



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: **Court of Appeals Panel**
Judge Michèle Picard
Judge Emilio Gatti
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 21 December 2021

Language: English

Classification: Confidential

**Prosecution response to Haradinaj Defence appeal from 'Decision on Prosecution
Requests in Relation to Proposed Defence Witnesses'**

with Public Annex 1

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I. INTRODUCTION

1. The Court of Appeals Panel ('the Panel')¹ should summarily dismiss the Appeal² because it is founded on deficient submissions incapable of demonstrating any error in the Decision.³ Even if the Appeal were to be considered on its merits, the Decision should be affirmed since the Trial Panel properly exercised its discretion in finding that the proposed evidence of DW1250 and DW1251 is irrelevant while that of DW1253 is impermissible, and in declining to hear the evidence of these witnesses.⁴

II. PROCEDURAL HISTORY

2. On 12 July 2021, the Haradinaj Defence provided a Provisional Witness List.⁵

3. On 21 July 2021, the Trial Panel ordered the Defence to file a summary of facts or circumstances in relation to which each witness on the Provisional Witness List would testify.⁶

4. On 27 August 2021, the Haradinaj Defence filed the submissions on witnesses requested in the 21 July 2021 order.⁷

¹ Decision Assigning a Court of Appeals Panel, KSC-BC-2020-07/IA006/F00001, 9 December 2021 ('Decision Assigning a Court of Appeals Panel').

² Haradinaj Defence Submissions on Appeal in Respect of Decision KSC-BC-2020-07/F00470, KSC-BC-2020-07/IA006/F00003, 16 December 2021, Confidential ('Appeal').

³ Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, KSC-BC-2020-07/F00470, 3 December 2021 ('Decision').

⁴ See Decision, para.120, and Decision on Defence Request for Leave to Appeal F00470, KSC-BC-2020-07/F00484, 8 December 2021, paras 1, 21, setting out the 'First Issue' as 'the Panel's findings in relation to the irrelevance of the proposed testimony of DW1250 and DW1251 and its decision not to hear these witnesses' and the 'Second Issue' as 'the Panel's findings in relation to the impermissible character of the proposed evidence of DW1253 under Rule 149 of the Rules and its decision not to hear this witness.'

⁵ Annex 1 to Defence Pre-Trial Brief on behalf of Nasim Haradinaj: List of Potential Witnesses the Defence Intends to Call [...], KSC-BC-2020-07/F00260/A01, 12 July 2021, Confidential ('Provisional Witness List').

⁶ Order for Submissions and Scheduling the Trial Preparation Conference, KSC-BC-2020-07/F00267, 21 July 2021, paras 12, 34(e).

⁷ Submission on Witnesses, KSC-BC-2020-07/F00289, 27 August 2021.

5. On 1 September 2021, the Specialist Prosecutor's Office ('SPO') indicated that it intended to file a motion, *inter alia*, to strike Defence witnesses.⁸
6. On 2 September 2021, the Trial Panel ordered the SPO to file its motion to strike Defence witnesses by 15 September 2021.⁹
7. On 15 September 2021, the SPO requested, *inter alia*, that the Trial Panel order the Defence to strike DW1250 and DW1251, then referred to as Witnesses 15 and 16, off the Provisional Witness List.¹⁰
8. On 27 September 2021, the Haradinaj Defence responded to the SPO's 15 September 2021 request.¹¹
9. On 18 October 2021, the Trial Panel informed the Parties that a decision on the requests in relation to proposed Defence witnesses would be rendered after the Defence Preparation Conference and after receiving Defence filings pursuant to Rule 119(2) of the Rules.¹²
10. On 23 October 2021, the Haradinaj Defence requested authorisation to add DW1253, then referred to as Witness 18, to its list of potential witnesses.¹³
11. On 26 October 2021, the Trial Panel ordered the Haradinaj Defence to file DW1253's report by 9 November 2021.¹⁴

⁸ KSC-BC-2020-07, 1 September 2021 Transcript, p.446.

⁹ KSC-BC-2020-07, 2 September 2021 Transcript, p.603.

¹⁰ Prosecution requests in relation to Defence witnesses, KSC-BC-2020-07/F00312, 15 September 2021.

