



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 5 November 2021

Language: English

Classification: Confidential

**Prosecution requests for leave to appeal Decision KSC-BC-2020-07/F00413 and
suspensive effect**

Specialist Prosecutor's Office

Jack Smith

Counsel for Mr Gucati

Jonathan Elystan Rees

Counsel for Mr Haradinaj

Toby Cadman

I. INTRODUCTION

1. In accordance with Article 45 of the Law¹ and Rule 77 of the Rules,² the Specialist Prosecutor's Office ('SPO') hereby seeks leave to appeal the 'Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice' ('Impugned Decision').³ The result of the Impugned Decision is that disclosure is ordered to enable the Defence to investigate allegations that the SPO entrapped the Accused ('Entrapment Allegations') which are legally implausible and factually unsubstantiated to the point of being fanciful. Disclosure was ordered without resolving threshold issues, resulting in a decision whereby merely uttering the word 'entrapment', without any substantiation whatsoever, granted the Defence access to sensitive information in contravention of the statutory framework.

2. Leave to appeal is sought in respect of the following issues (collectively, 'Issues'):

- i. Whether, as a matter of law, an assessment of materiality to the preparation of the defence can be done in the abstract or whether it requires assessing materiality in relation to the facts and circumstances of the case ('First Issue').
- ii. Whether information can be disclosed solely in relation to allegations of entrapment without assessing whether the entrapment allegations advanced by the Defence are wholly improbable ('Second Issue').
- iii. Whether, as a matter of law, disclosure can be ordered to show a failure to investigate entrapment where underlying allegations of entrapment are unsubstantiated and wholly improbable to the point of being fanciful ('Third Issue').

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Article 45(2) provides, in relevant part: '[a]ny 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'.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

³ Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, KSC-BC-2020-07/F00413, 3 November 2021, Confidential (with annex) ('Impugned Decision').

iv. Whether the SPO's proposed countermeasures can be exceeded to assist an investigation into whether the SPO investigated a wholly improbable entrapment claim ('Fourth Issue').

3. The Issues all arise from the decision and were essential to its determination.⁴ They significantly affect both the fair and expeditious conduct of the proceedings. Granting leave will also materially advance the proceedings. The critical importance of this disclosure litigation is underscored by the fact that the Pre-Trial Judge previously granted leave to appeal in respect of non-disclosure of items alleged to be related to the Entrapment Allegations.⁵ The Pre-Trial Judge's decision denying disclosure was upheld on appeal ('Appeals Ruling'),⁶ necessitating a further appellate ruling now to ensure that the exact opposite result reached in the Impugned Decision is in conformity with the Appeals Ruling. As has been clear from the trial thus far, no evidence has been presented since the Appeals Ruling to justify changing the Pre-Trial Judge's findings on non-materiality confirmed on appeal. In fact, everything that has transpired since the Appeals Ruling further reinforces the non-materiality of any information sought in connection with the Entrapment Allegations.

II. SUBMISSIONS

4. The information deemed material to the preparation of the defence concerned an internal investigation report ('Internal Report') and certain call data records ('CDRs').⁷

5. In relation to the Internal Report, the Trial Panel determined it was disclosable and that counterbalancing measures were insufficient despite concluding, *inter alia*,

⁴ See *Prosecutor v. Thaçi et al.*, Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021 (reclassified 14 January 2021) ('Thaçi et al. Decision'), para.11.

⁵ Decision on the Defence Applications for Leave to Appeal the Decision on the Gucati Requests B-C, KSC-BC-2020-07/F00235, 15 June 2021 (reclassified on 15 July 2021).

⁶ Public Redacted Version of Decision on the Appeals Against Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, 29 July 2021 ('Appeals Ruling').

