



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 13 June 2022

Language: English

Classification: Public

Public Redacted Version of

**Decision on Veseli Defence Request for Reconsideration and Leave to Appeal
Decision on Confirmation of Amendments to the Indictment**

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THE PRE-TRIAL JUDGE,¹ pursuant to Articles 39(11) and 45 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 77, 79, 86, 90 and 97 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 30 October 2020, further to the Pre-Trial Judge's decision confirming the indictment against Hashim Thaçi ("Mr Thaçi"), Kadri Veseli ("Mr Veseli"), Rexhep Selimi ("Mr Selimi") and Jakup Krasniqi ("Mr Krasniqi") (collectively "Accused"),² the Specialist Prosecutor's Office ("SPO") submitted the indictment as confirmed, with redactions as authorised by the Pre-Trial Judge ("Confirmed Indictment").³

2. On 23 December 2021, the Pre-Trial Judge issued the "Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)" ("First Decision on Request to Amend") in which the Parties were ordered to file their responses and reply, as the case may be, on the question of whether the supporting material to the amendments deemed to constitute new

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00026, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, strictly confidential and *ex parte*. A confidential redacted version was filed on the same day, F00026/CONF/RED. A public redacted version was filed on 30 November 2020, F00026/RED.

³ KSC-BC-2020-06, F00034, Specialist Prosecutor, *Submission of Confirmed Indictment and Related Requests*, 30 October 2020, confidential, with Annex 1, strictly confidential and *ex parte*, and Annexes 2-3, confidential. A further corrected confirmed indictment, correcting certain clerical errors, was submitted on 4 November 2020, strictly confidential and *ex parte* (F00045/A01), with confidential redacted (F00045/A02) and public redacted (F00045/A03) versions. A lesser confidential redacted version was submitted on 11 December 2020 (F00134). Subsequent to the Decision on Defects in the Form of the Indictment, a further corrected confirmed indictment was submitted on 3 September 2021, strictly confidential and *ex parte* (F00455/A01), with confidential redacted (F00455/CONF/RED) and public redacted (F00455/RED) versions. A confidential further lesser redacted version of the confirmed indictment was filed on 17 January 2022, F00647/A01.

charges support a finding of well-grounded suspicion pursuant to Rule 86(4) of the Rules.⁴

3. On 22 April 2022, the Pre-Trial Judge confirmed, upon request of the SPO,⁵ amendments to the Confirmed Indictment against the Accused (“Impugned Decision”), and ordered the SPO to file, *inter alia*, an amended indictment.⁶

4. On 2 May 2022, the Defence for Mr Veseli (“Defence”) filed a request for reconsideration on the basis of two issues, or in the alternative, leave to appeal the Impugned Decision (“Request”) on eleven issues.⁷ That same day, the Pre-Trial Judge granted the Defence for Mr Thaçi and the remaining Parties an extension of time to file requests for certification to appeal the Impugned Decision, including submissions on the admissibility of any Rule 77 remedy in light of Rule 90(4) of the Rules.⁸

5. On 12 May 2022, the Defence for Mr Thaçi notified the Pre-Trial Judge that it would not seek leave to appeal the Impugned Decision.⁹

6. On 20 May 2020, the Defence for Mr Selimi and the Defence for Mr Krasniqi also indicated that they would not seek leave to appeal the Impugned Decision or make

⁴ KSC-BC-2020-06, F00635, Pre-Trial Judge, *Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)*, 23 December 2021, confidential, paras 48, 53(d), (e). A public redacted version was filed on 14 February 2022, F00635/RED.

⁵ KSC-BC-2020-06, F00455, Specialist Prosecutor, *Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)* (“Request to Amend”), 3 September 2021, strictly confidential and *ex parte*, with Annexes 1-5, strictly confidential and *ex parte*. Confidential redacted and public redacted versions were filed on 8 September 2021, F00455/CONF/RED and F00455/RED, respectively.

⁶ KSC-BC-2020-06, F00777, Pre-Trial Judge, *Decision on the Confirmation of Amendments to the Indictment*, 22 April 2022, strictly confidential and *ex parte*, para. 185(a)-(c), (f)-(g). A confidential version was filed the same day, F00777/CONF/RED. A public redacted version was filed on 6 May 2022, F00777/RED. A lesser redacted confidential version was filed on 16 May 2022, F00777/CONF/RED2. A confirmed amended indictment was filed on 29 April 2022, strictly confidential and *ex parte* (F00789/A01), with confidential redacted (F00789/A02) and public redacted (F00789/A05) versions.

