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 Hysni Gucati
Date:	29 November 2021
Language:	English
Classification:	**Public**

Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00450 pursuant to Article 45(2) and Rule 77(1)

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I. INTRODUCTION

1. On 17 November 2021, the Defence filed its Motion to Dismiss pursuant to Rule 130 ("Motion to Dismiss")[1] in relation to all six counts faced by the Accused.

2. On Friday 26 November 2021, the Defence received notification of the Decision on the Defence Motions to Dismiss Charges ("the Impugned Decision")[2] denying the motion in relation to all six counts.

3. Having acknowledged that there were a number of significant differences between the SPO (and, it follows, the Pre-Trial Judge) and the Defence in respect of some of the elements of the charged offences, the Trial Panel stated that "…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", referring specifically to paragraphs 33 to 80 of the Confirmation Decision[3]. In doing so, the Trial Panel refrained from making a determination on any disputed element of the charged offences[4].

4. In accordance with Article 45 of the Law on Specialist Chambers and Specialist Prosecutor's Office Law No.05/L-053 ("Law") and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), the

[1] KSC-BC-2020-07/F00439, *"Motion to Dismiss pursuant to Rule 130"*, Gucati, 17 November 2021, Confidential
[2] KSC-BC-2020-07/F00450, *"Decision on the Defence Motions to Dismiss Charges"*, Trial Panel II, 26 November 2021, Public
[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] The Impugned Decision at paragraph 26, 27

Accused applies for leave to appeal from the Impugned Decision on the following issue, namely:

Whether the Trial Panel erred in assessing the evidence against the elements of the charged offences as identified by the Pre-Trial Judge only, when the elements of the charged offence as identified by the Pre-Trial Judge are disputed and the Trial Panel refused to rule on the dispute.

5. Additionally, the Accused applies for suspensive effect pursuant to Rule 171 of the Rules.

II. APPLICABLE LAW

6. Article 45 of the Law empowers a Court of Appeals Panel to hear interlocutory appeals from decisions of the Pre-Trial Judge.

7. Article 45(2) of the Law provides that any interlocutory appeal, other than from decisions or orders relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers, must be granted leave to appeal through certification by the Pre-Trial Judge 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, an immediate resolution by a Court of Appeals Panel may materially advance proceedings[5].

8. Rule 77(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules") provides that:

[5] In contradiction with Article 45(2) of the Law, Rule 130(4) apparently provides to the Prosecution only for an additional appeal as of right against a decision dismissing the indictment – there is no similar right for the Defence, which must seek certification accordingly

"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".

9. The following specific requirements, therefore, apply[6]:

(1) Whether the matter is an "appealable issue" – that is, an identifiable subject or topic the resolution of which is essential for the determination of matters arising in the judicial cause under examination[7];

(2) 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

(3) Whether, in the opinion of the Panel, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

[6] KSC-BC-2020-06/F00172, "*Decision on the Thaci Defence Application for Leave to Appeal*", Pre-Trial Judge, 11 January 2021 at paragraph 10

[7] *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-75, Decision on the Prosecutor's Application for Leave to Appeal Pre-Trial Chamber III's Decision on Disclosure ("*Bemba* Decision on Prosecutor's Application for Leave to Appeal"), 25 August 2008, paragraph 10

10. The object is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial[8].

11. Arguments on the merits or as to the substance of the appeal are *not* factors to be considered at the leave stage - they are factors to be considered and examined by the Court of Appeals Panel in the event that leave to appeal is granted[9].

12. Where certification is granted, the appellant has 10 days from the date of certification to file an appeal[10].

III. SUBMISSIONS

Whether the matter is an "appealable issue" – that is, the issue emanates from the Impugned Decision

13. The issue identified in paragraph 4 above emanates from the Impugned Decision and does not amount to an abstract question or hypothetical concern.

14. Correct identification of the essential ingredients of the offences charged – and the corresponding challenge to the interpretation of the Pre-Trial Judge - was at the heart of the Motion to Dismiss[11].

[8] Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 at paragraph 19
[9] *Prosecutor v Kony*, Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20, 19 August 2005, paragraph 22
[10] Rule 170(2) of the Rules
[11] Notice in relation to its challenge to the essential ingredients of the offence having been given by the Defence in advance of the Prosecution case: see Transcript, 8 September 2021, at pages 647 to 685; and

15. The findings of the Pre-Trial Judge as to the essential ingredients of the offences charged are not binding on the Parties or the Trial Panel, as the Trial Panel correctly acknowledged in the Impugned Decision[12].

