

In: KSC-BC-2020-06
**Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli,
Rexhep Selimi and Jakup Krasniqi**

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

Date: 17 January 2022

Language: English

Classification: Confidential

**Veseli Defence Application for Leave to Appeal Decision Concerning
Submission of Corrected Indictment and Request to Amend
Pursuant to Rule 90(1)(b)**

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I. INTRODUCTION

1. The Veseli Defence (“Defence”) hereby files this application for leave to appeal the 23 December 2021 Decision concerning the SPO’s submission of corrected indictment and request to amend (“Impugned Decision”).¹
2. The Defence proposes the following Issues for Certification:
 - First Issue: Whether the Pre-Trial Judge erred in law by failing to find a violation of the right to be heard in article 39(8) of the Law and rule 90(1)(b) of the Rules, in relation to allegations contained in paragraph 42 of the Proposed (now Amended) Indictment that are entirely redacted;
 - Second Issue: Whether the redactions applied to paragraph 42 of the Amended Indictment violate the right of Mr Veseli to be informed promptly of the nature and cause of the charges against him, as guaranteed by Article 30(1) of the Constitution, Article 6 of the ECHR, as well as Article 21(4)(a) of the Law;
 - Third Issue: Whether the new allegations of personal participation could constitute an independent basis for conviction, *i.e.*, a new charge, by virtue of being re-characterised by a Court of Appeals Panel acting pursuant to Article 46(6);
 - Fourth Issue: Whether the Pre-Trial Judge erred by finding that the redacted allegation of personal participation of the Accused, referred to in paragraph 42 of the Amended Indictment does not carry an additional risk of conviction.

¹ F00635, Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), 23 December 2021.

- Fifth Issue: Whether the Pre-Trial Judge erred in law by failing to consider appropriate measures to counterbalance the redactions applied to paragraph 42 of the Amended Indictment.
- Sixth Issue: Whether prosecutorial “diligence” must be assessed against the conduct of the SPO, as opposed to the stage of the proceedings; whether the proposed amendments are inconsistent with the right to be tried within a reasonable time; whether the scope of the amendments infringe the right to have adequate time to prepare the defence; and taken together, whether the amendments are prejudicial to, and inconsistent with the rights of the Accused.

II. APPLICABLE LAW

3. The Defence recalls the legal test set out in filing KSC-BC-2020-06/F00474 which is hereby incorporated by reference.²

III. SUBMISSIONS

First Issue

4. The First Issue is concrete, easily identifiable and stems directly from the Impugned Decision. At paragraphs 5-6 of its Response,³ the Defence argued, *inter alia*, that the fully redacted new factual allegation referred to in paragraph 42 of the (now) Amended Indictment, vitiated the Accused’s rights under Rule 90(1)(b), by foreclosing the possibility that Mr Veseli be heard prior to the Pre-Trial Judge deciding whether leave to amend the indictment should be granted. At paragraph 47 of the Impugned Decision, the Pre-Trial Judge found that the

² F00474/CORR, Corrected Version of Veseli Defence Application for Leave to Appeal Decision on Motion to Challenge Jurisdiction on the Basis of Violations of the Constitution, 18 October 2021, paras 3-4.

³ F00481, Veseli Defence Response to SPO Submission of Corrected Indictment and Leave to Amend the Indictment (KSC-BC-2020-06-F00455CONFRED), 20 September 2021.

Defence was “in an overall position to provide meaningful challenges to the Proposed Amendments on the basis of the confidential redacted version of the Confirmed Indictment and the supporting material.”⁴

5. The issue concerns the proper interpretation of Rule 90(1)(b) proceedings. For instance, the Pre-Trial Judge held that “the Veseli Defence fails to demonstrate how the Third Category of the Proposed Amendments is factually or legally distinct and can serve as additional basis of conviction.”⁵ However, since the incident referred to in paragraph 42 of the Proposed Amendments is fully redacted, the Defence was barred from conducting such assessment. The Court of Appeals will, therefore, be asked to determine the proper scope of the Accused’s participation in such proceedings and whether the right to be heard may still be considered satisfied in case the new factual allegations of personal participation of the Accused in the crimes charged are not disclosed to the Accused.
6. The issue undoubtedly affects the fair conduct of the trial and the outcome of the proceedings. The *audi alteram partem* principle, as reflected in Rule 90(1)(b) of the Rules, is a cornerstone requirement in guaranteeing a fair trial. An immediate resolution from the Court of Appeals would therefore offer clarity on the interpretation of Rule 90(1)(b) and avoid a potential violation of constitutional and human rights of the Accused.

