

In: KSC-CA-2022-01
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 Hysni Gucati

Date: 17 June 2022

Language: English

Classification: Public

**Public Redacted Version of Gucati Notice of Appeal
re Trial Judgment KSC-BC-2020-07/F00611 (“Judgment”)**

Pursuant to

Art.46(1)(a), (b) and (c) of the Law on Specialist Chambers and Specialist
Prosecutor’s Office (“Law”) and

Rule 176(2) of the Rules of Procedure and Evidence before the Kosovo Specialist
Chambers (“Rules”)

Specialist Prosecutor

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I. INTRODUCTION

1. The Appellant appeals:

- (i) the Judgment on Counts 1,2,3,5 and 6, on the basis that the Trial Panel (“TP”) made: errors on questions of law (“erred in law”) which invalidate the Judgment (“ITJ”); and/or errors of fact (“erred in fact”) which occasioned a miscarriage of justice (“OMJ”); and
- (ii) the sentence, on the basis that the TP made errors in sentencing.

2. The Appellant seeks:

- a. the reversal of convictions on counts 1,2,3,5 and 6, to be replaced with judgments of acquittal on each count; or
- b. the reversal of convictions on counts 1,2,3,5 and 6 and an order returning the case to the TP; or
- c. if any/all convictions are affirmed, a reduction in sentence.

3. Footnote references are to paragraphs in the Judgment unless otherwise stated.

II. GROUNDS OF APPEAL

Count 3

Ground-1

The TP erred in law:

Ground-1A

when finding that the words “when such information relates to obstruction of criminal proceedings” in Art.387 KCC qualified only the third alternative in Art.387 KCC and do not limit the application of the entire provision¹.

Ground-1B

when finding that “serious threat” for the purposes of Art.387 KCC was not restricted to a threat to use force but included a “threat to inflict serious harm on the health, well-being, safety, security or privacy of a person”².

¹ Para.114

² Para.112

Ground-1C

when finding that an act and/or statement which causes serious fears and concerns, or from which a serious threat 'stems', amounts itself to a serious threat for the purposes of Art.387 KCC³.

Ground-1D

when finding that Art.387 KCC does not require proof that the serious threat did in fact induce a person to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge⁴.

Ground-1E

when finding that the *actus reus* was satisfied when the persons to be induced were persons who had already given evidence to the SC/SPO or who were likely to do so and were presented with a strong disincentive for such persons to provide *information about any crimes under SC jurisdiction*⁵, whereas Art.387 KCC restricts the relevant information to information relating to "obstruction of criminal proceedings".

³ Para.557-586

⁴ Para.115

⁵ Paras.585-586

Ground-2

The TP erred in law and fact:

Ground-2A

when:

- (a) refusing to exclude oral and documentary evidence from W04841 as to the contents of parts of Batches 1-4 that were neither exhibited nor disclosed, and which evidence could not be effectively challenged⁶;
- (b) finding that the Accused “revealed the identity and/or personal data of hundreds of Witnesses and Potential Witnesses contained in the Protected Information” in reliance upon (a) above⁷; and
- (c) thereafter using the finding in (b) above, based upon the errors in (a) above, as proof of the *actus reus* for count 3⁸.

Ground-2B

when:

⁶ KSC-BC-2020-07/F00328, *Order on Rule 117 Defence Motions*, 27/09/21, para.11,14; KSC-BC-2020-07/F00427, *Decision on the Admissibility of Deferred Exhibits*, 9/11/21, paras.9,14,19

⁷ Paras.333,345,346,352,353,355,379,425,431,432,435,438,559

⁸ Para.558-560

- (a) finding that “*serious* fears and concerns of *many*” were engendered by the Accused’s acts and statements, and using the same as proof of the *actus reus*, when no reasonable tribunal could have reached that finding and where the TP itself found that the SPO had not established a substantial interference with the well-being, privacy or dignity of protected persons for all but a small number, and
- (b) relying upon the “concerns expressed by Witnesses” in support of that finding, when the Accused was unable to test the accounts of those “Witnesses”⁹.