¹¹ Defence Response to Prosecution requests in relation to Defence witnesses, KSC-BC-2020-07/F00330, 27 September 2021 ('27 September 2021 Response').

¹² KSC-BC-2020-07, 18 October 2021 Transcript, p.817. Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

¹³ Defence Request for Addition of an Expert to its List of Potential Witnesses, KSC-BC-2020-07/F00394, 23 October 2021.

¹⁴ KSC-BC-2020-07, 26 October 2021 Transcript, pp.1412-1413.

12. On 9 November 2021, the Haradinaj Defence filed a proposed expert report for DW1253.¹⁵

13. On 16 November 2021, the SPO requested that the Trial Panel, *inter alia*, reject the admission of the Report into evidence and not authorise the testimony, as an expert or otherwise, of DW1253.¹⁶

14. On 22 November 2021, the Haradinaj Defence responded to the SPO's 16 November 2021 request.¹⁷

15. On 3 December 2021, the Trial Panel issued the Decision, noting, *inter alia*, that it would be inclined to grant leave to appeal in relation to the First and Second Issues.¹⁸

16. On 6 December 2021, the Haradinaj Defence confirmed that it sought leave to appeal in relation to the First and Second Issues.¹⁹

17. On 7 December 2021, the SPO noted that in view of the Trial Panel's indication that it would be inclined to grant leave to appeal in relation to the First and Second Issues, the SPO did not object to the Haradinaj Defence request for leave to appeal.²⁰

18. On 8 December 2021, the Trial Panel issued the Decision on Defence Request for Leave to Appeal, certifying the appeal in respect of the First and Second Issues.

19. On 9 December 2021, the President of the Specialist Chambers issued the Decision Assigning a Court of Appeals Panel.

¹⁵ Annex A to Submission of Expert Report from the Defence of Mr. Haradinaj, KSC-BC-2020-07/F00426/A01, 9 November 2021, Confidential ('Report').

¹⁶ Prosecution challenge to proposed Defence expert Witness 18 and report, KSC-BC-2020-07/F00438, 16 November 2021.

¹⁷ Haradinaj Defence Response to F00438, KSC-BC-2020-07/F00444, 22 November 2021 ('22 November 2021 Response').

¹⁸ Decision, para.120.

¹⁹ Defence Application for Leave to Appeal in respect of 'Decision on Prosecution Requests in Relation to Proposed Defence Witnesses', KSC-BC-2020-07/F00474, 6 December 2021.

²⁰ KSC-BC-2020-07, 7 December 2021 Transcript, p.2238.

20. On 9 December 2021, the Panel ordered the Haradinaj Defence to file its appeal by 16 December 2021, the SPO to respond by 23 December 2021, and the Haradinaj Defence to file any reply by 29 December 2021.²¹

21. On 16 December 2021, the Haradinaj Defence filed the Appeal.

III. SUBMISSIONS

A. The Appeal should be summarily dismissed

22. Despite repeated concerns raised, and warnings issued, by Court of Appeal Panels in relation to submissions by Counsel for Mr. Haradinaj,²² the Appeal is deficient and should be summarily dismissed for the following reasons.²³

23. First, the Appellant fails to set out the alleged error and to indicate, with sufficient precision, how this error would have materially affected the impugned decision. Indeed, the Appeal fails to specify, let alone establish, that in reaching the Decision the Trial Panel committed: (i) an error on a question of law invalidating the Decision; (ii) an error of fact which has occasioned a miscarriage of justice; or (iii) a discernible error in that the decision is: (a) based on an incorrect interpretation of governing law; (b) based on a patently incorrect conclusion of fact; or (c) so unfair or unreasonable as to constitute an abuse of discretion.²⁴

²¹ Order Varying Time Limits for Briefing of Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, KSC-BC-2020-07/IA006/F0002, 9 December 2021.

²² See Decision on the Defence Appeals Against Decision on Preliminary Motions, KSC-BC-2020-07/IA004/F00007, 23 June 2021 ('IA004/F00007'), paras 15-17, 20-23; Decision on the Appeals Against Disclosure Decision, 29 July 2021 KSC-BC-2020-07/IA005/F0008 ('IA005/F0008'), para.16; Decision on Appeal Against "Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi", KSC-BC-2018-01/IA001/F00005, 1 October 2021, paras 4, 6.

