

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 Counsel for Nasim Haradinaj

Date: 29 November 2021

Language: English

Classification: Confidential

Application for Leave to Appeal through Certification from Decision

KSC-BC-2020-07/F00450

Specialist Prosecutor

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I. INTRODUCTION

1. On 26 November 2021, the Trial Panel issued its decision 'Decision on the Defence Motions to Dismiss Charges,¹ in which the application submitted to dismiss some or all of the charges levied against the Defendant was rejected in its entirety.
2. The Defence for Mr. Nasim Haradinaj ("Haradinaj Defence") now seeks leave to appeal that decision.
3. Further, the Defence for Mr. Nasim Haradinaj notes and joins the submissions of Counsel for Hysni Gucati on this point.

II. BACKGROUND

4. The background in respect of the instant case is well-known and therefore, there is, respectfully, little benefit in rehearsing the background in full, instead, the Defence, for the purpose of this application, adopt that which has been outlined within the impugned decision at paragraphs 1-24, save for the following addition which are submitted to be pertinent.

¹ KSC-BC-2020-07/F00450.

5. On 30 September 2021, at the invitation of the Trial Panel, the Defence submitted its motion “Defence Submissions on Elements of Crime and Modes of Liability”.²
6. At the time of filing this submission, no decision has been rendered in respect of that motion.
7. Further, the Trial Panel acknowledges that there are significant differences between the SPO and Pre-Trial Judge, and the Defence, in terms of the elements of the indicted offences, the Trial Panel ruling “...for the purposes of the present decision, the Panel has assessed the evidence against the elements of the charged offences as identified by the Pre-Trial Judge”, highlighting paragraphs 33-80 of the Confirmation Decision.³

II. LAW

8. Article 45(2) of the Law on the Specialist Chambers and Specialist Prosecutor’s Office (“Law”)⁴ provides:

“Any 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

² KSC-BC-2020-07/F00342.

³ The Impugned Decision at paragraph 26 and footnote 36; and KSC-BC-2020-07/F00074/RED, “Public Redacted Version of Decision on the Confirmation of the Indictment” (“Confirmation Decision”), 11 December 2020, Public.

⁴ Law on the Specialist Chambers and Specialist Prosecutor’s Office (‘the Law’), 05/L-053.

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.”

9. Rule 77(2) of the of the Rules of Procedure and Evidence before the Specialist Chambers (“Rules”)⁵ provides:

“The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.”

10. The ‘Application to Dismiss’ was made pursuant to Rule 130 of the Rules; of relevance for the purposes of the instant application for leave to appeal, is Rule 130(4) which reads:

“The Specialist Prosecutor may as of right appeal a decision dismissing the indictment or any charge thereof pursuant to Rule 170. The Defence shall not have a right to appeal a decision rejecting a request for the dismissal of the indictment”.

⁵ KSC-BD-03/Rev3/2020.

11. Accordingly, it is accepted that the Defence may not 'appeal as of right'; however, Rule 130 does not preclude the Defence from seeking leave to appeal, in accordance with Article 45(2) of the Law, and Rule 77(2) of the Rules, in the usual way.

III. SUBMISSIONS

12. The Defence seeks Leave to Appeal on one primary ground, namely:
- a. Did the Trial Panel err in assessing the evidence, and therefore determining the application to dismiss, against the elements of the charged offences as confirmed by the Pre-Trial Judge.

The Legal Test for Applications for Leave to Appeal

13. The legal test is as follows:
- a. Whether the matter is an 'appealable issue';
 - b. Whether the issue at hand would significantly affect:
 - i. The fair and expeditious conduct of the proceedings; or
 - ii. The outcome of the trial; and
 - c. Whether, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

Whether the Issue is an 'Appealable' Issue

14. Appealable issues must relate to *“an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination”* and must also *“emanate from the ruling concerned and...not amount to abstract questions or hypothetical concerns.”*⁶
15. It is respectfully submitted that the question posed is clearly an ‘Appealable’ issue, and therefore the first element of the test is satisfied.
16. Firstly, the issue concerns the indictment, and the elements of crime and/or modes of liability. The issue is therefore not one that can be characterised as ‘abstract’ or ‘theoretical’, it is a discrete and specific issue of direct relevance to the instant case.
17. The Trial Panel considered the motion to dismiss within the context of the indictment as confirmed by the Pre-Trial Judge;⁷ however, subsequent to the confirmation decision of the Pre-Trial Judge, the Trial Panel invited submissions on whether the position as confirmed by the Pre-Trial Judge, was accepted as a correct interpretation of the law.⁸

⁶ KSC-BC-2020-06/F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021, Public, at para. 11.