⁷ A further official note had any assessment of its disclosability deferred pending further information. See Impugned Decision, KSC-BC-2020-07/F00413, paras 76-77.

that: (i) the Internal Report contains ‘no clear information that could assist the Defence claim or its investigations of entrapment’;⁸ (ii) the Internal Report contains sensitive information concerning the manner in which the SPO protects, processes and stores sensitive data;⁹ (iii) there is a risk that, if the Accused gained access to the Internal Report, they may attempt to disseminate the information contained therein;¹⁰ and, that even if this risk did not exist, (iv) the full disclosure of that item could prejudice ongoing SPO investigations as a result of its use during Defence investigations of the Entrapment Allegations.¹¹ In relation to the CDRs, the Trial Panel also determined that they do not, in themselves, assist the Defence in its claim or investigation of entrapment.¹²

6. Before turning to the appealable issues, the effect of the Impugned Decision is that the SPO has to provide further disclosures by 5 November 2021.¹³ In order not to defeat the purpose of the present application, and pursuant to Rule 171, the SPO requests suspensive effect of this part of the Impugned Decision until the present application and any resulting appeal are resolved.¹⁴

A. ALL ISSUES QUALIFY AS APPEALABLE ISSUES

1. First Issue

7. In the Impugned Decision, the Trial Panel explained whether the information sought was material to the preparation of the defence by setting out the following test (‘Materiality Test’):

In its assessment under the third step, the Panel considered that information was material under Rule 102(3) of the Rules in the context of the Entrapment Allegations if: (i) the information could

⁸ Impugned Decision, KSC-BC-2020-07/F00413, para.64.

⁹ Impugned Decision, KSC-BC-2020-07/F00413, para.65.

¹⁰ Impugned Decision, KSC-BC-2020-07/F00413, para.66.

¹¹ Impugned Decision, KSC-BC-2020-07/F00413, para.66.

¹² Impugned Decision, KSC-BC-2020-07/F00413, para.71.

¹³ Impugned Decision, KSC-BC-2020-07/F00413, para.95(b).

¹⁴ Transcript of Hearing, 5 November 2021, p.8 (real-time transcript).

assist for the Defence claim or its investigations of entrapment (without assessing the weight, reliability or credibility of that information); or (ii) the information, interpreted in the relevant context, suggested that the SPO failed to take adequate investigative steps to exclude the possibility that a member of its staff or someone under its control entrapped the Accused by disclosing the impugned information.¹⁵

8. Neither the Materiality Test nor the Trial Panel's subsequent reasoning fully considered the circumstances of or evidence in the case when determining materiality. A materiality determination necessarily requires a preliminary assessment of how a piece of information might or might not advance an asserted defence in a case. Even where the weight, reliability, or credibility of a particular piece of evidence is not considered, the materiality determination cannot be made in the complete abstract, but requires some assessment of the nature and scope of the asserted defence. This is particularly important in the present case, as entrapment cases require an official person exercising influence over the accused and no such facts or circumstances exist here.

9. The Trial Panel's reasoning on these points make clear that, not only were the facts and circumstances of the case not fully considered to determine if the Entrapment Allegations or the information purportedly linked to them were fanciful, the Trial Panel considered it legally could not do so when determining materiality under Rule 102(3).¹⁶ This issue arises from the Impugned Decision and, had the facts and circumstances of the case been fully considered, no disclosure would have been ordered.

2. Second Issue

10. The Trial Panel's decision to not decide whether the Entrapment Allegations were wholly improbable¹⁷ means that SPO arguments that entrapment was factually and legally impossible were not considered. The Trial Panel considered the wholly

¹⁵ Impugned Decision, KSC-BC-2020-07/F00413, para.56.

¹⁶ Impugned Decision, KSC-BC-2020-07/F00413, para.53.

¹⁷ Impugned Decision, KSC-BC-2020-07/F00413, para.53.

improbable nature of the Entrapment Allegations to be a question of evidentiary assessment at the end of trial, rather than a question of disclosure.¹⁸ It did so in the course of interpreting part of an appellate disclosure ruling whereby the wholly improbable nature of entrapment was referenced.¹⁹

11. On the Accused's own version of events, there was no contact between any SPO official and the Accused in the process by which the Batches²⁰ were delivered to the KLA WVA.²¹

12. Moreover, on the Accused's own version of events, there was only a momentary exchange between the individual who delivered Batch 1 and the persons who received it.²² Accordingly, the Accused have not alleged either that an SPO official or person acting on behalf of an SPO official was in contact with the Accused, or that the will of the Accused was somehow overborne, both of which are essential elements of an entrapment defence. By the time Batch 3 was delivered, the Accused were well into the course of their alleged criminal conduct, such that it was impossible to influence the Accused to commit the same crimes charged in relation to these materials in particular. To the contrary, throughout the charged timeframe the Accused made clear they were acting deliberately and of their own free will.²³

13. On any definition of entrapment, an official person influencing the Accused must exist.²⁴ Entrapment is simply impossible on what has been alleged by the Defence, not just in the SPO's assessment but even theoretically.

