

In: KSC-BC-2020-07
The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: The President of the Specialist Chambers
Judge Ekaterina Trendafilova

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 17 June 2022

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Haradinaj Defence Notice of Appeal of Trial Judgement

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I. INTRODUCTION

1. Pursuant to Article 32 of the Kosovo Constitution, Article 46(1)(a), (b) and (c) of the Law on Specialist Chambers and Specialist Prosecutor Office (“Law”), and Rule 176 of the Rules of Procedure and Evidence (“Rules”), the Defence for Mr. Nasim Haradinaj (“Defence”) submits its Notice of Appeal of the Trial Judgment of 18 May 2022.¹
2. This Appeal is brought pursuant to Rule 176(2) of the Rules, the decision being appealed being the Trial and Sentencing Judgment entered pursuant to Rule 159.²

II. GROUNDS OF APPEAL³

3. The grounds of appeal⁴ relate to three main categories:

¹ KSC-BC-2020-07/F00611, Trial Judgment, 18 May 2022 and KSC-BC-2020-07/F00611, Dissenting Opinion of Judge Barthe, 18 May 2022.

² See also ‘*Registry Practice Direction – Files and Filings before the Kosovo Specialist Chambers*’, specifically Article 47.

³ The standard of review is set out under Article 46(1) of the Law.

⁴ NOTE: following KSC-CA-2022-01/F00005, Decision on Haradinaj’s Request for Clarification on Appeal Timescale, Public, 25 May 2022, the translation into the Albanian language of KSC-BC-2020-07/F00611 has not been completed as of the time of submission of the Notice and Grounds of Appeal and therefore the Defence reserves the right to seek leave to amend its Grounds of Appeal once the trial judgment has been provided to the Appellant in a language which he understands.

- a) errors of law (invalidating the judgment) and fact (occasioning a miscarriage) raising overall concerns as to the safety of the conviction in respect of each of the counts;
 - b) errors of law (invalidating the judgment) and fact (occasioning a miscarriage) with regards to the substantive determination of guilt of the Appellant in respect of each of the counts; and
 - c) errors of fact relevant to sentencing.
4. The Haradinaj Defence adopts and joins the grounds of appeal as set out in the Gucati Defence Notice of Appeal, specifically Grounds 1A, 1B, 1C, 1D, 1E, 2A, 2B, 3, 4F, 4G, 7, 10A, 10B, 10C, 11, 12A, 12B, 12C, 13, 14, 17A, 17B, 18A, 18B, 18C, 18D, 19A, 19B, to the extent that it does not contradict the position taken in this Notice.

A. OVERALL CONCERNS AS TO THE SAFETY OF THE CONVICTION ON ALL COUNTS

Ground 1

5. The Trial Panel erred in law by failing to uphold the basic tenets of a fair and impartial trial by demonstrating an excessively biased position in favour of the SPO throughout the conduct of the proceedings including: i) the admission and assessment of SPO evidence; ii) the scope of cross-examination

of prosecution witnesses; iii) the scope of cross examination of Defence witnesses; iv) the censure of referring to Serbian officials in public session and referring to material already in the public domain; iv) the failure to maintain equality of arms; v) the failure to prevent and sanction improper SPO comments during hearings; and vi) the failure to uphold the presumption of innocence of the Appellant; that no fair-minded and informed observer would conclude that the Defendant had a fair trial

Ground 2

6. The Trial Panel adopted a contradictory approach in preventing the Appellant from adducing evidence and/or offering testimony and/or challenging evidence adduced that related to Serbian aggression, whereas it gave the SPO freedom to cross-examine the Appellant and Defence witnesses on issues arising out of the conflict, and in doing so, prejudiced the Appellant both in terms of the case he could present, and the extent to which he was able to challenge propositions advanced by the SPO, and in doing so, demonstrated bias against the Appellant, thus constituting an error of law taking into account the manner in which it was applied and therefore contrary to Art.46(1)(a) of the law.

Ground 3

7. The Defence submits that the failure to disqualify Presiding Judge Charles Smith III from the proceedings, in light of allegations that have arisen that are of relevance to this trial, as well as his personal involvement in ruling on the admissibility of witness testimony relevant to the allegations, constitutes an error in law in that it is a fundamental infringement to the right of the Appellant to an impartial and independent tribunal pursuant to Art.31 of the Kosovo Constitution, Art.21 of the Law and Art.6 of the ECHR.