Second Issue

7. While the Second Issue emanates from the same section of the Impugned Decision as the First Issue, it concerns a different legal error. It engages the constitutional rights of Mr Veseli to be informed promptly of the nature and cause of the charges against him and to have adequate time and resources to prepare his defence, pursuant to Article 30(1) of the Constitution, Article 6 of

⁴ Impugned Decision, para. 47.

⁵ Impugned Decision, para. 27.

the ECHR, as well as Article 21(4)(a) of the KSC. Irrespective of whether the incident referred to in paragraph 42 of the Amended Indictment constitutes a new charge, it is undisputed that factual allegations of personal participation in the crimes charged concern the “nature and cause of the charges” against Mr Veseli.

8. Moreover, as the Defence previously argued,⁶ the issue remains whether, considering the stage of the proceedings and the considerable time passed since the Accused have been remanded in detention, any redaction of the material facts alleged in the indictment would be *tout court* in violation of the right of the Accused to be promptly informed of the charges against them. The Defence notes that the Court of Appeals is already seized with a similar appeal by the Thaçi Defence in the context of challenges to the form of the Indictment.⁷ However, the Thaçi appeal relates, *a fortiori*, to other redacted sections of the Indictment.⁸ It is not clear whether if, in the event the Court of Appeal grants the appeal, it would apply to *all* redactions of material facts in the Indictment.
9. The Issue concerns a basic constitutional right, namely the right to a fair trial. Any violation thereof will significantly affect the outcome of the trial. An immediate resolution by a Court of Appeals Panel is warranted.

Third Issue

10. The Third Issue derives from paragraphs 26-27 of the Impugned Decision, and concerns the proper interpretation of the Law, namely whether Article 46(6) of the Law (or any other provision) allows a Trial Panel or Court of Appeals Panel to change the legal characterisation of the facts and enter a finding of guilt on

⁶ F00481, para. 6.

⁷ IA012/F00006, Thaçi Defence Appeal with Leave Against the “Decision on Defence Motions Alleging Defects in the Form of the Indictment”, 12 November 2021, “Issue 3”, paras 11-13.

⁸ *Ibid*, para. 11 (referring to paragraphs 163, 165, 167, 218, 250, 269, 277-281, 285-286 of filing F00413).

the basis of an alternative mode of liability *not previously charged in the confirmed Indictment*. At paragraph 26, the Pre-Trial Judge found that the two additional incidents are “*factually distinct from those already pleaded under this heading*” but they did not amount to new charges. According to the Pre-Trial Judge, the Third Category did not allege a new type of participation in the alleged JCE, but rather added further precision to a form of participation already pleaded. At paragraph 27 of the Impugned Decision, the Pre-Trial Judge disagreed with the Defence’s interpretation of Article 46(6) of the Law, and held that the provision “*does not establish whether a proposed amendment amounts to a new charge.*” However, the Defence did not make such argument. Responding to the SPO submissions,⁹ the Defence noted that, even if no new mode of liability is charged, the factual allegations contained in the Third Category may serve as an independent basis for conviction under an alternative mode of liability.¹⁰ The Defence notes that the phrase “*alternative modes of liability*” contained in Article 46(6) of the Law is vague and does not specifically refer to alternative modes of liability already pleaded in the Indictment. Nor did the Pre-Trial Judge explicitly exclude the possibility that a Trial Panel or Court of Appeals Panel may enter a conviction based on an alternative mode of liability which is not already pleaded by the SPO (such as direct perpetration).

