

In: KSC-BC-2020-07

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Court of Appeals Panel

Judge Michele Pichard

Judge Emilio Gatti

Judge Nina Jorgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

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Defence Reply to Prosecution Response to Haradinaj Defence Appeal

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I. INTRODUCTION

1. On 3 December 2021, the Trial Panel issued its 'Decision on Prosecution requests in Relation to Proposed Defence Witnesses'.¹
2. On 6 December 2021, the Defence for Mr. Nasim Haradinaj ("Haradinaj Defence"), as per the invitation of the Trial Panel in the aforesaid Decision, filed its 'Application for Leave to Appeal', having regard to the Decision wherein it confirmed at paragraph 121 that the Defence were "*not required to make submissions regarding the certification test under Rule 77(2) of the Rules in relation to the above issues*".²
3. On 8 December 2021, that decision being communicated on 9 December 2021, the Trial Panel formally granted leave to appeal,³ 'Decision on Defence Request for Leave to Appeal F00470', certifying the question of whether the decision to refuse to hear the evidence of DW1250, DW1251, and DW1253 was correct, those issues characterised as being:
 - a. The findings of the Trial Panel "*in relation to the irrelevance of the proposed testimony of DW1250 and DW1251 and its decision not to hear these witnesses*";⁴
and

¹ KSC-BC-2020-07/F00470, Trial Panel, Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 3 December 2021, Public.

² KSC-BC-2020-07/F00474, Haradinaj Defence, Defence Application for Leave to Appeal in respect of 'Decision on Prosecution Requests in Relation to Proposed Defence Witnesses', 6 December 2021, Public.

³ KSC-BC-2020-07/F00484, Trial Panel, Decision on Defence Request for Leave to Appeal F00470, 8 December 2021, Public.

⁴ *Ibid.* at paragraph 1.

- b. The findings of the Trial panel *“in relation to the impermissible character of the proposed evidence of DW1253 under Rule 149 of the rules and its decision to not hear this witness”*.⁵
4. On 9 December 2021, the President of the Specialist Chambers issued the Decision Assigning a Court of Appeals Panel.⁶
5. On 16 December 2021, the Haradinaj Defence filed its Appeal.⁷
6. On 21 December 2021, the Specialist Prosecutor’s Office (“SPO”) filed its ‘Response’ to that Appeal.⁸
7. The Haradinaj Defence now seeks to reply to that Response, noting that the purpose of any reply is to address those issues specifically raised within any Response.

II. SUBMISSIONS

That the Appeal should be summarily dismissed

8. The submissions of the SPO on this point are misconceived and without merit; further, there appears to be a failure to acknowledge that the granting of leave to

⁵ *Ibid.*

⁶ KSC-BC-2020-07/F00IA006/F00001, President, Decision Assigning a Court of Appeals Panel, 9 December 2021, Public.

⁷ KSC-BC-2020-07/IA006-F00003, Haradinaj Defence, Submissions on Appeal in Respect of Decision KSC-BC-2020-07-F00470, 16 December 2021, Confidential (“Appeal”).

⁸ KSC-BC-2020-07/IA006/F00004, SPO, Prosecution response to Haradinaj Defence appeal from ‘Decision on Prosecution Requests in Relation to Proposed Defence Witnesses’, 21 December 2021, Confidential. (“SPO Response”).

appeal was at the express invitation of the Trial Panel,⁹ and thus the application for leave submitted thereafter was not required to address the specifics of the test, as per the specifics of the decision of the Trial Panel. The SPO submissions in this regard should be dismissed.

9. The substantive submissions on appeal filed by the Haradinaj Defence clearly and adequately set out the submitted errors of the Trial Panel, noting that the Trial Panel erred in terms of its assessment of relevance of the proposed evidence, the extent to which the proposed expert evidence would assist the Trial Panel, and further, whether or not the proposed evidence would usurp the functions of the Trial Panel.¹⁰
10. Further, the nature of the errors submitted as being made by the Trial Panel are specific, with relevant elements of that decision cited, and cross-referenced with the relevant elements of the proposed evidence.¹¹
11. At paragraph 24 of the Response, the SPO submit that the Appeal ought to be rejected *in limine*. It is submitted that such a position is entirely baseless. The SPO again appear to fail to acknowledge that the application for leave to appeal was invited by the Trial Panel, after having already indicated that it would grant leave by way of an

⁹ KSC-BC-2020-07/F00484, Trial Panel, Decision on Defence Request for Leave to Appeal F00470, 8 December 2021, Public.