Ground 4

8. The Trial Panel erroneously and unlawfully supplanted itself in the place of the domestic Kosovo courts in seeking to interpret domestic jurisprudence without having any recourse to the same Kosovan courts despite such recourse being readily available,⁵ and in doing so, acted *ultra vires* thus constituting an error of law taking into account the manner in which it was applied and therefore contrary to Art.46(1)(a) of the Law, and further misdirected itself and therefore erred in resolving any ambiguity in favour of the SPO,⁶ any such ambiguity instead should have been resolved in favour of the Appellant, and in doing so, the Trial Panel have made an error of law within the context of Art.46(1)(a).

⁵ See *Ibid* at paragraph 166 for example

⁶ Trial Judgment, para. 233

Ground 5

9. The Trial Panel erred in law by allowing the SPO to withhold and excessively redact the material that is subject to the alleged unlawful disclosure by the Appellant. As a result, neither the Chamber nor the Defence was able to effectively use the material, as required by principles of fair trial to determine whether the protected label assigned to each document was appropriately imposed.⁷

B. ERRORS OF LAW AND FACT WITH REGARDS TO THE DETERMINATION OF GUILT

Ground 6

10. The Trial Panel erred in law by failing to define the ‘modes of liability and elements of crime’ as requested by the invited submissions⁸ until after the conclusion of the Trial, thereby failing to require the SPO to identify with sufficient specificity the particular modes of liability and *mens rea* which form the basis for the charges in the Indictment. This misdirection in law is fatal to the fairness of the proceedings since as a result, the Appellant was unable to

⁷ Transcript, 25 October 2021 at page 1323 lines 14-19 re:Salih Mustafa; Transcript, 25 October 2021 at page 1325 lines 4-12 re:Thaçi et al; Transcript, 25 October 2021 at page 1325 lines 22-24 re:Pjetër Shala.

⁸ Transcript, 8 September 2021, page 710, lines 9-19; KSC-BC-2020-07/F00342, Defence Submissions on Elements of Crimes and Modes of Liability, 30 September 2021.

appropriately assess the relevant standards to be adopted in the course of his trial.

Ground 7

11. The Trial Panel erred in law in regard to Art.387 KCC when finding that the offence it defines can be committed with eventual intent⁹ and when interpreting the scope of the phrase “when such information relates to obstruction of criminal proceedings”.¹⁰

Ground 8

12. The Trial Panel erred by refusing to hear the testimony of Defence witnesses DW1250 and DW1251¹¹ who put forward critical evidence to disprove the SPO’s case and support the Defence case, thereby significantly limiting the scope of the Defence, and erred in limiting the extent of the expert evidence of DW1252 and DW1253 and thereby made an error of law and/or fact within the meaning of Art.46(1)(a) and (b).

Ground 9

⁹ Trial Judgment, para 124

¹⁰ Trial Judgment, para 114

¹¹ KSC-BC-2020-07/F00470, Trial Panel II, Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 3 December 2021.

13. The Trial Chamber made a material error in law by failing to outline the extent to which it relied on the hearsay evidence admitted and the basis on which it attributed specific weight to each item in determining the guilt of the Appellant.¹² This is all the more pertinent since the SPO relied on anonymous hearsay evidence to prove crucial points in their case,¹³ when first hand evidence was available but not advanced by the SPO and in doing so making an error of fact and/or law, within the meaning of Art.46(1)(a) and/or (b).

Ground 10

14. The Trial Panel wrongfully exercised its discretion with regards to: i) the significant inconsistencies in the evidence provided by W04841 and W04842; and ii) the limited recollection of the W04876, when assessing the reliability and weight to be attributed to these witnesses. The Defence submits that a reasonable trier of fact could not have reached this conclusion on the basis of the material available.

Ground 11

¹² Trial Judgment, paras 24-26 and 38-45.

¹³ 084008-084010; 093386-093387 RED; 084303-084303 RED; 093388-093388 RED.

15. The Trial Panel erred in law in concluding that a serious threat against third parties could be sufficient to meet the *actus reus* and intent for the crime of obstructing official persons.¹⁴

Ground 12

16. The Trial Panel has erred in fact in finding that the SPO proved that the Appellant used serious threats to induce or attempt to induce any person under Count 3 and by inferring that the Appellant used or intended to use a serious threat to induce any person to act as set forth in Art.387.¹⁵ The Trial Panel erred in applying a disjunctive test and failing to consider that if the Appellant did not know whether the witnesses told the truth, and didn't share their names, he could not have held the necessary intent to intimidate under Art.387.