⁷ KSC-BC-2020-07/F00450, at para. 23.

⁸ KSC-BC-2020-07, Trial Transcript, 8 September 2021, at page 710, lines 9-13.

18. Submissions have been filed on this, seeking to challenge the elements of crime and modes of liability as confirmed,⁹ and a decision in respect of the same remains outstanding.
19. This position was explicitly referred to within the application to dismiss,¹⁰ and thus issue relates to what are the correct elements of crime to be considered both in terms of the application to dismiss and arguably the wider context of the trial itself.
20. The issue and question posed therefore concerns an act and/or omission of the Trial Panel and therefore, is an issue that is Appealable.
21. Secondly, Rule 130 provides an appeal as of right to the SPO, but explicitly precludes that same right in terms of the Defence.
22. Rule 130(4) does not however preclude the Defence from seeking leave to appeal and therefore and again, the issue is one that is 'appealable' for the purposes of Rule 77.

Whether the Issues would Significantly Affect the Fair and Expeditious Conduct of the Proceedings or the Outcome of the Trial

⁹ KSC-BC-2020-07/F00342, Haradinaj Defence Submissions on Elements of Crimes and Modes of Liability, 30 September 2021, Public; KSC-BC-2020-07/F00354, Gucati Defence Further Written Submissions on the Elements of the Offence and Modes of Liability, 30 September 2021, Public.

¹⁰ KSC-BC-2020-07/F00342, Defence Submissions on Elements of Crimes and Modes of Liability, 30 September 2021.

23. The Defence asserts that this element of the test has been satisfied.
24. The impugned decision concerns an application to dismiss the charges.
25. It is imperative that in considering that application that the correct charges, and therefore, the correct elements of crime and/or modes of liability are considered, within the context of that application.
26. Failure to do so would render the process by which the application was considered, wholly unfair and thereby render the proceedings and/or outcome, unfair, and in the same vein, affect the expeditious conduct of proceedings.

Whether an Immediate Resolution by the Appeals Chamber May Materially Advance the Proceedings

27. Again, as per the above elements of the test, the application for leave to appeal would materially advance the proceedings and therefore, the final element of the test is satisfied.
28. The issue concerns the appropriate elements of crime and/or modes of liability to consider when determining the application to dismiss, given that those points still fall to be determined by the Trial Panel.
29. The issue is therefore one of fundamental importance to the Defendant(s) and further, is likely to have a demonstrable effect on any other Defendant in a

similar position and therefore furthers the jurisprudence of the Kosovo Specialist Chambers as an institution.

30. Further, subject to a decision on leave and any subsequent decision on any substantive appeal, the immediate resolution of the issue would demonstrably advance the proceedings, and would do so for the following reasons:

- a. Firstly, it clarifies and determines the question of whether decisions such as the impugned decision ought to be made when there are relevant issues outstanding;
- b. Secondly, it would bring closure to a relevant issue of fairness; and
- c. Thirdly, it ensures that all relevant issues are finalised prior to the commencement of the Defence case.

IV. ANCILLARY APPLICATIONS

31. The Defence would further seek a 'Suspensive Order', per Rule 171.

32. Per Rule 171, interlocutory appeals shall not ordinarily have a suspensive effect. However, it is respectfully submitted that the instant application is one that would justify an exceptional measure, on the basis that the prosecution case has now closed, with the Defendant's case, as confirmed as to be

advanced, is due to start on 2 December 2021 with the Defence Case Conference.

33. Thereafter, Defence evidence is anticipated as being called as of the week commencing 6 December 2021.
34. If leave to appeal is granted, it is respectfully submitted to be wholly inappropriate that the Defence case is start whilst an issue concerning the dismissal of the indictment is outstanding.
35. To continue with the presentation of the Defence case in such circumstances undermines the Defence case specifically and the entire process more widely.
36. Accordingly, it is respectfully submitted that the instant application is one where the exceptional measure to suspend proceedings pending resolution ought to be made.

Word Count: 1581 words



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