

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 Nasim Haradinaj

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Haradinaj Defence Re-Filed Notice of Appeal of Trial Judgement

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I. INTRODUCTION

1. In accordance with the “*Decision on Haradinaj’s Request for Variation of Word Limit to File Appeal Brief and SPO’s Request for Order to Re-File Haradinaj’s Notice of Appeal*”¹ of 1 July 2022, the Defence for Mr. Nasim Haradinaj (“Defence”) hereby re-files its Notice and Grounds of Appeal of the Trial Judgment of 18 May 2022.²
2. This Appeal is brought pursuant to 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”).

II. GROUNDS OF APPEAL³

3. The grounds of appeal concern errors on a question of law invalidating the judgment, errors of fact which have occasioned a miscarriage of justice and errors of sentencing.⁴

¹ KSC-BC-2020-07/F000611, Decision on Haradinaj’s Request for Variation of Word Limit to File Appeal Brief and SPO’s Request for Order to Re-File Haradinaj’s Notice of Appeal, 1 July 2022.

² KSC-BC-2020-07/F000611, Trial Judgment, 18 May 2022 and KSC-BC-2020-07/F000611, Dissenting Opinion of Judge Barthe, 18 May 2022.

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

⁴ Article 46(1) of the Law.

A. GROUNDS PERTAINING TO ALL THE COUNTS ON WHICH THE APPELLANT WAS CONVICTED

4. The following grounds, unless otherwise stated, are brought against conviction on all counts in the trial judgment.

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;⁵ ii) the censure of referring to Serbian officials in public session and referring to material already in the public domain;⁶ iii) the failure to uphold the presumption of innocence of the Appellant;⁷ and iv) other aspects of the failure to maintain equality of arms.⁸

⁵ *Ibid*, paras 50-51, 55-58, 60, 329, 385-396, 458, 536-537, 540, 583.

⁶ Trial Judgment, para 374 footnotes 796-797; Transcript, 6 December 2021, pp 2146-2147 (Oral Order on the Use of Names Mentioned in the Batches).

⁷ Transcript, 17 March 2022, at page 3771 lines 16-22.

⁸ The Trial Panel allowed the SPO to refer to the context of the conflict in Kosovo in the course of cross-examination while the Defence was refused the right to do so. *See* Transcript, 12 January 2022, at page 2903 lines 11-25, page 2904 lines 1-7; Transcript, 14 January 2022 at pages 3039-3043. Furthermore, the SPO was allowed to go beyond the scope of the examination in chief in their cross examination of both Mr. Haradinaj and expert witness Mr. Reid. *See* Transcript, 12 January 2022, at page 2903 lines 11-25, page 2904 lines 1-7; Transcript, 24 January 2022, at pages 3304-3313. The Trial Panel took an inconsistent approach on the admission of evidence by the SPO and the Defence in regard to historical events. Trial Judgment, paras 30-31, 64, 577-578.

Ground 2

6. 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 the trial, as well as his personal involvement in ruling on the admissibility of witness testimony relevant to the allegations,⁹ constitutes an error of 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 European Convention on Human Rights (“ECHR”).

Ground 3

7. The Trial Panel erred in law in seeking to interpret domestic jurisprudence without having any recourse to the same Kosovan courts despite such recourse being readily available.¹⁰

⁹ KSC-BC-2020-07, *The Prosecutor v. Hysni Gucati and Nasim Haradinaj*, Publicly Redacted Version of the Corrected Version of Application for the Recusal of the President of the Specialist Chambers, Judge Ekaterina Trendafilova, and the Vice President of the Specialist Chambers, Judge Charles L. Smith III, Presiding Judge of Trial Panel II, 28 July 2021; KSC-BC-2020-07/F00272, Decision on the Application for Recusal or Disqualification, 6 August 2021; KSC-BC-2020-07/F00470, *The Prosecutor v. Hysni Gucati and Nasim Haradinaj*, Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 3 December 2021, paras 80-82.

¹⁰ See Trial Judgment, para 166 for example.

Ground 4

8. 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.¹¹ As a result, neither the Trial 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.¹²

Ground 5

9. The Trial Panel erred in law by failing to define the ‘modes of liability and elements of crime’ as requested by the invited submissions¹³ 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 and the elements required to be proven of each offence. This misdirection in law is fatal to the fairness of the proceedings since as a result, the Appellant was unable to appropriately

¹¹ *Ibid*, paras 331-333. See also KSC-BC-2020-07/F00141, Pre-Trial Judge, Public Redacted Version of Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association, 15 July 2021, paras 39, 45, 47.

¹² 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.

¹³ 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.

assess the relevant standards to be adopted in the course of his trial in putting forward a defence.

Ground 6

10. The Trial Panel erred by refusing to hear the testimony of Defence witnesses DW1250 and DW1251¹⁴ 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 DW1253¹⁵ and thereby made an error of law and/or fact within the meaning of Art.46(1)(a) and (b).

Ground 7

11. The Trial Panel 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.¹⁶ This is all the more pertinent since the SPO relied on anonymous hearsay evidence to prove crucial points in their case,¹⁷ when first hand evidence was available but not advanced by the SPO and in doing so the Trial

¹⁴ See e.g. KSC-BC-2020-07/F00470; KSC-BC-2020-07/F00484; IA006-F00006.

¹⁵ *Ibid.*

¹⁶ Trial Judgment, paras 24-26 and 38-45.