Ground 13

17. The Trial Panel made inconsistent findings in respect of its definitions of 'any person' and/or 'witness',¹⁶ and in doing so has made an error of law within the meaning of Art.46(1)(a).

¹⁴ Trial Judgment, para 146.

¹⁵ *Ibid*, paras. 587-605.

¹⁶ *Ibid*, paras. 615, 621, and 626.

Ground 14

18. The Trial Panel erred in law in finding that the treatment by SITF/SPO of certain documents as “confidential” amounted to the information contained in them being declared “secret” under Art.392(1)¹⁷ and failing to take account of the domestic law definition of “secret information”.¹⁸

Ground 15

19. Count 6 charges the Appellant with violating the secrecy of proceedings in violation of Art.392(2) KCC which criminalises, *inter alia*, unauthorised disclosure of “information or personal data of a person under protection in criminal proceedings”. The Trial Panel erred in law in finding that such a person is “any person in relation to whom there is a legal requirement, an order or a measure of protection issued or implemented in criminal proceedings”.¹⁹

Ground 16

20. The Trial Panel erred in fact in finding that the SPO has met the burden of proof in showing that the information disclosed was protected since it has: i)

¹⁷ *Ibid*, paras 78, 469-473.

¹⁸ Law on the Classification of Information and Security Clearances (Law No.03/L –178) and Article 426 of the Criminal Code of the Republic of Kosovo (Law No. 06:L-074)

¹⁹ *Ibid*, para 509 and 95.

failed to particularise all of protected individuals concerned; ii) the decisions that provide them with this alleged legal status; iii) the date on which such a status was provided; iv) the time frame for which such a protection was granted; v) the risk it was granted to manage; and vi) the legal basis of proceedings to which each of the protected individuals relate to, thereby failing in law to provide to the Defence the ability to challenge the SPO's case. In doing so the Trial Panel has also erred in fact by applying the aggravated form of Art.392(1) KCC.

Ground 17

21. The Trial Panel found that the offence under Art.392(2) KCC of unauthorised disclosure of the identities and personal data of protected witnesses resulted in serious consequences for some persons concerned²⁰ and thereby amounted to an offence under Art.392(3) which carries a higher penalty. In making this finding the Trial Panel erred in fact by failing to take due account of the deficiencies in W04842's testimony, the reliance on hearsay evidence and the nature of the alleged consequences for the persons concerned.

Ground 18

²⁰ Trial Judgment, paras 536-541.

22. The Trial Panel has erred in law in its determination that public interest was not a defence available under Kosovo law and in doing so has prevented the Appellant from having the context of his action fairly, equitably and reasonably assessed.²¹

Ground 19

23. The Trial Panel erred in fact by failing to consider the involvement of the SITF/SPO Serbian sources in the Milošević regime, a globally condemned criminal regime involved in the commission of crimes in Kosovo - the same crimes that have been and are being ignored by the SPO in its accountability efforts for crimes in Kosovo, as indicating bias and therefore the potential existence of impropriety by the Specialist Prosecutor in violation of Art.31 of the Code of Conduct of the KSC.²²

Ground 20

24. The Trial Panel erred in refusing the defence requests²³ to make submissions relating to the SPO's disclosure obligations regarding any material concerning Dick Marty's allegations that Serbian state authorities were behind a plot to

²¹ *Ibid*, para 800.

²² *Ibid*, para 814.

²³ KSC-BC-2020-07/F00606, Haradinaj Defence, Haradinaj Request for Permission to Make Further Submissions re: Disclosure, 12 May 2022, confidential and KSC-BC-2020-07/F00605, Gucati Defence, Gucati Request for Permission to Make Further Submissions re Disclosure, 12 May 2022, confidential.

threaten his life with the aim of falsely implicating Kosovan Albanians - allegations directly relevant to the Defence submissions of SPO impropriety relating to Serbian state authorities and pertinent to an assessment of whether the Specialist Prosecutor's cooperation with the Serbian authorities violated Art.31 of the Code of Conduct of the KSC.²⁴

Ground 21

25. The Trial Panel erred in determining that the Whistleblower protection that is part of the Kosovo legal framework is not directly applicable in the context of the SC proceedings.²⁵

Ground 22

26. The Trial Panel erred in fact by failing to reach a conclusion as to the propriety of the SPO's investigation relating to the leak, and in particular the identity of the perpetrator despite the clear understanding that the material was kept within secured SPO premises accessible only to SPO staff members. Nonetheless, the Trial Panel reached an inconsistent finding that there was no evidence that the initial whistle-blower who unlawfully obtained the information from the SPO records was in an employment relationship for the

²⁴ Trial Judgment, para 814.

