

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 Christoph Barthe
Judge Guenaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 17 October 2021

Language: English

Classification: Public

APPLICATION FOR RELIEF PURSUANT TO RULES 62 AND 63

Specialist Prosecutor

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Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

I. INTRODUCTION

1. On 16 October 2021 and after the opening of the Specialist Prosecutor's case on 7 October 2021, the Specialist Prosecutor's Office ("SPO") issued a press release on the front page of the Kosovo Specialist Chambers and Specialist Prosecutor's Office Website titled "*Specialist Prosecutor: We must Protect Those Who Seek Justice*"¹ (the "Press Release").
2. This is the Defence for Mr Haradinaj's application pursuant to Rules 62 and 63 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules") for an order that:
 - a. The Press Release violates:
 - i. The Accused's presumption of innocence as contained in, *inter alia* Articles 22 and 31 of Constitution of the Republic of Kosovo, Articles 3(2) and 21(3) of the Law on the Specialist Chambers and Specialist Prosecutor's Office ("Law"), Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), Article 14(2) of

¹ See, [Specialist Prosecutor: We must protect those who seek justice | Kosovo Specialist Chambers & Specialist Prosecutor's Office \(scp-ks.org\)](https://www.scp-ks.org/en/specialist-prosecutor-we-must-protect-those-who-seek-justice)

the International Covenant on Civil and Political Rights (“ICCPR”); and

- ii. Articles 13 and 30 of the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers dated 28 April 2021² (“Code of Conduct”).
 - b. A declaration that the Press Release violates the presumption of innocence and/or the Code of Conduct and that its publication on the website of the joint institutions, whether intentionally or not, creates the impression that the statement is endorsed by the Specialist Chambers.
 - c. The Press Release be immediately removed from the Kosovo Specialist Chambers’ website, or amended to be compliant with the presumption of innocence.
 - d. Any other relief that the Panel deems fit under the Rules including, but not limited to, Rules 63(1)(a)-(c).
3. Further or alternatively, the Defence for Mr Haradinaj seeks an order that:

² [*Code of Professional Conduct – for Counsel and Prosecutors Before the Kosovo Specialist Chambers \(scp-ks.org\)](http://scp-ks.org)

- a. The Press Release was plainly inappropriate given the presumption of innocence, Code of Conduct and stage of the trial.
- b. The Press Release be immediately removed from the Kosovo Specialist Chambers' website, or amended to be compliant with the presumption of innocence.
- c. Any other relief that the Panel deems fit under the Rules including, but not limited to Rules 63(1)(a)-(c).

II. THE LAW

Legislation, treaties and the Code of Conduct

4. Articles 22 and 31(5) of the Constitution of the Republic of Kosovo provide:

"Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo, and in the case of conflict, have priority over provisions of the laws and other acts of public authorities... (2) The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (3) International Covenant on Civil and Political Rights and its Protocols."

“Everyone charged with a criminal offense is presumed innocent until proven guilty.”

5. In relevant part, Articles 3(2) and 21(3) of the Law provide:

“The Specialist Chambers shall adjudicate and function in accordance with... (e) international human rights law which sets criminal justice standards including the European Convention on Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution.”

“The accused shall be presumed innocent until proven guilty beyond reasonable doubt according to the provisions of this Law.”

6. Rule 15(4) of the Rules provide:

“As provided by the Rules or decided by the Panel, the Presiding Judge may, having informed the other members of the Panel of the course he or she intends to take, render decisions on matters related to the management of the proceedings. Such decisions may be reconsidered by the Panel.”

7. In relevant part, Rule 116(4) of the Rules, provide:

“After consultation with the other members of the Panel, the Presiding Judge may issue trial management orders and decisions pursuant to Rule 15(4).”

The Panel may issue orders or decisions on any matter as necessary to ensure a fair and expeditious trial. These may include, but are not limited to:

(e) any other preparatory matters, necessary.”

8. Article 6(2) ECHR provides:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law.”

9. Article 14(2) ICCPR provides:

“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

10. In relevant part, Articles 13 and 30 of the Code of Conduct provide:

“Counsel and Prosecutors shall not knowingly:

b. publish, or assist in publishing any material relating to proceedings before the Specialist Chambers:

ii. which prejudices or has the tendency to prejudice any proceedings.”

“Prosecutors shall, in the investigation and prosecution of crimes within the jurisdiction of the Specialist Chambers:

- a. *fully respect the presumption of innocence when making public comments or speaking to the media about the merits of particular cases;*
- b. *fully respect and ensure the suspect's and accused's fair trial rights."*

Case law and commentaries

11. It is an essential component of the right to a fair trial that there is *"a duty for all public authorities to refrain from pre-judging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused."*³
12. Consistent with this international courts and tribunals have held, *inter alia*:
 - a. *"[the] State should not convict an individual informally or emit an opinion in public that contributes to forming public opinion, while the criminal responsibility of an individual has not been proven."*⁴
 - b. The presumption of innocence can be violated by public authorities, including prosecutors.⁵
 - c. The presumption of innocence *"will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an*

³ Human Rights Committee, General Comment No. 32 (2007), para 30

⁴ Inter-American Court of Human Rights, *Brenson-Mejia v Peru* Judgment of November 25, 2004, para 160.

