

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 Guënaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

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Haradinaj Defence Response to F00438

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I. INTRODUCTION

1. On 16 November 2021, the Specialist Prosecutor's Office ("SPO") filed its 'Prosecution challenge to proposed Defence expert Witness 18 and report'.¹
2. The Defence for Mr. Nasim Haradinaj ("Haradinaj Defence") now seeks to respond to that objection.

II. BACKGROUND

3. On 20 October 2021, the Haradinaj Defence notified the Trial Panel in Oral Submissions that it sought to adduce the evidence of a second expert, an experienced investigator to comment on the adequacy of the investigation, chain of custody procedures and adherence to basic investigative standards.²
4. On 27 October 2021, the Haradinaj Defence corresponded with the SPO on an *inter partes* basis in an attempt to agree the documents and/or evidence that would be provided to the nominated expert prior to the preparation of any report.
5. On 27 October 2021, the SPO responded that it takes no position on what information should be provided to the proposed Defence expert, thereby

¹ KSC-BC-2020-07/F00438.

² KSC-BC-2020-07, Trial Transcript, 20 October 2021, at page 1073, lines 17-23.

reserving its position for challenge, that challenge now being the subject of this Response.

6. On 31 October 2021, the Haradinaj Defence provided formal instructions to the proposed Defence expert.
7. From 31 October 2021 to 9 November 2021, the proposed Defence expert prepared their report.
8. On 9 November 2021, that report was disclosed to the Trial Panel and the parties.
9. On 16 November 2021, the SPO filed its 'Prosecution challenge to proposed Defence expert Witness 18 and report'.³

III. Submissions

10. The SPO seeks to challenge the relevance of the expert report, and thus challenges the admission of the same on two primary grounds:
 - a. That the proposed evidence is irrelevant to the charges against the Accused; and

³ KSC-BC-2020-07/F00438.

- b. That the Report and/or Witness would not assist the Trial Panel and would inappropriately usurp the Trial Panel's functions.
11. The Defence rejects both assertions as being groundless, but for the purposes of this response, will deal with each in turn.

That the proposed evidence is irrelevant to the charges against the Accused

12. The SPO seeks to suggest that the focus of Witness 18, namely 'investigative standards, international best practices and procedures normally undertaken during a complex investigation...' are "*not relevant to the charges against the Accused*".⁴
13. The Trial Panel is invited to reject the SPO challenge in this regard as being made without any proper basis and without any proper consideration of the prosecution case as presented before the Specialist Chambers. It is on the basis of the glaring inadequacies of the prosecution case and the complete absence of any evidence presented to establish continuity of chain of custody, authentication of the material alleged to have been seized and the absence of proper investigative records, that the proposed expert's evidence is necessary.

⁴ *Ibid.* at paragraph 6.

14. It is respectfully submitted that the SPO submission is one that is contrary to a central thrust of cross-examination, and therefore a central thrust of the Defence case.
15. The fact that the SPO do not deem a fact to be relevant, a theme that runs through this case, does not make it so, in a similar vein to the SPO's adopted position in respect of disclosure, in that simply because the SPO does not want material that might undermine its case to be disclosed, or that it considers it is not obliged to disclose an item, does not render that item non-disclosable, as the Trial Panel has consistently ruled.
16. Of the four witnesses called by the SPO, three of those are SPO employees and were involved in the searches and investigation itself to some degree.
17. Each of those three witnesses gave evidence, so far as they were able, or so far as they were willing as to the steps that they undertook during the relevant elements of the investigation in which they were involved.
18. Further, each of those three witnesses were cross-examined on the steps taken, and whether those steps were appropriate or otherwise.
19. The Trial Panel was able to observe the evidence they gave and the manner in which it was given and can draw its own conclusions on the reliability of that evidence.

20. Further, the Trial Panel's attention is drawn to the application to dismiss submitted,⁵ and the evidence given, particularly (but not exhaustively) with regard to the doubt cast on:

- a. The verification of documents;
- b. The chain of custody or complete lack thereof;
- c. The manner in which the KLA WVA offices were searched;
- d. The manner in which evidence was secured, retained, and stored;
- e. The manner in which statements and/or contact notes were generated and stored;
- f. The manner in which the delivery of the Batches was investigated, if investigated at all; and
- g. More widely, the manner in which this entire investigation and prosecution has been approached by the SPO.

21. The Defence have submitted, and maintain, that each of the above issues is a valid point to consider given that they point to the credibility of the evidence put forward and the reliability of the prosecution case against the Defendant.

⁵ KSC-BC-2020-07/F00440.

22. Accordingly, the investigation itself goes to the very heart of the case against the Defendant, and thus comment upon the same cannot be said to be anything other than relevant. The submissions of the SPO on this point are therefore entirely without foundation and ought to be summarily rejected.
23. The submissions in paragraph 7 of the SPO submission⁶ are entirely relevant to the question being asked of the Trial Panel and appear to be a desperate attempt to taint the evidence given it being clear that in certain respects the submission of the SPO is an attempt to put forward an entirely irrational proposition.
24. The manual referred to is in any event publicly available,⁷ the most cursory of searches would have demonstrated this. It is notable, that amongst its contributing authors is the Prosecutor, Ms. Valeria Bolici.