²⁵ *Ibid*, para 826.

purposes of the Whistle-blower defence and in doing so is allowing a failure of the SPO to impact the application of a Defence.

Ground 23

27. The Trial Panel erred in law and fact that (a) the finding that there was no evidence that the leak of information was the result of the actions of a Whistleblower from the SPO/Serbian authorities amounted to a reversal of the burden of proof; and (b) where there was evidence that the source of the leak was the SPO.²⁶

Ground 24

28. The Trial Panel erred in law in finding that ‘in line with Art.62 of the Law, a person “under protection in the criminal proceedings” can also be a person whose identity or personal data appears in SC or SPO documents or records the disclosure of which has not been authorised’, whereas Art.62 of the Law provides no such sweeping protection.²⁷

Ground 25

²⁶ Para.830

29. The Trial Panel erred in fact in finding that there was no credible indication that W04842 exaggerated or lied about the number of relocated witnesses, when no reasonable tribunal could have reached that finding.²⁸

Ground 26

30. The Trial Panel erred in failing to consider the SPO's collusion with the Serbian Authorities in the context of the mono-ethnic nature of the court in reaching its conclusion with regards to the Defence of necessity.²⁹

Ground 27

31. The Trial Panel erred in not considering that the information was already in the public domain following the leak from the SPO office when reaching its conclusion with regards to Art.11 KCC.

Ground 28

32. The Trial Panel erred in failing to apply the correct legal test for the defence of entrapment once it had been raised by the defence and failed to order disclosure of evidence, including but not necessarily limited to, contact notes, from individuals contacting the SPO stating they had information pertaining to the 'leaks' and in doing so, prevented the Appellant from advancing a

²⁸ Judgment para.536

²⁹ Trial Judgment, para 910.

defence of entrapment and thus the Appellant was prejudiced, decisions that amount to an error of law within the meaning of Art.46(1)(a).

Ground 29

33. The Trial Panel erred in failing to disclose material relevant to the defence of entrapment, that it had seen, in breach of Art.6(1) ECHR, in that it made a determination of facts on matters not seen by the Defence.

C. ERRONEOUS REASONING RELEVANT TO SENTENCING

Ground 30

34. The Trial Panel, taking into account all the circumstances, erred in fact and reached a manifestly excessive sentence considering that: i) it erroneously found that there was a “*climate of witness intimidation*” and thus viewed as an aggravating feature, having heard evidence that was restricted to an alleged position some 20 years previously,³⁰ ii) the sentence failed to appropriately reflect the relative role of the two Defendants despite recognising that the Appellant did not have a ‘leadership role’;³¹ iii) it wrongly subscribed instances of the Appellant exercising his legitimate right to free speech and

³⁰ *Ibid*, para 1004.

³¹ *Ibid*, paras 705, 707, 708, and 709.

expression³² as an aggravating factor; iv) it failed to take account of previous and established sentencing jurisprudence from other international tribunals, and further, erred in seeking to justify why it need not consider that same jurisprudence;³³ v) it failed to account for the fact that the Appellant has been accused and tried despite the fact that the Trial Panel has absolved all journalists, specifically but not necessarily limited to Witness W04866, of any criminal responsibility despite acting over and above the Appellant.

IV. RELIEF SOUGHT

35. It is respectfully submitted that the case against the Appellant, was such that no reasonable trier of fact, properly directed, on the evidence, could safely convict and no decision other than a complete reversal of Counts 1, 2, 3, 5, and 6 on the Indictment will remedy the issues raised that go to the heart of the fairness of the proceedings and that consequently the sentence currently imposed should be quashed.

36. In the alternative, where the Appeals Chamber dismisses the appeal against conviction, the Appellant seeks a reduction in sentence to one that:

- a. Is commensurate to the offences for which he has been convicted;

³² *Ibid*, para 996.

³³ *Ibid*, paras 979, 1004.

- b. Appropriately weighs the factors raised in Ground 30 above; and
- c. Takes account of sentences imposed for like offences by other international tribunals.

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