¹⁰ KSC-BC-2020-07/IA006-F00003, Haradinaj Defence, Submissions on Appeal in Respect of Decision KSC-BC-2020-07-F00470, 16 December 2021, Confidential (“Appeal”).

¹¹ KSC-BC-2020-07/IA006-F00003, Haradinaj Defence, Submissions on Appeal in Respect of Decision KSC-BC-2020-07-F00470, 16 December 2021, Confidential (“Appeal”).

oral order, and further, that invitation ordered that there was no need to demonstrate how the relevant test per Rule 77 had been satisfied.¹²

12. At paragraph 26 the SPO again seeks to wrongly categorise issues as being irrelevant. The fact that those issues quoted may have been considered within other elements of the case does not render the same irrelevant to the instant issue. A trial is not compartmentalised where an issue is raised at a certain point and once it has been, it cannot be raised again in terms of another point where it may be relevant to do so. Such an approach would be wholly illogical.
13. The reality of the matter, is that a central theme of the defence adduced by the Defendant is the investigation undertaken by the SPO, or demonstrable lack thereof, the failure of any proper chain of custody and the failure to maintain proper records of investigative actions, the cavalier, at best, attitude towards its disclosure obligations by the SPO, and the question of procedural fairness. The SPO may dispute all such issues, as they are entitled to do; however, the fact that they dispute such issues, does not render those issues irrelevant. In the same vein, the fact that disclosure applications have been ruled upon for example, does not mean that such issues are no longer relevant.
14. The SPO has, from the outset of these proceedings, appeared to have adopted its own position in terms of how the trial ought to proceed, what rules it should and should not follow, and what it should and should not disclose. This is a matter for the SPO

¹² KSC-BC-2020-07/F00484, Trial Panel, Decision on Defence Request for Leave to Appeal F00470, 8 December 2021, Public.

as to how it runs its own case and what case it puts forward at trial, however, such decisions cannot be taken at the expense of a fair trial and further, its decisions do not usurp the Rules of Procedure and Evidence before the Kosovo Specialist Chambers,¹³ nor do they usurp the fair trial rights to which they must adhere, guarantees that are contained under Chapter II to the Constitution of the Republic of Kosovo and an integral part of the domestic law.

15. The initial submissions of the SPO can therefore be appropriately dismissed as being wholly devoid of merit.

The Trial Panel did not err in Finding the proposed testimony of DW1250 and DW1251 as irrelevant.

16. No issue is taken with the principle that the Trial Panel can limit the evidence to be called by a party in appropriate circumstances.
17. However, as already argued within the substantive submissions, the proposed evidence is of direct relevance to matters that form part of the defence to be presented at trial, and thus the submissions of the SPO at paragraph 32 of the Response are misconceived.
18. The SPO are entirely wrong in their submission that EULEX and/or SPRK have no link to the KSC and/or the SPO and to suggest that there is no link is entirely fanciful.
19. The proposed evidence makes that link.¹⁴

¹³ KSC-BD-03/Rev2/2020, Rules of Procedure and Evidence, adopted on 5 May 2020.

¹⁴ Appeal, at paras. 31, 34, 38 and 42.

20. Again, the SPO are perfectly entitled to reject that position, and therefore, they are at liberty to challenge that evidence during cross-examination. However, to suggest that there is no link is purely fanciful, in particular, a cursory search of the EULEX website demonstrates that *“The Mission also assists the Specialist Chambers and Specialist Prosecutor’s Office with logistic and operational support in line with relevant Kosovo legislation”*.¹⁵ Further, the recent vacancy announcements by the KSC/SPO are advertised by the European External Action Service (“EEAS”),¹⁶ the same appointing authority as EULEX.
21. The Haradinaj Defence are not seeking to *“distort the reality”*, and such a submission is deeply offensive, albeit a common and regrettable characteristic of this case.
22. Further, the issues concerning the approach taken by the SPO and the KSC to this specific case, and cases more generally has been a common theme throughout the entirety of proceedings, accordingly, the proposed evidence, particularly in terms of case selection, individuals, political interference, and concerns, are matters that are entirely relevant as it supports the defence position.
23. Again, the SPO is entitled to disagree with the evidence and challenge that evidence, much as it is entirely within the powers and function of the Trial Panel to reject such evidence having heard live testimony. However, to prevent the calling of that

¹⁵ EULEX, Mandate, available at: <https://www.eulex-kosovo.eu/?page=2,75>, last accessed 29 December 2021.