²³ See IA004/F00007, paras 14-17, 20-23; IA005/F0008, paras 16-18.

²⁴ See Article 46(1) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015; IA004/F00007, paras 8-11.

24. On the rare occasion where the Appellant specifically alleges that the Trial Panel erred, no specificity is provided as to the nature of the error.²⁵ Indeed, the Appeal merely amounts to an expression of disagreement with the Decision.²⁶ As such, the Appeal is incapable of success and should be rejected *in limine*.

25. Second, the Appellant merely repeats arguments that were unsuccessful before the Trial Panel,²⁷ without demonstrating that their rejection constituted an error warranting the Panel's intervention.

26. Third, the Appeal contains arguments that go beyond the scope of the First and Second Issues, are irrelevant to the Decision and/or concern matters that do not actually arise from it. In particular, the Appeal inappropriately addresses and/or challenges the following such issues, the majority of which have also been decided upon following previous litigation: (i) the issue of disclosure to the Defence of the documents allegedly made public by the Accused;²⁸ (ii) allegations concerning the Trial Panel's Presiding Judge;²⁹ (iii) the Trial Panel's decision as to what evidence should be elicited in private session;³⁰ (iv) Defence views on what cases the SPO may or may not be pursuing beyond that involving the Accused;³¹ and (v) the Trial Panel's finding as to the permissible scope of evidence concerning 'public interest'.³²

²⁵ See Appeal, paras 26, 62, 65.

²⁶ See Appeal, paras 12-13, 33, 36, 38, 55, 61-65, 68, 71, 74, 76-78, 82.

²⁷ Compare Appeal, paras 12-13, 29, 35-36, 38, 52, 56-64, 67-68 with 27 September 2021 Response, paras 33-35, and 22 November 2021 Response, paras 13, 22, 26-27, 31-33, 36-38, 42.

²⁸ Appeal, paras 18-20, 74-75; See Public Redacted Version of Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSC-BC-2020-07/F00141/RED, 23 February 2021.

²⁹ Appeal, paras 41, 43; See Decision on the Application for Recusal or Disqualification, KSC-BC-2020-07/F00272, 6 August 2021; Decision on the Request for Reconsideration of the Decision on Recusal or Disqualification, KSC-BC-2020-07/F00278, 20 August 2021.

³⁰ Appeal, para.21; See KSC-BC-2020-07, 20 October 2021 Transcript, pp.1116-1117; KSC-BC-2020-07, 6 December 2021 Transcript, pp.2146-2147.

³¹ Appeal, paras 21, 24.

³² Appeal, paras 16-21, 27-29; See Decision, para.61.

27. Fourth, the Appeal misrepresents and ignores relevant parts of the factual record and Decision. In particular: (i) the Trial Panel did not reject DW1253's proposed evidence in its entirety merely because he proposes to offer an opinion on the compatibility of the search and seizure operations with the Rules.³³ Rather, this was one of numerous factors relied upon in such rejection;³⁴ and (ii) contrary to the Appellant's assertions,³⁵ both the Trial Panel and Defence have been provided with certain excerpts of the documents which the Accused are alleged to have made public, as well as voluminous evidence in which the contents of such documents are discussed at length by the Accused themselves.

28. Fifth, the Appellant fails to provide specific references to evidence discussed in the Appeal,³⁶ and fails to substantiate argument with reference to case-law.³⁷

29. Should the Panel nevertheless consider the merits of the Appeal, it should be rejected for the following reasons.

B. The Trial Panel did not err in finding that the proposed testimony of DW1250 and DW1251 is irrelevant and deciding not to hear these witnesses (First Issue)

30. A Party's discretion in selecting and presenting its evidence is not unlimited, and trial panels may intervene in order to exclude irrelevant evidence and ensure the fair and expeditious conduct of the trial.³⁸ Indeed, trial panels enjoy considerable discretion in the conduct of proceedings before them, including as to what witness

³³ *Contra* Appeal, paras 71-72.

³⁴ *See* Decision, paras 106-111.

³⁵ Appeal, paras 16-20, 74-75.

³⁶ *See e.g.* Appeal, para.52.