4. The errors in grounds 1-2 ITJ/OMJ on the *actus reus* of count 3 and the conviction should be reversed.

Ground-3

The TP erred in law by adopting an approach to the assessment of direct intent *mens rea* which (i) ignored the requirement for awareness of, and desire for, the use of serious threat, (ii) ignored entirely the qualification “when such information relates to obstruction of criminal proceedings”, and (iii) ignored, for the purposes of the TP’s conclusions on *mens rea*, the qualification that the information the perpetrator intends to induce another to refrain from stating to a prosecutor or judge is true¹⁰.

⁹ Paras.581,582,584

¹⁰ Paras.588,603-605

5. **The error in ground 3 ITJ on the *mens rea* of count 3 and the conviction should be reversed.**

Count 5

Ground-4

The TP erred in law:

Ground-4A

when finding that 'disclosure' for the purposes of Art.392(1) KCC:

(a) is not restricted to disclosure to the alleged perpetrator during an official proceeding¹¹; but

(b) includes the exchange of information within the SITF/SPO for the purposes of investigation and prosecution as well as shared between the SITF/SPO and its counterparts in the course of cooperation for investigative purposes¹².

Ground-4B

¹¹ Para.75

¹² Para.74

when finding that the term 'secret' in Art.392(1) KCC means only that 'the information cannot be disclosed to unauthorised persons' and no more¹³.

Ground-4C

in finding that R.106 of the Rules expressly prohibits the revelation of internal work product of the SPO, whereas R.106 states only that such material is not subject to disclosure or notification *under the Rules*, other than R.103¹⁴.

Ground-4D

in finding that Art.62(1) of the Law prohibits the revelation of SPO records by a person in possession of such records, whereas Art.62(1) deals only with restrictions to access to such records by third parties who are not in possession (and, to the extent that Art.62(2) regulates possession once accessed under Art.62(1), Art.62(2) does not provide for a general prohibition on revelation of any SPO record, requiring only the maintenance of any confidentiality/protections *granted* by either the SC or the SPO)¹⁵.

Ground-4E

¹³ Para.78

¹⁴ Para.475

¹⁵ Para.475

when finding that the words “*declared to be secret by a decision*”, for the purposes of Art.392(1) KCC, requires no more than any positive act of a competent authority through which information is marked/treated in that authority’s performance of functions as secret¹⁶.

Ground-4F

in that the finding that it had received no evidence that the SITF/SPO had abusively/unnecessarily marked/treated as confidential any of the information relevant to these proceedings amounted to a reversal of the burden of proof, in circumstances where the content of Batches 1-4 was neither exhibited nor disclosed in full, and the witness W04841 did not consider whether the SITF/SPO had abusively/unnecessarily marked/treated as confidential any information therein as part of her review of the undisclosed content¹⁷.

Ground-4G

when finding that the Prosecution did not have to prove the absence of public interest in revelation of information as part of proving that the revelation was not permitted by law¹⁸.

¹⁶ Para.78,471-473

¹⁷ Para.472

¹⁸ Paras.486-487,805

Ground-4H

in that the finding that there was no credible basis to conclude that the information revealed by the Accused contained indications of improprieties attributable to the SITF/SPO amounted to a reversal of the burden of proof, in circumstances where the content of Batches 1-4 was neither exhibited nor disclosed in full, and the witness W04841 did not consider indications of improprieties therein as part of her review of the undisclosed content¹⁹.

6. **The errors in ground 4 ITJ on the *actus reus* of count 5 and the conviction should be reversed.**

Count 6

Ground-5

Grounds 4E, 4F and 4G above re Count 5 apply *mutatis mutandis* to Count 6.

Ground-6

¹⁹ Paras.812-817

The TP erred in law and fact:

Ground-6A

when it adopted for the purposes of Count 6 W04841's definitions of a witness/potential witness, which did not require that the information obtained/sought from such persons was information about offences falling under SC jurisdiction²⁰.

Ground-6B

in finding that the SITF/SPO's decision to treat as confidential SITF Requests/WCPO Responses in Batches 1-4 was a measure it adopted pursuant to Art.5(2)(f) of the Law and R.30(2)(a) of the Rules to place witnesses and potential witnesses, as defined by W04841, under SITF/SPO protection, in the absence of any evidence as to assessments of necessity under Art.35(2)(f) and risk under R.30(2)(a).

Ground-7

The TP erred in law when finding that "serious consequences" for the purposes of Art.392(3) KCC does not require "interference with the safety, security, well-being, privacy or dignity of protected person or their families" which is "serious" (only "substantial")²¹.