¹⁸ Impugned Decision, KSC-BC-2020-07/F00413, para.53.

¹⁹ See Impugned Decision, KSC-BC-2020-07/F00413, para.52.

²⁰ The charges in the Indictment concern the unlawful distribution of three batches of materials ('Batch 1', 'Batch 2', 'Batch 3', collectively 'Batches').

²¹ See Response to Defence Appeals of Disclosure Decision, KSC-BC-2020-07/IA005/F00005, 8 July 2021, para.21 (and citations therein).

²² Press Conference Transcript of 7 September 2020, 081344-01-TR-ET Revised, pp.1, 4; Interview of Hysni Gucati of 7 September 2020, 081358-01-TR-ET Revised, p.1.

²³ Confidential redacted version of Prosecution challenges to disclosure of items in updated Rule 102(3) Notice, KSC-BC-2020-07/F00316/CONF/RED, 17 September 2021 ('Rule 102(3) Challenge'), para.34.

²⁴ See Submissions in Preparation for Trial Preparation Conference, KSC-BC-2020-07/F00287, 27 August 2021, para.47.

14. The SPO is mindful that the wholly improbable nature of entrapment must be assessed differently when considering disclosure as opposed to the merits of a case at the end of trial. Moreover, ordinarily entrapment is alleged in cases where there is no dispute regarding interactions between state actors and the Accused, and therefore the *prima facie* test is easily met. Here, however, the circumstances and facts of the cases are contrary to any possibility of entrapment, and therefore the Accused should be required to make some *prima facie* showing of how entrapment could have occurred in this case before broad disclosure is ordered.

15. The Trial Panel made clear that it did not assess this matter at all before making its materiality findings and exceeding the SPO's proposed counterbalancing measures. Not considering the credibility, reliability, and weight of the information sought does not preclude the court from recognising the contours of the case before it. As such, the Second Issue also arises from the Impugned Decision and, had the wholly improbable nature of the entrapment allegation been considered, no disclosure would have been ordered.

3. Third Issue

16. In the Materiality Test, information is deemed material to the preparation of the defence if it could arguably suggest that the SPO failed to take adequate investigative steps to exclude the possibility of the Entrapment Allegations.²⁵ Because the Trial Panel found that both the Internal Report and CDRs contained no clear evidence of entrapment, they were only found to be material on the basis of this prong of the Materiality Test.

17. The consequence of this part of the test is that investigative acts of the SPO into the process by which the batches were delivered to the KLA WVA are disclosable *because they did not show* that any entrapment occurred. This conclusion led to findings of materiality for an item that 'contains no clear information that could assist the

²⁵ Impugned Decision, KSC-BC-2020-07/F00413, para.56.

Defence claim or its investigations of entrapment' and call data records which 'do not appear on their face to contain further incriminating or exculpatory evidence nor do they appear to relate to any existing issue and do not raise any new issue in the present proceedings'.²⁶ This approach broadens the notion of materiality well beyond the breaking point to an examination of whether the SPO expended resources to investigate fanciful and unsubstantiated allegations of entrapment, a showing that both invades the authorities and powers of the SPO and exceeds any burden of proof that the SPO bears in this prosecution.

18. Had any substantiation been required for the possibility that entrapment occurred, these findings could not have been made.

4. Fourth Issue

19. In relation to the SPO's internal investigation report, the SPO's proposed counterbalancing measures were deemed insufficient because they failed to 'put the Defence in a position to ascertain the relevant context of the SPO's efforts to exclude the possibility of the information having been intentionally leaked by one of its staff'.²⁷ As also developed under the Third Issue, the proposed counterbalancing measures were exceeded by determining that an absence of information related to entrapment is relevant to the Entrapment Allegations.

20. The SPO's principal concern in providing any such counterbalancing measures was that they would serve as stepping stones for future disclosure.²⁸ Had the Trial Panel subjected the Entrapment Allegations to any scrutiny, as developed under other issues, the SPO's counterbalancing measures would not have been exceeded.

²⁶ Impugned Decision, KSC-BC-2020-07/F00413, para.64.

²⁷ Impugned Decision, KSC-BC-2020-07/F00413, para.67.