⁷ KSC-BC-2020-06, F00796, Specialist Counsel, *Veseli Defence Request for Reconsideration and Leave to Appeal Decision on Confirmation of Amendments to the Indictment*, 2 May 2022, confidential.

⁸ KSC-BC-2020-06, F00795, Pre-Trial Judge, *Decision on Thaçi Defence Request for an Extension of Time for Request for Certification to Appeal and Order for Further Submissions*, 2 May 2022, public.

⁹ KSC-BC-2020-06, F00799, Specialist Counsel, *Thaçi Defence Notification in Response to Decision Granting an Extension of Time for Request for Certification to Appeal “Decision on the Confirmation of Amendments to the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi”*, 12 May 2022, public.

submissions on the admissibility of such requests.¹⁰ The Pre-Trial Judge subsequently ordered the SPO to include submissions on the admissibility of the Request in its response due on 23 May 2022 and further ordered the Defence to include similar submissions, if any, in a reply to be filed on 3 June 2022.¹¹

7. On 23 May 2022, the SPO responded to the Request (“Response”).¹²

8. On 2 June 2022, the Defence replied to the Response (“Reply”).¹³

II. APPLICABLE LAW

9. Pursuant to Article 45 of the Law and Rule 77(2) of the Rules, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the SPO in accordance with the Law and the Rules. Interlocutory appeals, other than those that lie as of right, must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that they involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

10. Pursuant to Rule 79(1) of the Rules, in exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice, a Panel may, upon request by a Party or *proprio motu* after hearing the Parties, reconsider its own decisions.

¹⁰ KSC-BC-2020-06, Transcript of Hearing, 20 May 2022, public, p. 1221, line 19 to p. 1222, line 8.

¹¹ KSC-BC-2020-06, Transcript of Hearing, 20 May 2022, public, p. 1223, lines 1-7.

¹² KSC-BC-2020-06, F00814, Specialist Prosecutor, *Prosecution Response to Veseli Defence Request for Reconsideration and Leave to Appeal the Decision on Confirmation of Amendments to the Indictment*, 23 May 2022, confidential.

¹³ KSC-BC-2020-06, F00831, Specialist Counsel, *Veseli Defence Reply to SPO Response to its Request for Reconsideration and Leave to Appeal Decision on Confirmation of Amendments to the Indictment*, 2 June 2022, confidential.

11. Pursuant to Rule 86(3)-(5) and (7) of the Rules, an indictment shall be filed together with supporting material. The Pre-Trial Judge shall examine the supporting material to determine whether well-grounded suspicion has been established. As a result of such examination, the Pre-Trial Judge shall, in a reasoned decision, confirm or dismiss the charges in whole or in part. Challenges by the Defence to a decision on the indictment shall be limited to those under Rule 97 of the Rules.

12. Pursuant to Rule 90(2) of the Rules, a Panel may grant leave to amend the indictment if satisfied that the amendment is not prejudicial to or inconsistent with the rights of the Accused. Where the Specialist Prosecutor seeks to include new charges or substitute more serious charges, Rule 86(3) and (4) of the Rules shall apply *mutatis mutandis*.

13. Pursuant to Rule 90(4) of the Rules, the Defence shall be granted twenty-one (21) days to file preliminary motions pursuant to Rule 97 of the Rules in respect of new charges.

14. Pursuant to Rule 97(1) of the Rules, the Accused may file preliminary motions before the Pre-Trial Judge, which (a) challenge the jurisdiction of the Specialist Chambers; (b) allege defects in the form of the indictment; and (c) seek the severance of indictments. Pursuant to Rule 97(3) of the Rules, appeals against decisions on preliminary motions under Rule 97(1)(a) of the Rules shall lie as of right and for all other decisions rendered under Rule 97(1), Rule 77 of the Rules shall apply.