16. Accordingly, the refusal by the Trial Panel to rule on the essential ingredients of the offences charged itself, and instead to simply assess the evidence against the elements of the charged offences as identified by the Pre-Trial Judge:

    a. amounted to a refusal to engage with the substance of the Motion to Dismiss; and

    b. means that the decision to deny the Motion to Dismiss is based upon a legal analysis which, by reserving determination until a later date, the Trial Panel necessarily concedes *may* be incorrect[13].

Whether the issue at hand would significantly affect: (i) The fair and expeditious conduct of the proceedings

17. The "fair and expeditious conduct of proceedings" is generally understood as referencing the general requirement of fairness[14]. One of the fundamental aspects of this requirement is that proceedings should be adversarial in nature[15].

KSC-BC-2020-07/F00345, *"Further Written Submissions on the Elements of the Offence and Modes of Liability"*, Gucati, 30 September 2021, Public

[12] The Impugned Decision at paragraph 26

[13] The Impugned Decision at paragraph 27

[14] KSC-BC-2020-07/F00423, *"Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect"*, Trial Panel II, 8 November 2021, Public at paragraph 18

[15] KSC-BC-2020-07/F00423, *"Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect"*, Trial Panel II, 8 November 2021, Public at paragraph 18

18. The provision for a motion to dismiss under Rule 130 protects the adversarial nature of proceedings and the proper determination thereof is fundamental to the fairness and expeditious conduct of proceedings:

> "The primary rationale underpinning the hearing of a 'no case to answer' motion … is the principle that an accused should not be called upon to answer a charge when the evidence presented by the Prosecution is substantively insufficient to engage the need to mount a defence case. This reasoning flows from the rights of an accused, including the fundamental rights to a presumption of innocence and to a fair and speedy trial…"[16]

Whether the issue at hand would significantly affect: (ii) The outcome of the trial

19. The proper determination of a Rule 130 motion is fundamental to the outcome of the trial, as decisions relating to the calling of defence evidence, including whether the Accused himself gives evidence or not, are consequent thereon. Such decisions are irreversible.

Whether an immediate resolution by the Appeals Chamber may materially advance the proceedings

[16] *Prosecutor v Ruto & Sang*, Decision No.5 on the Conduct of Trial Proceedings (Principles and Procedure on "No Case to Answer Motions"), Trial Chamber, ICC-01/09-01/11-1334, 3 June 2014 at paragraph 12

20. The proper determination of a Rule 130 motion is fundamental to the outcome of the trial, as decisions relating to the calling of defence evidence, including whether the Accused himself gives evidence or not, are consequent thereon. Such decisions are irreversible.

21. Accordingly, an immediate resolution by the Appeals Chamber will pre-empt the repercussions of the Impugned Decision adversely affecting the fairness of the proceedings or the outcome of the trial (such as a decision to call evidence in relation to a count when, on a proper analysis, there is no prosecution evidence of an essential ingredient of the charge concerned).

IV. CONCLUSION

22. Accordingly, leave to appeal should be granted to permit the Court of Appeals Panel to consider whether the Trial Panel erred in assessing the evidence against the elements of the charged offences as identified by the Pre-Trial Judge only, when the elements of the charged offence as identified by the Pre-Trial Judge are disputed and the Trial Panel refused to rule on the dispute.

V. REQUEST FOR SUSPENSIVE EFFECT UNDER RULE 171

23. Implementation of a decision under Rule 130 is the trigger for Defence disclosure obligations under Rule 119, including notification of its decision whether a Defence case will be presented, and, should the Defence choose to present a case, under Rule 104(5). Once disclosure is made under Rule 119 and 104(5), it cannot be reversed.

24. On the timetable as presently envisaged, if the Defence chooses to present a case, and if the Accused himself intends to give evidence as part of that case, the Accused will do so on Monday 6 December 2021. If the Defence chooses not to present a case, the evidential proceedings will end shortly. On either timeframe, no appeal of the Impugned Decision is likely to be determined before defence evidence is heard by the Trial Panel or alternatively no defence evidence is heard and the evidential proceedings conclude (either consequence being irreversible).

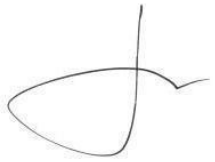
25. It is incompatible with the primary rationale underpinning the hearing of a Rule 130 motion - namely, the principle that an accused should not be called upon to answer a charge when the evidence presented by the Prosecution is substantively insufficient to engage the need to mount a defence case - for that process to be permitted to continue when a decision under Rule 130 is subject to an appeal.

26. Decisions as to whether a defence case will be presented, and if so, what evidence to call as part of that defence case (including whether or not to call the Accused to give evidence), are irreversible and justify, as an exceptional measure, suspension of the effect of the Impugned Decision until determination of the appeal.

VI. CLASSIFICATION

27. This filing is classified as public.

Word count: 1910 words



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