²⁰ Paras.344,511-512

²¹ Para.100

Ground-8

The TP erred in fact:

Ground-8A

in finding that the assessment by the SPO of a high level of risk in relation to persons, without any evidence as to the individual circumstances upon which that assessment was based, amounted to serious consequences for those persons for the purposes of Art.392(3) KCC, whereas no reasonable tribunal could have reached that finding²².

Ground-8B

in finding that the negative consequences associated with relocation (e.g losing access to one's home community and family) amounted to serious consequences within the meaning of Art.392(3) KCC, in the absence of evidence that such negative consequences actually resulted²³.

Ground-8C

²² Paras.536,537

²³ Para.536

in finding that the “ensuing awareness” of persons, subject to emergency risk planning by the SPO, that they were at risk of harm/imminent relocation amounted to serious consequences, when there was no evidence that any such persons were aware that they were at risk of harm/imminent relocation²⁴.

Ground-9

The TP erred in fact and law when finding that ‘the fear and concern resulting from being publicly named as a Witness’ amounted to serious consequences for [REDACTED], in circumstances where:

- (a) there was no evidence that [REDACTED] complained of *fear*;
- (b) the SPO took no protective measure relating to him; and
- (c) the Accused was unable to test any complaint made by [REDACTED].

7. The errors in grounds 5-9 ITJ/OMJ on the *actus reus* of count 6 and the conviction should be reversed.

²⁴ Para.537

Count 1

Ground-10

The TP erred in law:

Ground-10A

when finding that “serious threat” for the purposes of Art.401(1) KCC is not restricted to serious threat to use force²⁵.

Ground-10B

when finding that a “serious threat” may be directed against a person other than an official person for the purposes of Art.401(1) KCC²⁶.

Ground-10C

when finding that the words “in performing official duties” for the purposes of Art.401(1) KCC did not require the use of force or serious

²⁵ Para.144

²⁶ Para.148

threat to happen at the same time the official person is actively exercising a particular duty²⁷.

8. **The errors in ground 10 ITJ on the *actus reus* of count 1 and the conviction should be reversed.**

Ground-11

The TP erred in law when equating its finding that ‘the Accused acted with awareness of, and desire for, obstructing SC/SPO Officials in performing SC/SPO work’ with the direct intent *mens rea* for count 1, which required that “the perpetrator must have acted with awareness of, and desire for, *using force or serious threat* in order to obstruct an official in performing official duties”²⁸.

9. **The error in ground 11 ITJ on the *mens rea* of count 1 and the conviction should be reversed.**

Count 2

Ground-12

The TP erred in law:

²⁷ Para.148

²⁸ Paras.670-671,960

Ground-12A

in finding that Art.401(2) KCC did not require that the “common action” is common action to use force or serious threat²⁹.

Ground-12B

when finding that the “common action” may be directed against a person other than an official person for the purposes of Art.401(2) KCC³⁰.

Ground-12C

when finding that the words “in performing official duties” for the purposes of Art.401(2) KCC did not require the “common action” to happen at the same time the official person is actively exercising a particular duty³¹.

10. The errors in ground 12 ITJ on the *actus reus* of count 2 and the conviction should be reversed.

²⁹ Para.162

³⁰ Para.164

³¹ Para.164

Ground-13

The TP erred in law when finding:

- (a) that the attempted form of the offence under Art.401(2) KCC can be committed with eventual intent³²; and
- (b) that Art.401(2) KCC does not require that all persons in the group participate with the same intent³³; and
- (c) that it was sufficient, to establish that the Appellant participated in a group of persons using common action for the purposes of Art.401(2) KCC, that he participated with two others, one of whom acted with eventual intent only³⁴.

11. The errors in ground 13 ITJ on the *actus reus* and *mens rea* of count 2 and the conviction should be reversed.

Ground-14

The TP (attached to the Basic Court of Pristina) erred in law when finding that it was not bound by the decision of the Kosovo Court of Appeals in *M.I. et al.* Appeal Judgment to the effect that Art.401(2) KCC

³² Para.155

³³ Para.178

³⁴ Paras.690,700

was subsidiary to the situations in which the offence under Art.401(1) KCC is not established³⁵.

12. The error in ground 14 ITJ entering convictions on both count 1 and 2, and the conviction on count 2 should be reversed.