The Report and/or Witness 18 would not assist the Trial panel and would inappropriately usurp the Trial Panel's functions

25. Again, the submissions of the SPO ought to be rejected as being groundless and misconceived.

⁶ KSC-BC-2020-07/F00438.

⁷ ICTY Manual on Developed Practices, 2009, available at: https://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf. See also KSC-BC-2020-07/F00426/A02.

26. Contrary to the position espoused by the SPO, the evidence of Witness 18 would be of assistance to the Trial Panel.
27. Further, to suggest that the admission of the evidence would “*usurp the functions of the Trial Panel as the ultimate arbiter of fact and law*”,⁸ is with respect misconceived and a submission without proper foundation.
28. The submissions of the SPO appear to simply be a number of wide and general objections to the evidence, without substantiating precisely why the evidence would not assist the panel, and further, how the expert is attempting to, or would, usurp the Trial Panel’s function.
29. The Trial Panel is made up of experienced international judges, judges with significant experience at the national, international and hybrid level, that is accepted by the Defence, and at no stage has the Defence sought to suggest otherwise.
30. Further, the Defence are not seeking to adduce expert opinion on the procedures being adopted by the Trial Panel, but rather, on the legitimacy of the investigation undertaken by the SPO.
31. In somewhat simplified terms, the SPO has consistently maintained that its investigation, its procedures, and the standards it seeks to adhere to, are

⁸ KSC-BC-2020-07/F00438, at paragraph 8.

beyond reproach; the Defence submit that the opposite is true; the procedures adopted in this case are seriously flawed and to ensure that these proceedings do not occasion a miscarriage of justice, the Defence are entitled to present evidence to demonstrate that part of the defence case.

32. Further, when a significant proportion of the case concerns the investigation or lack thereof itself, the evidence of a vastly experienced international investigator who can rightly be considered a leading expert in the field given his experience is quite evidently going to be of assistance to the proceedings.
33. In terms of the Trial Panel, as much as the Panel is made up of experienced international judges, that experience is not necessarily 'in the field' as investigators, and therefore the finer nuances of investigative and evidence retention procedures, is not necessarily something that is within their immediate expertise, and thus the submitted report is or will be of assistance.
34. Secondly, the SPO's submission that it is an attempt to usurp the functions of the Trial Panel, is noted, however, and again, this is entirely without foundation.

35. Further, the Defence notes that the SPO sought to rely upon this misconceived submission in respect of the expert report adduced concerning whistleblowing.⁹
36. To rehearse those similar submissions, at no stage has the Defence sought to suggest that the Trial Panel cannot or ought not to rule on the relevant issue without expert evidence; nor has the Defence sought to suggest that the issue is one that is outside of the Trial Panel's purview.
37. The Trial Panel is indeed the ultimate arbiter of fact and law and the admission of expert evidence on a point does not go any way to suggest that that function is being usurped; if the SPO's position is extrapolated, it is unlikely that any expert evidence can ever be called on any case.
38. Such a position is with respect fanciful.
39. Again, the reality of the position is that the investigation undertaken has been called into question and has been done so for good reason. The SPO are therefore seeking to avoid further scrutiny of that investigation.
40. At paragraph 13 of the SPO submission, it is submitted, somewhat surprisingly, that the claim that *"the Trial Chamber and the Defence teams appear not to have been provided with copies of the seized materials and cannot make an*

⁹ KSC-BC-2020-07/F00388.

independent assessment of the documents seized, nor can they conduct further investigation in relation to each of the documents”, is “both inaccurate and improper”.

41. Certain documents have been disclosed,¹⁰ that is accepted, however, to suggest that the submission is inaccurate and improper is outrageous.
42. The SPO have not at any time disclosed all of those documents leaked, that is a simple fact. An extreme minority of documents have been disclosed, and to suggest otherwise is a fundamental mischaracterisation of the position. In respect of paragraph 13 of the SPO submission, as a minimum, the Trial Panel is invited to simply ignore the proposition as improperly made.
43. Similarly, the submission of the SPO that *“The Trial Panel should not allow the Defence to waste precious court resources”*,¹¹ is an aspersion on the Defence and the manner in which it has conducted proceedings thus far, and one that is devoid of merit.
44. The Defence have consistently, and particularly during the ‘trial phase’ of proceedings, sought to ensure that the proceedings progress in accordance with the timetable presented by the Trial Panel. In particular the Defence has

¹⁰ See, e.g., P00093-P00097, P00104, P00106-P00119, P00139-150.

¹¹ KSC-BC-2020-07/F00438, at paragraph 15.

presented a joint position on many issues so as to avoid repetition and extend the time required for the trial process.

45. The Defence have dealt with any and all issues in an efficient and timely manner and have at no stage wasted any resource.
46. The evidence of Witness 18 will not cause any pressure to be exerted on the trial timetable, undue or otherwise.
47. Finally, in respect of the request of the SPO at paragraph 17, namely that Witness 18 should be made available for cross-examination, the Defence takes no issue with this request, it being entirely proper that if the evidence of an individual is to be adduced, that same individual ought to appear before the Trial Panel so as to enable that evidence to be tested.

IV. CONCLUSION

48. For the reasons given above, the submissions of the SPO ought to be rejected, and the evidence of Witness 18 admitted.
49. The evidence is:
 - a. Relevant;
 - b. Will assist the Trial Panel in making a determination;

- c. Is credible; and

- d. Is central to an important issue between the SPO and the Defence

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