¹⁷ 084008-084010; 093386-093387 RED; 084303-084303 RED; 093388-093388 RED.

Panel making an error of fact and/or law, within the meaning of Art.46(1)(a) and/or (b).

Ground 8

12. The Trial Panel wrongfully exercised its discretion with regards to: i) the significant inconsistencies in the evidence provided by W04841¹⁸ and W04842;¹⁹ and ii) the limited recollection of the W04876,²⁰ 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 at trial.

Ground 9

13. With regard to the defence of public interest, the Trial Panel erred in law in its determination that it was not available under Kosovo law²¹ and erred in law and fact in 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.²²

¹⁸ Trial Judgment, paras 50-51.

¹⁹ *Ibid*, paras 52-58, 536-541.

²⁰ *Ibid*, paras 60, 318, 322.

²¹ *Ibid*, para 800.

²² *Ibid*, para 814.

Ground 10

14. The Trial Panel erred in law by refusing the defence requests²³ to make submissions relating to the SPO's disclosure obligations regarding any material concerning Senator Dick Marty's allegations that Serbian state authorities were behind a plot to threaten his life with the aim of falsely implicating Kosovan Albanians.²⁴

Ground 11

15. The Trial Panel erred in law and fact 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.²⁵

Ground 12

16. The Trial Panel erred in law 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.²⁶

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.

²⁴ Trial Judgment, para 814.

²⁵ *Ibid*, para 910.

²⁶ *Ibid*, para 826.

Ground 13

17. 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.²⁷

Ground 14

18. 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 perpetrator²⁸ 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 purposes of the Whistle-blower defence²⁹ and in doing so is allowing a failure of the SPO to impact the application of a Defence.

²⁷ *Ibid*, para 830

²⁸ *Ibid*, paras 859-862.

²⁹ *Ibid*, para 830.

Ground 15

19. The Trial Panel erred in law and fact 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.³⁰

Ground 16

20. The Trial Panel erred in law in failing to apply the correct legal test for the defence of entrapment once it had been raised by the defence³¹ and erred in fact and law in failing 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 defence of entrapment.³²

Ground 17

21. The Trial Panel erred in law 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.³³

³⁰ *Ibid*, paras 921-926.

³¹ *Ibid*, paras 835-839.

³² Final Trial Brief on Behalf of Nasim Haradinaj, paras 407-414.

³³ Trial Judgment, paras 843-844.

22. Each of the above Grounds justifies the reversal of the convictions on Counts 1, 2, 3, 5 and 6 of the Indictment.

B. GROUNDS PERTAINING TO INDIVIDUAL COUNTS ON WHICH THE APPELLANT WAS CONVICTED

Ground 18

23. 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.³⁴

24. Ground 18 justifies the reversal of the conviction on Count 1 of the Indictment.

Ground 19

25. The Trial Panel erred in law in regard to Art.387 KCC when finding that the offence it defines can be committed with eventual intent³⁵ and when interpreting the scope of the phrase "*when such information relates to obstruction of criminal proceedings*".³⁶

³⁴ *Ibid*, para 146.

³⁵ *Ibid*, para 124

³⁶ *Ibid*, para 114

Ground 20

26. 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.387.³⁷
27. **Grounds 19 and 20 each justify the reversal of the conviction on Count 3.**

Ground 21

28. 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)³⁸ and failing to take account of the domestic law definition of “secret information”.³⁹
29. **Ground 21 justifies the reversal of the conviction on Count 5.**

Ground 22

30. The Trial Panel erred in law in finding that “a person under protection in criminal proceedings” under Article 392(2) KCC was “any person in relation

³⁷ *Ibid*, paras. 587-605.

³⁸ *Ibid*, paras 78, 469-473.

³⁹ 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)

to whom there is a legal requirement, an order or a measure of protection issued or implemented in criminal proceedings” and can be “a person whose identity or personal data appears in SC or SPO documents or records the disclosure of which has not been authorised”.⁴⁰

Ground 23

31. The Trial Panel erred in fact in finding that the SPO has met the burden of proof in demonstrating that the information disclosed was protected since it has: i) failed to particularise all of the 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,⁴¹ 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.

32. Grounds 22 and 23 each justify the reversal of the conviction on Count

⁴⁰ Trial Judgment, paras 95, 509.

⁴¹ Trial Judgment, paras 512-516. See also *Ibid*, paras 334-356, 379-381.

C. GROUND PERTAINING TO SENTENCING*Ground 24*

33. 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;⁴² ii) the sentence failed to appropriately reflect the role of the Defendant despite recognising that he did not have a ‘leadership role’;⁴³ iii) it wrongly subscribed instances of the Appellant exercising his legitimate right to free speech and expression⁴⁴ 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;⁴⁵ 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.

⁴² *Ibid*, para 1004.

⁴³ *Ibid*, paras 705, 707, 708, and 709.

⁴⁴ *Ibid*, para 996.

⁴⁵ *Ibid*, paras 979, 1004.

IV. RELIEF SOUGHT

34. It is respectfully submitted that the convictions on Counts 1, 2, 3, 5, and 6 should be reversed and an acquittal directed and that consequently the sentence imposed quashed.
35. In the alternative, where the Appeals Chamber dismisses the appeal against conviction on one or more of the counts, the Appellant seeks a reduction in sentence to one that:
- a. Is commensurate to the offences for which he has been convicted;
 - b. Appropriately weighs the factors raised in Ground 24 above; and
 - c. Takes account of sentences imposed for like offences by other international tribunals.

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