III. SUBMISSIONS

15. The Defence proposes eleven (11) issues (“Issues”) for certification. The Defence submits that: (i) the Issues are appealable because they are concrete, easily identifiable and stem from the Impugned Decision; (ii) the Issues significantly

affect the fair and expeditious conduct of the proceedings as they concern the right of the Accused to be promptly informed of the charges against him; and (iii) an immediate resolution by a Court of Appeals Panel will materially advance the proceedings by avoiding unnecessary delays, preventing the waste of Defence and Trial Panel resources, and providing clarity on the legal issues identified.¹⁴

16. The Defence further requests reconsideration of the Impugned Decision because the Pre-Trial Judge erred in failing to consider the medical report of [REDACTED] (“Medical Report”) in his assessment of the supporting material underlying the proposed amendments;¹⁵ and the Pre-Trial Judge erred in finding that the accounts of [REDACTED] and [REDACTED] “differ to such an extent that it is unlikely that they are speaking of the same incident.”¹⁶

17. The SPO responds that the Request should be rejected.¹⁷ The SPO submits that the Request is inadmissible because challenges to an indictment are limited to preliminary motions under Rule 97 of the Rules.¹⁸ The SPO further submits that the Request is without merit as it does not meet the threshold required for reconsideration or leave to appeal.¹⁹

18. The Defence replies that the Request is admissible as new charges may be challenged pursuant to Rule 97 of the Rules, but the decision on the confirmation of new charges may be appealed subject to Rule 77 of the Rules.²⁰ The Defence further replies that Rule 79 of the Rules does not require an applicant to substantiate all three prongs cumulatively,²¹ but in any case, the Request

¹⁴ Request, paras 4-9.

¹⁵ Request, paras 10-12.

¹⁶ Request, paras 13-15.

¹⁷ Response, paras 1, 21.

¹⁸ Response, paras 1-4.

¹⁹ Response, paras 5-19.

²⁰ Reply, paras 2-5.

²¹ Reply, para. 6.

adequately describes the impact of errors made by the Pre-Trial Judge to the legal characterisation of the charges.²²

IV. DISCUSSION

A. ADMISSIBILITY OF REQUEST REGARDING LEAVE TO APPEAL

19. The SPO submits that the Request is inadmissible because, in respect of new charges, Defence challenges to any resulting decision are limited to those under Rule 97 of the Rules.²³ In this regard, the SPO submits that, because the Impugned Decision exclusively concerned proposed amendments that the Pre-Trial Judge considered to be new charges, the applicable law bars Defence applications for certification.²⁴ The SPO contends that the Request is procedurally flawed and should be dismissed.²⁵

20. The Defence replies that new charges to an indictment may be challenged pursuant to Rule 97 of the Rules, while decisions on their confirmation may be appealed subject to Rule 77 of the Rules.²⁶ The Defence argues that preliminary motions challenging defects in the form of the indictment are directed against the indictment, rather than the decision confirming the indictment, and therefore Rule 90(4) of the Rules provides a different, yet additional guarantee than the one already offered by Rule 77 of the Rules.²⁷ The Defence further argues, that the Impugned Decision cannot be distinguished from the First Decision on Request to Amend as both decision originate from the same SPO request.²⁸

21. The Pre-Trial Judge notes, that Rule 90(2) of the Rules provide that, where the SPO seeks to add new charges or substitute more serious charges, Rule 86(3)

²² Reply, paras 6-10.

²³ Response, para. 2.

²⁴ Response, para. 3.

²⁵ Response, para. 4.

²⁶ Reply, paras 2-3.

²⁷ Reply, para. 5.

²⁸ Reply, para. 4.

and (4) of the Rules shall apply *mutatis mutandis*. Under these subsections of Rule 86 of the Rules, the Pre-Trial Judge is required to examine whether well-grounded suspicion has been established with respect to the new charges.

22. The Pre-Trial Judge considers that an examination of whether well-grounded suspicion has been established necessarily entails a decision of the Pre-Trial Judge memorialising that examination. Indeed, Rule 86(5) of the Rules provides that “as a result of such examination” the Pre-Trial Judge shall confirm or dismiss the charges in a reasoned decision. Rule 86(7) of the Rules further provides that any challenges to a *decision on the indictment* shall be limited to those under Rule 97 of the Rules. Thus, through a plain reading of Rule 86 of the Rules, a *decision on the indictment* is not immediately challenged via the procedure set out in Rule 77 of the Rules,²⁹ but rather the review process requires an additional step by necessitating that challenges be funnelled through Rule 97 of the Rules. The Defence’s conceptual bifurcation of challenges to the indictment charges themselves versus challenges to the decision confirming those charges and the concomitant review process that follows is therefore without support under Rule 86 of the Rules.

