

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: 11 July 2022

Language: English

Classification: Public

Public Redacted Version of Re-Filed 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

Jack Smith

Valeria Bolici

Matthew Halling

James Pace

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

Eleanor Stephenson

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

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:

(i)-acquittals on each count; or

(ii)-an order returning the case to the TP; or

(b)-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:

(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.

(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

(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.

(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.

(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”.

Ground-2

The TP erred in law and fact:

(2A)-when:

³ Para.557-586

⁴ Para.115

⁵ Paras.585-586

(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.

(2B)-when:

(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

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

(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:

(3A)-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.

(3B)-when finding that the offence under Art.387 KCC can alternatively be committed with eventual intent¹¹.

⁹ Paras.581,582,584

¹⁰ Paras.588,603-605

¹¹ Para.124

5.The errors 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:

(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 proceeding¹²; 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 purposes¹³.

¹² Para.75

¹³ Para.74

(4B)-when finding that the term ‘secret’ in Art.392(1) KCC means only that ‘the information cannot be disclosed to unauthorised persons’ and no more¹⁴.

(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.103¹⁵.

(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 where Art.62(2) requires only the maintenance of any confidentiality/protection *granted* by the SC/SPO, and does not provide for a general prohibition on revelation)¹⁶.

(4E)-when finding that the words “*declared to be secret by a decision*”, for the purposes of Art.392(1) KCC, require no more than any positive act of a competent authority through which information is marked/treated in that authority’s performance of functions as secret¹⁷.

(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

¹⁴ Para.78

¹⁵ Para.475

¹⁶ Para.475

¹⁷ Para.78,471-473

Batches 1-4 was not exhibited/disclosed in full, and 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 content¹⁸.

(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 law¹⁹.

(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 not exhibited/disclosed in full, and W04841 did not consider indications of improprieties therein as part of her review of the undisclosed content²⁰.

Ground-5

The TP erred in law and fact in that 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

¹⁸ Para.472

¹⁹ Paras.486-487,805

²⁰ Paras.812-817

of the burden of proof, where there was evidence that the source of the leak was the SPO²¹.

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

Count 6

Ground-6

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

Ground-7

The Trial Panel erred in law in finding that “in line with Art.62 of the Law” a person whose identity or personal data appears in SC/SPO documents or records the disclosure of which has not been authorised, is a person “under protection in the criminal proceedings”, when Art.62 provides no such sweeping protection²².

²¹ Para.830

²² Para.95

Ground-8

The TP erred in law and fact:

(8A)-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 jurisdiction²³.

(8B)-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/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)²⁴.

Ground-9

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")²⁵.

²³ Paras.344,511-512

²⁴ Para.515

²⁵ Para.100

Ground-10

The TP erred in fact:

(10A)-in finding no credible indication that W04842 exaggerated/lie about the number of relocated witnesses, whereas no reasonable tribunal could have reached that finding²⁶.

(10B)-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 finding²⁷.

(10C)-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 resulted²⁸.

(10D)-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

²⁶ Para.536

²⁷ Paras.536,537

²⁸ Para.536

no evidence that any such persons were aware that they were at risk of harm/imminent relocation²⁹.

Ground-11

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]³⁰, 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 6-11 ITJ/OMJ on the *actus reus* of count 6 and the conviction should be reversed.

Count 1

²⁹ Para.537

³⁰ Para.538

Ground-12

The TP erred in law:

(12A)-when finding that “serious threat” for the purposes of Art.401(1) KCC is not restricted to serious threat to use force³¹.

(12B)-when finding that a “serious threat” may be directed against a person other than an official person for the purposes of Art.401(1) KCC³².

(12C)-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 threat to happen at the same time the official person is actively exercising a particular duty³³.

8.The errors in ground 12 ITJ on the *actus reus* of count 1 and the conviction should be reversed.

Ground-13

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,

³¹ Para.144

³² Para.148

³³ Para.148

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”³⁴.

9.The error in ground 13 ITJ on the *mens rea* of count 1 and the conviction should be reversed.

