

In: KSC-CA-2022-01

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: A Panel of the Court of Appeals Chamber

Judge Michéle Picard

Judge Kai Ambos

Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 30 September 2022

Language: English

Classification: Public

Public Redacted Version of Gucati Application for a Formal Decision that the Prosecution has Failed to File a Brief in Response which complies with Rule 179

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I. INTRODUCTION

1. On 17 June 2022, the Appellant filed his Notice of Appeal¹ pursuant to Rule 176 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“the Rules”).
2. On 11 July 2022, the Appellant refiled his Notice Appeal² pursuant to the direction of the Court of Appeals Panel³.
3. On 19 August 2022, the Appellant filed his Appeal Brief⁴ pursuant to Rule 179 of the Rules.
4. On 19 September 2022, the Appellant received notification of additional item 206 on the Rule 102(3) Notice and the Prosecution’s challenge to disclosure of that item⁵.
5. On 22 September 2022, the Appellant received notification that the Prosecution had filed a document entitled “Prosecution Brief in Response to Defence Appeals with two public annexes”⁶ dated 21 September 2022 (“Prosecution Document”).

¹ KSC-CA-2022-01/F00009, *Gucati Notice of Appeal*, Gucati, 17 June 2022, Confidential

² KSC-CA-2022-01/F00030, *Re-Filed Gucati Notice of Appeal*, Gucati, 11 July 2022, Confidential

³ KSC-CA-2022-01/F00021, *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*, Court of Appeals Panel, 1 July 2022, Public

⁴ KSC-CA-2022-01/F00036, *Gucati Appeal Brief pursuant to Rule 179(1)*, Gucati, 19 August 2022, Confidential

⁵ KSC-CA-2022-01/F00046/CONF/RED, *Confidential Redacted Version of Prosecution Notice of Additional Item 206 and Challenge to Disclosure*, Prosecution, 19 September 2022, Confidential

⁶ KSC-CA-2022-01/F00047, *Prosecution Brief in Response to Defence Appeals with Two Public Annexes*, Prosecutor, 21 September 2022, Confidential

6. On 26 September 2022, the Appellant received disclosure of items 186-190 (redacted) on the Rule 102(3) Notice under Rule 103 [REDACTED] and another item [REDACTED] (“Disclosure 1”), pursuant to orders of the Court of Appeals Panel dated 15 September 2022 and 23 September 2022⁷.
7. On 29 September 2022, the Appellant filed his response to the Prosecution’s challenge to disclosure of item 206⁸.

II. LAW

8. Rule 179(1) of the Rules requires an Appellant to file an Appeal Brief setting out all the arguments and authorities in support of his grounds of appeal.
9. Rule 179(2) permits the Respondent thereto to file a Brief in Response.
10. Rule 179(5) provides that where the respondent is the Specialist Prosecutor any Brief in Response must contain “a declaration...that disclosure of material in his or her custody or control has been completed at the time of filing of that brief”.
11. The purpose and effect of Rule 179(5) is clear. Disclosure must be completed before a Brief in Response by the Specialist Prosecutor is filed.

⁷ KSC-CA-2022-01/F00044, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeal Panel, 15 September 2022, Confidential; KSC-CA-2022-01/F000049, *Confidential Redacted Version of Decision on Specialist Prosecutor’s Office Request for Protective Measures*, Court of Appeals Panel, 23 September 2022, Confidential

⁸ KSC-CA-2022-01/F00050, *Gucati Response to Prosecution Notice of Additional Item 206 and Challenge to Disclosure*, Gucati, 29 September 2022, Confidential

12. Once disclosure is complete and a Brief in Response which complies with Rule 179 has been filed, Rule 179(3) provides for the Appellant to file a Brief in Reply within 15 days thereafter.
13. Rule 6 of the Rules provides that non-compliance with the Court of Appeals Panel may address non-compliance causing material prejudice with any measure deemed appropriate to ensure the integrity and fairness of proceedings.
14. Rule 9 of the Rules provides that the Court of Appeals Panel may extend or reduce any time limit prescribed by the Rules or recognise as valid any act carried out after the expiration of the time limit but only where there is good cause.