23. Rule 90 of the Rules does not substantively alter this procedure for challenging new charges to an indictment. Rather, Rule 90(4) of the Rules presupposes that challenges to new charges would be made pursuant to Rule 97 of the Rules by truncating the deadline for the Defence to file such motions. In this way, Rule 90(4) of the Rules mirrors the review process provided for under Rule 86(7) of the Rules. The Defence does not demonstrate why preliminary motions would be directed at *decisions* pursuant to Rule 86(7) of the Rules and *indictments* in Rule 90(4) of the Rules. As the standard procedure for challenging confirmed charges is through

²⁹ See also, KSC-BC-2020-06, F00413/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Defence Motions Alleging Defects in the Form of the Indictment* (“First Decision on Defects of Indictment”), 22 July 2021, public, para. 47 (“The Pre-Trial Judge underscores that the Law does not foresee the possibility for the defence to appeal a decision on the review of the indictment”).

Rule 97 of the Rules before potentially reaching a Court of Appeals Panel, any deviation from the review process, in respect of new charges, would need to be explicitly provided for under the Rules.

24. Finally, the Pre-Trial Judge notes that the Court of Appeals Panel in the *Gucati and Haradinaj Case* analysed what sub-paragraph of Rule 97 of the Rules the relevant ground of appeal put forward fell under before concluding that certification under Rule 77 of the Rules was required before reaching the Court of Appeals.³⁰ Contrary to the Defence submissions, the Court of Appeals confirmed that issues relating to the sufficiency of the evidentiary basis for the confirmation of the indictment do not constitute jurisdictional challenges³¹ nor challenges to the form of the indictment under Rule 97(1)(b) of the Rules.³² Rather, as previously held, any issues of fact, including the adequacy of evidence by which the facts underpinning the charges are proven, are for determination at trial and not subject to preliminary motions relating to the form of the indictment.³³

25. In light of the foregoing, the Pre-Trial Judge finds that the request for leave to appeal the Impugned Decision is inadmissible and therefore the Defence request for leave to appeal will not be addressed further.

³⁰ See KSC-BC-2020-07, IA003/F0005, Court of Appeals, *Decision on the Admissibility of Appeal and Joinder Against Decision on Preliminary Motions* ("Appeal Decision of 12 May 2021"), 12 May 2021, public, para. 14.

³¹ Appeal Decision of 12 May 2021, para. 14.

³² See First Decision on Defects of Indictment, para. 49. Similarly, KSC-BC-2020-07, IA004/F00007, Court of Appeals, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public, para. 23.

³³ See First Decision on Defects of Indictment, para. 29 (with further references to case-law). See also, KSC-BC-2020-07, F00147, Pre-Trial Judge, *Decision on Defence Preliminary Motions*, 8 March 2021, public, para. 40; KSC-BC-2020-04, F00089/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Motion Challenging the Form of the Indictment*, 18 October 2021, public, para. 27.

B. RECONSIDERATION

26. The Defence requests that the Pre-Trial Judge reconsider the Impugned Decision with regard to two issues. The Defence argues that: (i) while it did not provide the ERN of the Medical Report, the report was easily to be located in the evidence disclosed pursuant to Rule 102(1)(b) of the Rules and, therefore, the Pre-Trial Judge erred in failing to assess the report to determine whether the relevant crimes were established in relation to the proposed charges and whether [REDACTED] was reliable on a key issue;³⁴ and (ii) the Pre-Trial Judge erred in failing to consider the type of weapons concerned when comparing the accounts of [REDACTED] and [REDACTED] and discarding [REDACTED] statement because the witness was not clear on the name of an individual.³⁵