11. The issue significantly affects the fair and expeditious conduct of proceedings as well as the outcome of the trial because, should the Third Category constitute new charges, any determination on the merits by a Trial Panel would be null and void in the absence of a further confirmation of the Indictment and further appearance of the Accused. A prompt determination by the Court of Appeals Panel would obviate such risk.

⁹ F00455/CONF/RED, paras 10-11.

¹⁰ Article 46(6) of the Law: (*ad contrario*, in cases where “the Trial Panel has failed to make findings on alternative modes of liability”).

Fourth Issue

12. The Fourth Issue stems from paragraph 26 of the Impugned Decision and concerns the merits of the Pre-Trial Judge's finding that the Third Category does not introduce a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment.
13. Due to the wholesale redaction of one of the Third Category incidents, the Defence cannot possibly know for certain whether the amendment *does not* in fact introduce a new basis for conviction (though the Pre-Trial Judge's description of it as an "additional incident" tends to indicate that it does more than add "further precision" to charges already contained therein). The Defence submits that, where it is suspected but cannot be fully substantiated that judicial error has occurred – due to extensive redactions – the Defence must be allowed to have that decision reviewed by the Court of Appeals as a counterbalancing measure to ensure the fairness of the proceedings.
14. Additionally, the Defence submits that the authorities that the Pre-Trial Judge relied upon do not appear to provide adequate support for the conclusion that the new JCE allegations do not amount to new charges. Both authorities relate to instances where the proposed amendments gave precision to an already pleaded allegation (charge).¹¹ Indeed, the subsequent paragraphs in the *Muvunyi* Decision (paras 32-33) confirm the view that a fresh allegation concerning the Accused's personal participation constitutes a new charge.¹²

¹¹ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-PT, [Written Reasons for Decision on Prosecution Motion to Amend the Second Amended Indictment](#), 16 December 2009, para. 41 ("but rather it gives the allegation more precision"); ICTR, *Prosecutor v. Muvunyi*, ICTR-00-55A-AR73, [Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005](#), 12 May 2005, para. 31 ("the Prosecution relies on these other incidents as supporting one charge of genocide, or alternatively complicity in genocide, and as such the additional incidents are supplementary material facts in support of an existing charge").

¹² ICTR, *Prosecutor v. Muvunyi*, ICTR-00-55A-AR73, [Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005](#), 12 May 2005, para. 33.

15. With regard to the test concerning the fair and expeditious conduct of proceedings or the outcome of the trial, and the need for an immediate resolution by a Court of Appeals Panel, the Defence reiterates *mutatis mutandis* the same considerations mentioned above in paragraph 11.

Fifth Issue

16. At paragraph 47 of the Impugned Decision, the Pre-Trial Judge found the redactions to be "*necessary and proportionate to protect the identities of the witnesses and the confidentiality of the information related to said witnesses.*" However, the Pre-Trial Judge conducted no discussion related to counterbalancing measures. In this respect, the Defence notes that, while the safety of witnesses is of paramount importance, such interests must be assessed against the rights of the accused for a fair trial. On balance, the rights of the accused must prevail.
17. The Defence stresses that this is not an attempt to circumvent previous decisions granting protective measures to witnesses. However, neither the SPO Request, nor the Impugned Decision indicate the specific decision(s) which constitute the basis for the redactions applied to paragraph 42 of the Amended Indictment. Therefore, the Defence has no information whether any counterbalancing measure has been applied in this case. Moreover, even if counterbalancing measures were ordered in respect of the supporting material contained in Annex 5 of the SPO Request, no counterbalancing measures were discussed with respect to the text of the Indictment, which relates to an encroachment of a different aspect of the right to fair trial, namely the right to be promptly informed of the nature and cause of the charges.
18. The issue significantly affects the outcome of the trial, considering that non-disclosure of material facts in the Indictment constitutes a clear encroachment upon an Accused's right to a fair trial. Resolution by a Court of Appeals Panel is urgently warranted.