III. CHRONOLOGY

15. The Prosecution Document dated 21 September 2022 was filed *before* disclosure of material in the Specialist Prosecutor's custody or control had been completed.
16. Disclosure 1 was not provided until five days later, despite (i) it consisting of [REDACTED]; and (ii) the Prosecution having notified the Court of Appeals Panel of this material in an *ex parte* "Notification" on 7 July 2022⁹.
17. Items 186-190 (part of Disclosure 1) were noticed on the Rule 102(3) Notice during the trial, but the belated disclosure reveals that (i) such notice was not "detailed notice" as required by Rule 102(3) and that (ii) such description as

⁹ KSC-CA-2022-01/F00028/CONF/RED, *Confidential Redacted Version of Notification on W04730 telephone contact with two confidential and ex parte annexes*, Prosecutor, 23 September 2022, Confidential

was provided was misleading and insufficient to allow the Appellant to effectively participate in the disclosure process at trial.

18. The [REDACTED] was never notified to the Appellant before Judgment was pronounced. No explanation has been given for why that material was not identified for disclosure immediately, despite the fact: (i) that the witness and investigator W04841 (Zdenka Pumper) was present in the interview where that information was provided¹⁰; (ii) that her evidence in October and December 2021 demonstrates that [REDACTED]¹¹; and (iii) of her assurance during her evidence that she would bring relevant material to the attention of the Specialist Prosecutor or his Deputy immediately¹². The strong inference must be the failure to disclose that material was based on a “unilateral assessment by the SPO of credibility and reliability”, which the Trial Panel had said would be treated “with the utmost severity”¹³.
19. Resolution of the prosecution challenge to disclosure of item 206, an item in the possession of the Specialist Prosecutor since [REDACTED], remains outstanding to date (the Prosecution having notified the Court of Appeals Panel of this material in an *ex parte* “Notification” on 7 September 2022).
20. No explanation has been provided as to why notification was not immediately given to the Accused of item 206, when: (i) the Trial Panel had previously ruled

¹⁰ Disclosure 1 at 105694-TR-ET Part 1, page 1

¹¹ E.g. Transcript 21 October 2021, page 1226 lines 7-22, page 1237 lines 4-17, page 1249 lines 5-12; Transcript 26 October 2021, page 1450 lines 1-5, page 1477 lines 8-25, page 1478 line 19 to page 1479 line 2; Transcript 15 December 2021, page 2622 lines 10 to line 15 referring to 1D33 [REDACTED]

¹² Transcript, 21 October 2021, page 1193 lines 17-25 (albeit within a broader passage of the evidence suggesting that the SPO does not regard a systematic approach to disclosure as a necessary part of its work - see Transcript, 21 October 2021, page 1179 line 22 to 1196 line 18)

¹³ KSC-CA-2022-01/F00028/CONF/RED, KSC-CA-2022-01/F00028/CONF/RED, *Confidential Redacted Version of Notification on W04370 telephone contact with two confidential and ex parte annexes*, Prosecutor, 23 September 2022, Confidential at para.1, 8, 9 and 11; KSC-BC-2020-07/F00413/RED, *Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, Trial Panel II, 3 November 2021, Public at para.48

that all material relating to [REDACTED] was to be subject to detailed notice under Rule 102(3)¹⁴; and (ii) the information, [REDACTED] disclosure challenge relating to material dealing with items 203-205 on the same topic¹⁵.

21. As disclosure was not complete on 21 September 2022, the Prosecution Document did not - and could not - contain a declaration that disclosure of material in the Specialist Prosecutor's custody or control was complete at the time of filing, which is a mandatory part of any Brief in Response from the Specialist Prosecutor.
22. An equivocal statement that completion of disclosure is subject to pending litigation at the time of filing does not comply with the unequivocal requirement in Rule 179(5)¹⁶.