⁵ The Right to a Fair Trial in International Law, Clooney and Webb (1st Ed.), p. 218; and European Court of Human Rights, *Allendet de Ribemont v France* (Application no. 15175/89), para. 36.

opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty. In this regard the Court emphasises the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence”.⁶

13. Under international human rights law, prosecutors are of course permitted to update the public on developments in a case. However, to respect the presumption of innocence, international jurisprudence makes clear that prosecutors must always be transparent and ensure that their statements are qualified to make clear that an individual is suspected of a crime or that a case is to be determined by judicial bodies.
14. For example, in *Allendet de Ribemont v France* and *Muradverdiyev v Azerbaijan*, the European Court of Human Rights stated:

“...Article 6 § 2 cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with

⁶ European Court of Human Rights, *Daktaras v Lithuania* (Application no. 42095/98), para 41

all the discretion and circumspection necessary if the presumption of innocence is to be respected.”⁷

15. Moreover, in *Situation in the Libyan Arab Jamahiriya*,⁸ in 2011, the ICC Pre-Trial Chamber effectively held that for public statements by a Prosecutor to avoid violating the presumption of innocence, the prosecutor must have “*been mindful of the need not to contradict the principle of the presumption of innocence*”⁹ and that he or she must take care to be clear that issues are to be determined by judges, where relevant.¹⁰
16. On the facts of that case, the Pre-Trial Chamber found there was no violation of the presumption of innocence because during interviews or press statements, the Prosecutor had:
- a. Said his Office “*presented evidence*” to the Judge and that he was requesting the International Criminal Court to issue arrest warrants.

⁷ European Court of Human Rights, *Allendet de Ribemont v France* (Application no. 15175/89), para 38; European Court of Human Rights *Muradverdiyev v Azerbaijan* (Application no. 16966/06), para 102

⁸ International Criminal Court, *Situation in the Libyan Arab Jamahiriya*, Decision on the OPCD “Requête relative aux propos publics de Monsieur le Procureur et au respect de la présomption d’innocence” (ICC-01/11) 8 September 2011, pp. 5-6

⁹ International Criminal Court, *Situation in the Libyan Arab Jamahiriya*, Decision on the OPCD “Requête relative aux propos publics de Monsieur le Procureur et au respect de la présomption d’innocence” (ICC-01/11) 8 September 2011, p. 6

¹⁰ *Ibid*

- b. Repeatedly clarified that he had *“presented evidence”* showing that the crimes were within the jurisdiction of the Court.
 - c. Expressly stated that *“based on the evidence collected”* the Prosecution had applied to Pre-Trial Chamber I for the issuance of three arrest warrants and that accordingly the case was *“before the judges”*.
 - d. Where necessary, made clear that it was for the judges to decide the outcomes of certain applications.¹¹
17. In international criminal cases where prosecutors have gone too far and not qualified statements sufficiently, Courts have been critical and made findings that a Prosecutor’s behaviour was *“clearly inappropriate in light of the presumption of innocence”* and that *“[s]uch behaviour not only reflects poorly on the Prosecutor but also, given the Prosecutor is an elected official of the Court and that his statements are often imputed the Court as a whole, may lead observers to question the integrity of the Court as a whole.”*¹²

¹¹ International Criminal Court, *Situation in the Libyan Arab Jamahiriya*, Decision on the OPCD “Requête relative aux propos publics de Monsieur le Procureur et au respect de la présomption d’innocence” (ICC-01/11) 8 September 2011, pp. 5-6

¹² Appeals Chamber of the International Criminal Court, *Situation in the Libyan Arab Jamahiriya in the Case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the Request for Disqualification (ICC-01/11-01/11 OA3) 812 June 2012, pp. 5-6

III. SUBMISSIONS

18. In this instance, the SPO has violated the presumption of innocence and the Code of Conduct in that the Press Release:

- a. Is not a simple factual and anodyne update on the opening of the Specialist Prosecutor's case that clearly strives to protect the presumption of innocence and respect the Defendant's rights.
- b. Fails to state expressly that guilt will be determined by the Panel in due course and / or does not qualify statements sufficiently to make it clear that the Defendant has not been convicted of any wrongdoing and that presence or wrongdoing or not will be determined by the Panel.
- c. Does not make any attempt to clearly state or even headline to an everyday non-lawyer reader that the Specialist Prosecutor bears the burden of proof, and that guilt will be determined by the Panel.

19. Instead, and problematically, the Press Release:

- a. Presents itself as adopting and advocating for a necessary policy position, namely, to protect those that seek justice and are threatened, with the trigger for that approach being wrongdoing in the present case, even though no wrongdoing has been found.

- b. Advances a public narrative in the context of the present case that victims are or have been threatened when this has not been proven.
- c. Makes powerful and unproven accusations against the Defendant without any meaningful qualification, particularly at paragraph 3 where the Press Release states:

“Mr Smith pointed out that Mr Gucati and Mr Haradinaj belong to this group and denigrate anyone cooperating with the Kosovo Specialist Chambers and SPO as “spies”, “collaborators” and “traitors” who have “betrayed” their fellow countrymen.”

- d. Risks creating confusion among everyday non-lawyer readers as to whether the Panel subscribes to the views expressed by the SPO in the Press Release in that the Press Release appears on the landing page for the website of both the Specialist Chambers and the SPO, thereby implying that the SPO has sought to have the statement endorsed by the Specialist Chambers.
20. The Press Release as a whole therefore cannot be said to be compatible with the presumption of innocence and it cannot be said that “ the *Prosecutor appears to have been mindful of the need not to contradict the principle of the presumption of*

*innocence*¹³ or that the Prosecutor has made clear guilt is for the trial panel to determine.

IV. CONCLUSION

21. For the reasons set out above, the Panel is invited to grant the relief requested at paragraphs 2 or 3 above.

Word count: 2,229



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¹³ International Criminal Court, *Situation in the Libyan Arab Jamahiriya*, Decision on the OPCD “Requête relative aux propos publics de Monsieur le Procureur et au respect de la présomption d’innocence” (ICC-01/11) 8 September 2011, pp. 5-6