All Counts – Entrapment

Ground-15

The TP erred in law:

Ground-15A

when approaching the assessment of a plea of entrapment, on the basis that there was (a) a requirement for *prima facie* evidence of entrapment³⁶ or (b) a requirement for evidence which ‘compelled’ an inference that the Appellant was entrapped³⁷ or (c) a requirement to establish a reasonable basis to conclude/infer that there was entrapment³⁸, when the correct threshold (“allegation not wholly improbable”) is far lower, includes no such requirements, and, once crossed, requires the Prosecution to prove that there was no entrapment.

³⁵ Paras.165-170

³⁶ Para.837(v)

³⁷ Paras.870,871

³⁸ Paras.180,860,861,864,877,878,889-890

Ground-15B

when finding that the Defence did not clearly explain how the Accused had been entrapped, whereas no reasonable tribunal could have reached the finding that the allegation had not been clearly explained³⁹.

Ground-16

The TP erred in fact:

Ground-16A

When finding that there was *no indication* that the First and Second Sets came from the SITF/SPO, whereas no reasonable tribunal could have reached that finding⁴⁰.

Ground-16B

in finding that it received no evidence regarding where the Three Sets had come from, whereas no reasonable tribunal could have reached that finding⁴¹.

³⁹ Para.180

⁴⁰ Para.859

⁴¹ Para.859

Ground-16C

when finding that there was no indication that the Third Set was intentionally leaked by the SPO, when there was some indication⁴².

Ground-16D

in finding an 'inability' of the SPO to prevent further deliveries when there was no evidence: that the SPO was unable to prevent further deliveries; or of any steps it took in an attempt to⁴³.

Ground-17

The TP erred in law and fact:

Ground-17A

in finding that the evidence that an SPO staff member was implicated as a source of the leak was highly speculative and had been credibly challenged when the only evidence on the trial record was that on two dates a witness implicated a named SPO officer as a source of the leak,

⁴² Para.860

⁴³ Para.871

where the SPO did not challenge that allegation with any evidence on the record, and where the TP heard no evidence on the record as to the circumstances of that allegation from which the conclusion could be drawn that it was speculative.

Ground-17B

when finding that the fact that the First Set was delivered by an unknown male with the instruction that it be made available to the media provided no circumstantial evidence of entrapment, when that fact included (i) provision by the deliverer to the Accused of the means to commit the offences alleged, together with (ii) evidence of an incitement by the deliverer to the Accused to publicise the information, leaving only the question whether the deliverer was acting under the instruction of an SPO official.

- 13. The errors in grounds 15-17 ITJ/OMJ on the plea of entrapment and the convictions on all counts should be reversed.**

Ground-18

The Appellant joins the grounds set out in the Notice of Appeal filed by Nasim Haradinaj dated 17/06/2022, specifically incorporating Grounds 7,23,24 and 25 thereof into this Notice.

Sentence

Ground-19

The TP made discernible errors in sentencing:

(a) when assessing gravity, in failing to appropriately reflect:

i) that the Appellant:

i. Did not use force/serious threat of force⁴⁴;

ii. Did not desire that actual harm be caused to any witness/potential witness⁴⁵;

iii. Did not intend to obstruct any SC Judge⁴⁶;

ii) the absence of any actual harm caused to investigations⁴⁷;

iii) that no persons suffered injury and only a limited number of persons suffered 'substantial interference with their safety, security, well-being, privacy or dignity'⁴⁸;

⁴⁴ Para.557

⁴⁵ Para.596

⁴⁶ Para.712

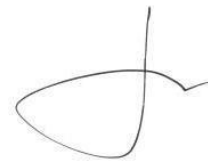
⁴⁷ Paras.550,639,653,655,692,712

⁴⁸ Paras.100,536-541

- (b) when assessing gravity, relying upon the matters impugned in sub-Ground 2A(a) and (b) above;
- (c) in failing to appropriately reflect the relative roles of the two Accused on count 3;
- (d) in refusing to take into consideration the range of sentences imposed on persons convicted of similar offences at other international courts/tribunals⁴⁹;
- (e) when imposing a term out of reasonable proportion with that range, by rendering a sentence of 4 ½ years imprisonment, which was both capricious and manifestly excessive in all the circumstances.

⁴⁹ Para.979

Word count: 2800 words



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