¹⁶ Kosovo Specialist Chambers and Specialist Prosecutor’s Office Internship Call for Contributions (CfC) 2-2021, available at https://www.scp-ks.org/sites/default/files/public/content/annex1-internship_cfc_2-2021-final-limite.pdf, last accessed 29 December 2021.

evidence unfairly and inappropriately limits the parameters of the Defence for no justifiable or appropriate reason.

24. The Haradinaj Defence set out in its appeal submissions that the mere fact that the proposed testimony may cause embarrassment to the institution, an individual judge or prosecutor, or the appointing authority, does not provide proper justification for refusing to hear that evidence.¹⁷

The Trial Panel did not err in finding that the proposed testimony of DW125 is impermissible

25. The submission of the SPO at paragraph 36 appears to attempt to distort the reality of the Defence(s) being raised, and the position of the Defendant.
26. During the SPO case, the Trial Panel has heard evidence concerning the investigation, its efficacy, and the dubious practices adopted. These are all relevant to the Defence and have been pursued accordingly.
27. Evidently, the proposed evidence does not relate to an individual 'charge', but, it does clearly and obviously relate to a limb of the defence being adduced, and therefore it is relevant.
28. At paragraph 37, the SPO suggests that in terms of the evidence management software issue that "*the manner in which this legal tool is used is entirely divorced from the charges against the Accused*". Such a submissions is devoid of merit.

¹⁷ Appeal, at paras. 37 and 42.

29. Two SPO witnesses gave evidence detailing the steps that they took and did not take, and the reasons for the decisions being made. It is of note that certain elements of that evidence is submitted to be incredible, however, the reality of the matter is that that software is central to the investigation and it is the investigation that forms part of the Defence. Accordingly, how that software is used is of relevance as it goes to the credibility of the two SPO witnesses on the issue.¹⁸
30. Accordingly, the position is maintained that the Trial Panel erred in making its determination on the issue of relevance.
31. Contrary to the position espoused at paragraph 38 of the SPO Response, there is no misrepresentation of the proposed evidence. It is however of note that the SPO appears to criticise the proposed expert witness for basing the statement on an *"incomplete record"* and *"limited documentation"*, when it is the SPO that, from the first day of proceedings, has consistently refused to provide the Defence, the Pre-Trial Judge, and the Trial Panel, with full and complete access to the evidence. It is wholly inappropriate to criticise when it is the SPO and its position of belligerence that has given rise to this situation in the first instance.
32. It notable, that the SPO criticises the expert for basing his statement on an *"incomplete record"* and *"limited documentation"* despite the fact that the Haradinaj Defence sought

¹⁸ KSC-BC-2020-07, Trial Transcript, 4 November 2021, Public, page 1779, lines 8-20, cross-examination of SPO Witness W04842 (Jukić).

invited the SPO, through *inter partes* communications, to agree the documentation to provide the expert, preferring instead to reserve its position and object to the expert.¹⁹

33. The reality is that the SPO is well aware that its investigative practices have fallen woefully short of that which ought to be expected and is therefore adamant that any further evidence from respected and senior individuals confirming this inadequacy must not be called.²⁰

34. Again, if the SPO do not accept the expert's evidence they are at liberty to challenge it through cross-examination.

35. Similarly, the Trial Panel would be acting within their mandate to reject the proposed evidence having heard the live testimony of the expert witness. However, to reject prior to it being adduced unfairly limits the ability of the Defendant to present his defence, and thus the Trial panel has clearly erred in its decision to refuse to allow such evidence to be called.

III. CONCLUSION

36. The arguments of the SPO add nothing to the matter before the Appeals Panel, the arguments raised being in the main baseless, or otherwise simply a rehearsal of a

¹⁹ Email from James Pace, Associate Prosecutor, to Toby Cadman, Specialist Counsel to Nasim Haradinaj, dated 27 October 2021: "At this stage the SPO takes no position on what information should be provided to the proposed Defence expert."

²⁰ KSC-BC-2020-07, Trial Transcript, 21 October 2021, Public, page 1192, lines 21-22: SPO Witness WO4841 (Pumper): "I am unaware of something written on a guidance how to conduct investigations." In this regard, it is noted that the instruction of the expert came about as a direct result of the evidence of Witness WO4841.

previous position that continues to seek to limit the ability of the Defendant to fairly present his case.

37. The position of the Defence is clear in terms of when and how the Trial Panel erred in its decision and the Appeals Panel is invited to rule accordingly.

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