Sixth Issue

19. The sixth issue – whether the proposed amendments are prejudicial to, and inconsistent with, the rights of the Accused – derives from paragraphs 32-36 of the Impugned Decision.
20. At paragraph 32 of the Impugned Decision, the Pre-Trial Judge correctly found that factors to be considered include, *inter alia*:
 - (i) whether the amended indictment improves the clarity and precision of the case to be met;
 - (ii) the diligence of the prosecution in making the amendment in a timely manner that avoids creating an unfair tactical advantage; and
 - (iii) any delay or prejudice to the defence from the amendment.
21. Considering that the first factor was clearly not met, the Pre-Trial Judge noted that *“in light of the more substantive nature and potential impact of these amendments, analysis of the diligence of the SPO in putting forth the Proposed Amendments and the potential prejudice to the Accused is all the more important.”*¹³
22. With regard to prosecutorial diligence, the Pre-Trial Judge noted the Defence submissions that i) the proposed Amendments occurred nine months after the last witness interview; and that ii) a number of such interviews occurred before the rendering of the Confirmation Decision.¹⁴ However, the Pre-Trial Judge did not find such conduct as lacking in diligence considering i) the current stage of the proceedings; ii) the SPO’s claim that *“many processing steps must follow the witness interview before an amendment to the Confirmed Indictment is proposed.”* The Court of Appeals Panel will therefore be asked to determine whether the assessment of prosecutorial diligence must be conducted following an objective analysis of the SPO’s obligations toward the Accused

¹³ Impugned Decision, para. 33.

¹⁴ Impugned Decision, para. 34. The Defence notes that the Pre-Trial Judge did not discuss the submissions of the Defence equally relating to the SPO’s diligence set out in paras 25-26 of F00481.

and the KSC; or whether other external factors may also be relevant, and if so, whether such factors may be determinative in finding prosecutorial diligence.

23. With regard to the right to be tried within a reasonable time¹⁵ the Pre-Trial Judge acknowledged that additional procedural steps require additional time, but can be carried out in parallel with the remaining staged of the pre-trial phase, considering that “preliminary motions remain pending at the appellate level and Rule 102(3) disclosure and Defence investigations are ongoing.” However, that these procedural steps will be conducted during the pre-trial phase is self-evident. The issue to be determined by the Court of Appeals Panel is whether the right of Mr Veseli to be tried within a reasonable time will be encroached considering that the additional procedural steps will require time **in addition** to Defence investigations and Rule 102(3), and whether the ultimate effect thereof will be to further postpone the start of the trial. As to preliminary motions concerning defects in the Indictment, it is unclear how a decision by the Appeals Court Panel would obviate any eventual need for the Defence, or limit its right, to submit preliminary motions in respect to the First and Second Category allegations.
24. With regard to the right to have adequate time and resources to prepare the defence¹⁶ the Court of Appeals Panel will be asked to determine whether the scope and volume of the First and Second Category Amendments – currently amounting to double the size of other cases currently being litigated before the KSC – should be considered as “*limited additions to the charges*”¹⁷ and whether such analysis should be conducted against the need for the Defence to have

¹⁵ Impugned Decision, para. 35.

¹⁶ Impugned Decision, para. 36.

¹⁷ Impugned Decision, para. 36.

adequate time and resources to prepare an effective defence “against *all* the charges and allegations’ included in the Indictment”.¹⁸

25. Finally, the Defence notes that the Sixth Issue significantly affects the fair and expeditious conduct of proceedings as well as the outcome of the trial due to the numerous fair trial rights guarantees encroached by the Impugned Decision. An immediate resolution from a Court of Appeals Panel is therefore warranted.

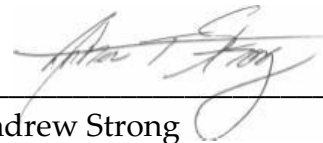
IV. CONCLUSION

26. For these reasons, the Defence for Mr Veseli respectfully requests the Pre-Trial Judge to grant the Application and certify the proposed Issues.

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¹⁸ See, ICTY, *Prosecution v. Đorđević*, IT-05-87/1-PT, [Decision on Prosecution Motion for Leave to Amend the Third Amended Joinder Amendment](#), 7 July 2008, para. 25.