³⁷ *See e.g.* Appeal, paras 30, 61-68.

³⁸ *See* Rules 119(3) and 138(1); ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, 4 February 2016, para.6; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.7, Decision on Defendants' appeal against 'Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge', 1 July 2008, para.25.

evidence to hear.³⁹ Trial panels are obliged to ensure that evidence is presented effectively for the ascertainment of the truth and that there is no undue consumption of time and resources.⁴⁰

31. The Trial Panel's findings in relation to the irrelevance of the proposed testimony of DW1250 and DW1251 and its decision not to hear these witnesses⁴¹ contain no discernible error in the exercise of the Trial Panel's discretion.

32. The subject-matter of the proposed evidence of DW1250 and DW1251 bears no relevant link to this case and none of the submissions in the Appeal succeed in establishing any such purported connection. The Defence attempts to link the SPO to EULEX or the SPRK⁴² cannot distort the reality that, as is plain to all but the Appellant, the institutions are distinct. Even if they were not, the proposed evidence would still fail in terms of relevance to the case because the conduct of EULEX and/or the SPRK has no bearing on the case as charged.

33. The insinuation that the Trial Panel's findings in relation to DW1250 and DW1251 were based on a need to avoid 'embarrassment to the institution'⁴³ is unfounded. The Trial Panel made no finding or remark to this effect, and the Appellant ignores the clear reasons for rejecting this evidence in the Decision.⁴⁴

³⁹ ICTR, *Prosecutor v. Setako*, ICTR-04-81-A, Judgement, 28 September 2011, para.19; IRMCT, *Prosecutor v. Stanišić and Simatović*, MICT-15-96-T, Decision on Prosecution Request for Certification to Appeal Decision on Prosecution Fourth Omnibus Motion for Admission of Evidence Pursuant to Rule 111, 5 November 2018, p.2; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, 30 January 2015 ('*Popović et al. Appeal Judgement*'), para.79; See also ICTR, *Prosecutor v. Uwinkindi*, ICTR-01-75-AR72(C), Decision on Defence Appeal Against the Decision denying Motion Alleging Defects in the Indictment, 16 November 2011, para.6.

⁴⁰ See Rule 143(4).

⁴¹ Decision, paras 80-82.

⁴² Appeal, paras 13, 31-34, 40.

⁴³ Appeal, paras 37, 42.

⁴⁴ Decision, paras 80-82.

34. Rather than constituting ‘a direct assault on the fairness of proceedings’, as the Appellant hyperbolically and unfoundedly alleges,⁴⁵ the decision to decline to hear the proposed evidence of DW1250 and DW1251 is reasoned,⁴⁶ consistent with the applicable regulatory framework and jurisprudence,⁴⁷ and conducive to the efficiency of proceedings.

C. The Trial Panel did not err in finding that the proposed testimony of DW1253 is impermissible and deciding not to hear this witness (Second Issue)

35. The Trial Panel’s findings in relation to the impermissible character of the proposed evidence of DW1253 under Rule 149 and its decision not to hear this witness⁴⁸ contain no discernible error in the exercise of the Trial Panel’s discretion.

36. As with DW1250 and DW1251, none of the Appellant’s submissions succeed in establishing any purported relevance of DW1253’s proposed evidence to the charges against the Accused.

37. Criticism or confirmation of the appropriateness of SPO operations⁴⁹ cannot assist the Trial Panel when, unlike DW1253, it has all the relevant evidence at its disposal to make any relevant determination thereon. The fact that DW1253 may have used the same evidence management software as the SPO does not mean his proposed evidence is relevant,⁵⁰ noting that the manner in which this legal tool is used is entirely divorced from the charges against the Accused. In this regard, the Appellant’s challenges to, and baseless assumptions about, the relevant experience of members of the Trial Panel⁵¹ are inappropriate and fail to demonstrate any error in the Decision.

⁴⁵ Appeal, para.30.

⁴⁶ See Decision, paras 80-82.

⁴⁷ See fns. 38-40 above.

⁴⁸ Decision, paras 106-111.

⁴⁹ Appeal, para.70.

⁵⁰ *Contra* Appeal, para.59.

⁵¹ Appeal, paras 57, 59-60.