Count 2

Ground-14

The TP erred in law:

(14A)-in finding that Art.401(2) KCC did not require that the “common action” is common action to use force/serious threat³⁵.

(14B)-when finding that the “common action” may be directed against a person other than an official person for the purposes of Art.401(2) KCC³⁶.

(14C)-when finding that the words “in performing official duties” for the purposes of Art.401(2) KCC did not require the “common action” to

³⁴ Paras.670-671,960

³⁵ Para.162

³⁶ Para.164

happen at the same time the official person is actively exercising a particular duty³⁷.

10. The errors in ground 14 ITJ on the *actus reus* of count 2 and the conviction should be reversed.

Ground-15

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 intent³⁸; and

(b)-that Art.401(2) KCC does not require that all persons in the group participate with the same intent³⁹; 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 only⁴⁰.

³⁷ Para.164

³⁸ Para.155

³⁹ Para.178

⁴⁰ Paras.690,700

11.The errors in ground 15 ITJ on the *actus reus* and *mens rea* of count 2 and the conviction should be reversed.

Ground-16

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 was subsidiary to the situations in which the offence under Art.401(1) KCC is not established⁴¹.

12.The error in ground 16 ITJ entering convictions on both count 1 and 2, and the conviction on count 2 should be reversed.

All Counts – Entrapment

Ground-17

The TP erred in law:

(17A)-when approaching the assessment of a plea of entrapment, on the basis that there was (a)-a requirement for *prima facie* evidence of

⁴¹ Paras.165-170

entrapment⁴² or (b)-a requirement for evidence which ‘compelled’ an inference that the Appellant was entrapped⁴³ or (c)-a requirement to establish a reasonable basis to conclude/infer that there was entrapment⁴⁴, 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.

(17B)-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 explained⁴⁵.

Ground-18

The TP erred in fact:

(18A)-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 finding⁴⁶.

⁴² Para.837(v)

⁴³ Paras.870,871

⁴⁴ Paras.180,860,861,864,877,878,889-890

⁴⁵ Para.180

⁴⁶ Para.859

(18B)-in finding that it received no evidence regarding where the Three Sets had come from, whereas no reasonable tribunal could have reached that finding⁴⁷.

(18C)-when finding that there was no indication that the Third Set was intentionally leaked by the SPO, when there was some indication⁴⁸.

(18D)-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 to attempt to⁴⁹.

Ground-19

The TP erred in law and fact:

(19A)-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 a witness twice implicated a named SPO officer as a source of the leak, 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

⁴⁷ Para.859

⁴⁸ Para.860

⁴⁹ Para.871

circumstances of that allegation from which the conclusion could be drawn that it was speculative.

(19B)-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 17-19 ITJ/OMJ on the plea of entrapment and the convictions on all counts should be reversed.

Sentence

Ground-20

The TP made discernible errors in sentencing:

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

(i)-that the Appellant:

(1)-Did not use force/serious threat of force⁵⁰;

(2)-Did not desire that actual harm be caused to any witness/potential witness⁵¹;

(3)-Did not intend to obstruct any SC Judge⁵²;

(ii)-the absence of any actual harm caused to investigations⁵³;

(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'⁵⁴;

(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;

⁵⁰ Para.557

⁵¹ Para.596

⁵² Para.712

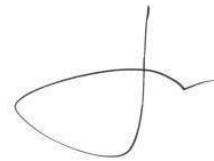
⁵³ Paras.550,639,653,655,692,712

⁵⁴ Paras.100,536-541

(d)-in refusing to take into consideration the range of sentences imposed on persons convicted of similar offences at other international courts/tribunals⁵⁵;

(e)-when imposing a term out of reasonable proportion with that range, by rendering a sentence of 4½ years imprisonment, which was both capricious and manifestly excessive in all the circumstances.

Word count: 2800 words



JONATHAN ELYSTAN REES QC

Specialist Counsel for Mr Gucati

HUW BOWDEN

Specialist Co-Counsel for Mr Gucati

ELEANOR STEPHENSON

Specialist Co-Counsel for Mr Gucati

⁵⁵ Para.979

11 July 2022

Cardiff, UK