidence which is inadmissible under Rule 138(1).
42. Accordingly, the Trial Panel should refuse to admit evidence from W04841 and W04842 as anticipated in the declarations and annexes made available pursuant to Rule 102(1).

¹⁷ Response at paragraph 13

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