27. The SPO responds that the Defence fails to demonstrate that the test for reconsideration pursuant to Rule 79 of the Rules has been met.³⁶ The SPO argues that the request for reconsideration amounts to mere disagreement with the reasoning and outcome of the Impugned Decision, because the Pre-Trial Judge: (i) properly declined to consider the Medical Report and (ii) properly assessed the accounts of [REDACTED] and [REDACTED].³⁷

28. The Defence replies that, if the Medical Report had been available to the Pre-Trial Judge, its conclusion would have impacted the legal qualification and standard of proof required to confirm an indictment.³⁸ The Defence further replies that the SPO fails to provide reasons as to why its submissions with regards to the accounts of [REDACTED] and [REDACTED] are unpersuasive.³⁹

³⁴ Request, paras 10-12.

³⁵ Request, paras 13-15.

³⁶ Response, para. 6.

³⁷ Response, paras 6-12.

³⁸ Reply, para. 7.

³⁹ Reply, para. 8.

29. The Pre-Trial Judge recalls that for an application for reconsideration to succeed pursuant to Rule 79 of the Rules, the moving party must demonstrate the existence of a clear error of reasoning or that reconsideration is necessary to avoid an injustice. Reconsideration should only be granted in exceptional circumstances. New facts and arguments arising since the Impugned Decision was rendered may be relevant to this assessment.⁴⁰

30. The Pre-Trial Judge recalls that, with respect to the Medical Report, it was not included in the material provided in support of the proposed new charges to the Confirmed Indictment,⁴¹ and therefore fell out of the scope of his review pursuant to Rules 86(3) and (4) and 90(2) of the Rules.⁴² In addition, there was no concomitant obligation on the Pre-Trial Judge to search for the material given the Defence's incomplete citation.⁴³ There is therefore no clear error warranting reconsideration.

31. Furthermore, the Defence fails to demonstrate how reconsideration is necessary to avoid an injustice. The Medical Report confirms that victims suffered injuries, including contusions to the head and thorax,⁴⁴ and is therefore consistent with the findings in the Impugned Decision.⁴⁵ Varying descriptions as to the severity of these injuries can be assessed during trial.⁴⁶ The Defence will therefore have ample opportunity to present their analysis of the evidence in the course of proceedings.

⁴⁰ See also KSC-BC-2020-05, F00046, Pre-Trial Judge, *Decision on Specialist Prosecutor's Request for Reconsideration or Certification for Appeal*, 5 November 2020, public, para. 14; KSC-BC-2020-07, F00353, Trial Panel II, *Decision on the Defence Requests for Reconsideration of Decision F00238*, 7 October 2021, public, para. 16.

⁴¹ See Disclosure Package 77; Annex 3 to Request to Amend.

⁴² Impugned Decision, para. 72.

⁴³ KSC-BC-2020-07, IA004/F00007, Court of Appeals, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public, paras 16-17.

⁴⁴ 0188-3935-0188-3937-ET, pp. 1

⁴⁵ Impugned Decision, para. 70.

⁴⁶ Impugned Decision, para. 36.

32. As regards the varying accounts provided by [REDACTED] and [REDACTED], the Defence fails to demonstrate a clear error of reasoning. The description of the weapon used does not negate the differences in the witnesses' accounts which led to the conclusion that the witnesses were unlikely to be speaking of the same incident.⁴⁷ The Defence's submissions amount to mere disagreement with the assessment made in the Impugned Decision and constitute an attempt to re-litigate the matter. As [REDACTED] and [REDACTED] evidence can be explored more fully at trial, the Defence fails to demonstrate that reconsideration is necessary to avoid an injustice resulting from the Impugned Decision.

33. In light of the foregoing, the Pre-Trial Judge finds the test for reconsideration has not been met.

C. CLASSIFICATION

34. The Pre-Trial Judge notes that the Request and Reply have been filed confidentially. Noting the publicity of proceedings, the Pre-Trial Judge orders the Defence to submit public redacted versions or request reclassification of its filings. A public redacted version of the present decision will be filed thereafter.

V. DISPOSITION

35. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a) **REJECTS** the Request; and
- b) **ORDERS** the Defence to submit public redacted versions or request reclassification of the Request and the Reply by **Friday, 17 June 2022**.

⁴⁷ Impugned Decision, para. 12.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Monday, 13 June 2022
At The Hague, the Netherlands.