²⁸ Confidential redacted version of Prosecution challenge to disclosure and proposed Rule 102(3) Notice counterbalancing measures, KSC-BC-2020-07/F00389/CONF/RED, 22 October 2021, para.12.

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

21. The Issues all implicate fundamental questions of whether the Defence can receive disclosure of sensitive SPO information by invoking a line of defence without any consideration of its prospective validity. The unwarranted disclosure of the information in the Impugned Decision compromises the SPO's investigations into obstruction of justice. The question of disclosing this information to establish a fanciful defence can – and has – dominated the conduct of these trial proceedings.

22. The future effects of the Impugned Decision are clear and inevitable. Whether or not the Impugned Decision correctly kept open this disclosure path will continue to impact this trial through the remainder of the evidence presentation and beyond. The Impugned Decision ensures this will continue because it gives no finality to these issues. As stated previously by the SPO:

The nature of what is sought by the Defence will lead to a disclosure path which cannot be reasonably limited or controlled. Ordering disclosure of the Materials will lead to almost every investigative development in the SPO's interference investigations creating a disclosure issue pertaining to allegations for which there is no shred of evidence. The information covered by the Rule 102(3) Notice Addendum will need to be updated whenever these investigations uncover new information on the process by which the Batches arrived at the KLA WVA. It will be tantamount to providing the Accused with a rolling update of what the SPO knows and does not know in the course of these investigations. This makes it effectively impossible to obtain further information without telegraphing – and therefore compromising – the steps necessary to acquire it. It would also run counter to the clear protections envisioned in the KSC's regulatory framework.²⁹

23. The SPO has argued that the disclosure in question threatens its mandate, and the Defence have made it clear that it considers the disclosure in question to be critical. The Trial Panel also considers what is at stake in this litigation to be of fundamental importance.³⁰ Moreover, the Trial Panel creates such a likelihood of a series of further

²⁹ Rule 102(3) Challenge, KSC-BC-2020-07/F00316/CONF/RED, para.33.

³⁰ Impugned Decision, KSC-BC-2020-07/F00413, para.48.

entrapment related disclosure requests that delays in the proceedings become unavoidable. The Issues' significant impact on the fair and expeditious conduct of the proceedings, presently and in the future, is clear.

C. GRANTING LEAVE TO APPEAL WOULD MATERIALLY ADVANCE THE PROCEEDINGS

24. For the same reasons the Issues significantly affect the fair and expeditious conduct of the proceedings, an interlocutory appellate resolution of them would materially advance these proceedings as well. At the Trial Preparation Conference, the first status conference convened by the Trial Panel, the meaning and consequences of the Appeals Ruling was a contested issue. Giving the Appeals Panel a further opportunity to clarify the scope of the disclosure obligations at issue would ensure that the remainder of this trial – and potentially future trials - proceed on the proper course. The Trial Panel has already recognised that measures can be pursued to address any deferred disclosure in this case,³¹ and continuing to defer the disclosure of these materials for a short time further to secure an appellate resolution would be worthwhile.

D. CONCLUSION

25. For the reasons above, leave to appeal should be granted in respect of the Issues.

26. As a final matter, in its findings the Trial Panel cautioned that non-compliance with disclosure obligations would be treated with the 'utmost severity' and contrasted between 'duties to be circumvented through sophistries' and 'legal obligations to be fulfilled with the greatest of care, urgency and diligence'.³² The litigation underlying this application occurred because the SPO has always been forthright about the evidence in its possession. The SPO has always taken its disclosure obligations

³¹ See Impugned Decision, KSC-BC-2020-07/F00413, para.95(e).

³² Impugned Decision, KSC-BC-2020-07/F00413, para.48.

seriously, and will always exercise them with the greatest of care, urgency, and diligence.

III. Classification

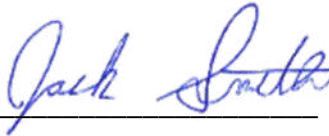
27. The present submission is filed confidentially as the Impugned Decision is confidential. The SPO has no objection to reclassifying this filing as public.

IV. Relief sought

28. For the foregoing reasons, the SPO seeks:

- (i) Leave to appeal the issues identified in paragraph 2 above; and
- (ii) An order for suspensive effect of the Impugned Decision in accordance with paragraph 6 above.

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Jack Smith

Specialist Prosecutor

Friday, 5 November 2021

At The Hague, the Netherlands