38. The Appellant also misrepresents DW1253's proposed evidence. A limited number of paragraphs in DW1253's report contain 'specific comment on that which has been undertaken by the SPO'.⁵² However, the basis for such 'comment' is wholly inadequate as it is based on an incomplete record, with DW1253 himself noting he only reviewed 'limited documentation', including redacted versions of evidence.⁵³ Further, the Appellant's claim, relating to search and seizure operations, that '[a]t no stage has the witness given an opinion on whether the process was lawful'⁵⁴ ignores the fact that the Report extensively assesses the lawfulness of such operations⁵⁵ and, in the final paragraph thereof, makes explicit conclusions on this matter.⁵⁶

39. Contrary to the Appellant's assertion,⁵⁷ the Trial Panel's reference to jurisprudence from *Nahimana et al.* in the context of its finding that 'most of what DW1253 would propose to say could be advanced by Counsel submissions'⁵⁸ is apt. As in *Nahimana et al.*, DW1253's proposed evidence relates to non-technical matters within the purview of the Trial Panel.⁵⁹ Regardless, the key aspect of the cited jurisprudence is the ability of counsel to address, in oral or written argument, matters a proposed expert would address,⁶⁰ which is certainly true of the Haradinaj Defence and DW1253's proposed evidence as demonstrated by previous Defence submissions.

40. Indeed, the Defence concedes it has 'consistently challenged the poor investigative practices of the SPO, both in preliminary submissions and in cross-

⁵² See Appeal, para.55; Report, paras 23-24.

⁵³ See Report, paras 23-25.

⁵⁴ Appeal, para.69.

⁵⁵ See Report, paras 24-31.

⁵⁶ See Report, para.31, stating, *inter alia* 'the SPO did not carry out these operations (a) in accordance with the RPE [...]']

⁵⁷ Appeal, paras 79-82.

⁵⁸ Decision, para.110, fn.151.

⁵⁹ See Report paras 26-31; *Contra* Appeal, paras 79-82.

⁶⁰ See ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Decision on the Expert Witnesses for the Defence, 24 January 2003, para.22; ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007, paras 292-294.

examination at trial'.⁶¹ This only serves to confirm the appropriateness of the Trial Panel's noting that: (i) to the extent that the Defence sought to take issue with the method used by W04841 to establish the confidential status of certain material, it did so as part of its cross-examination of that witness;⁶² and (ii) most of what DW1253 would propose to say could be advanced by Counsel as submissions.⁶³

41. The Decision in relation to DW1253 is also consistent with other relevant jurisprudence which establishes, *inter alia*, that trial panels: (i) have discretion to determine what proposed expert evidence may or may not assist them;⁶⁴ (ii) have discretion to bar testimony of a proposed expert on legal matters;⁶⁵ and (iii) should not allow expert report or testimony to usurp their functions as the ultimate arbiter of fact and law.⁶⁶

IV. CONFIDENTIALITY

42. Pursuant to Rule 82(4), this filing is confidential in line with the classification of the Appeal. The SPO notes that the Decision was classified as public and that the SPO has not referred to DW1250, DW1251 or DW1253 by name. Accordingly, the SPO would not oppose the reclassification of the filing to public should the Panel deem it appropriate to do so.

V. RELIEF REQUESTED

43. For the foregoing reasons, the Panel should dismiss the Appeal in its entirety.

⁶¹ Appeal, para.58.

⁶² Decision, para.109.

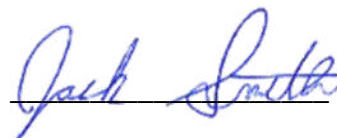
⁶³ Decision, para.110.

⁶⁴ ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Prosecution motion for reconsideration of the decision on prospective experts Guichaoua, Nowrojee and Des Forges, or for certification, 16 November 2007 ('Karemera Decision'), para.14; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1159, Decision on Defence preliminary challenges to Prosecution's expert witnesses, 9 February 2016 ('Ntaganda Decision'), para.8.

⁶⁵ *Popović et al.* Appeal Judgement, para.79.

⁶⁶ *Ntaganda* Decision, para.8; *Karemera* Decision, para.21.

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At The Hague, the Netherlands