IV. REMEDIES SOUGHT

23. The Appellant applies pursuant to Rule 6 of the Rules for a formal decision that:
 - a. No Prosecution Brief in Response which complies with Rule 179(5) of the Rules has been filed; and that
 - b. The Prosecution must file a Brief in Response which complies with Rule 179(5) of the Rules once disclosure of material in his custody or control has been completed; and that

¹⁴ KSC-BC-2020-07/F00304, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and *ex parte* annex at para.5 and 10

¹⁵ KSC-BC-2020-07/F00533, *Decision on the SPO Request Regarding Items 203 and 204*, Trial Panel II, 25 January 2022, Confidential; KSC-BC-2020-07/F00541, *Decision on the SPO Request Regarding Item 205*, Trial Panel II, 28 January 2022, Confidential

¹⁶ Such as contained within paragraph 192 of the Prosecution Document

- c. The time limit for filing a Brief in Reply shall run from the first working day after the notification of the filing of a Brief in Response which complies with Rule 179(5).
24. The effect of Rule 179(5) is that the Appellant is entitled to 15 days beginning with confirmation from the Specialist Prosecutor that disclosure is complete to consider his Brief in Reply.
25. The fairness and integrity of the proceedings are undermined if that period of 15 days is curtailed because the Specialist Prosecutor files a document purporting to be a Brief in Response before he has completed disclosure.
26. Where the Specialist Prosecutor has not completed disclosure by the expiry of the time at which Rule 179(2) permits the Specialist Prosecutor to file a Brief in Response, the appropriate course of action is for the Specialist Prosecutor to have apply for an extension of time under Rule 9(5).
27. It is no justification for failing to apply for an extension of time that the Specialist Prosecutor in the present case may have struggled to show good cause, based on his failure to complete disclosure at that stage.
28. It certainly does not amount to good reason to curtail the Appellant's entitlement to 15 days after confirmation that disclosure is complete to consider his Brief in Reply, that the Specialist Prosecutor has failed to complete disclosure to date.
29. The exculpatory disclosure contained within Disclosure 1 should have been disclosed during the trial phase (Judgment not being pronounced until 17 May 2022).

30. Having failed to disclose that material during the trial phase, the Specialist Prosecutor did not notify the Court of Appeals Panel of this material until 7 July 2022, nearly three full weeks after the time for the Appellant to file any Notice of Appeal “setting forth the grounds of appeal” under Rule 176(1) had expired.
31. Having failed to disclose that material before the Appellant was required to set out his grounds of appeal, disclosure did not in fact take place until 26 September 2022, more than one month after the time for filing the Appeal Brief under Rule 179(2) had expired and nearly three months after the Specialist Prosecutor had brought this material and its non-disclosure to the specific attention of the Court of Appeals Panel.
32. Items 186-190 (part of Disclosure 1) were noticed on the Rule 102(3) Notice during the trial, but the belated disclosure reveals that (i) such notice was not “detailed notice” as required by Rule 102(3) and (ii) such description as was provided was misleading and insufficient to allow the Appellant to effectively participate in the disclosure process at trial.
33. Item 206 was not notified to the Appellant at all during the trial phase. Having failed to give notice of item 206 to the Appellant during the trial phase, the SPO did not notify the Court of Appeals Panel until 7 September 2022 and notice was not given to the Appellant until 19 September 2022, three months after the Appellant was required to set out his grounds of appeal, and one month after the Appellant was required to file his Appeal Brief.
34. Disclosure is still not complete with only 5 working days before the timetable envisaged by Rule 179 for all appeal filings expires.

35. As far back as 3 November 2021, the Trial Panel felt it necessary to warn the SPO about its disclosure conduct:

“...the legal understanding advanced by the SPO in these proceedings causes the Panel to be concerned about the SPO’s full compliance with its disclosure obligations. Therefore, the Panel reminds the SPO of its ongoing obligation to conduct a full and effective review of its holding in a manner consistent with the Rules...The Panel emphasises that disclosure constitutes an essential and fundamental element of the guarantee of a fair trial. The Panel cautions the SPO that disclosure obligations stemming from this guarantee are not duties to be circumvented through sophistries but legal obligations to be fulfilled with the greatest of care, urgency and diligence”¹⁷.

36. Failure to disclose material falling under Rule 102(3) and 103, the Trial Panel stated, would be treated with the “utmost severity”¹⁸.

37. The very belated disclosure of Disclosure 1 and provision of notice of Item 206 suggests that the Prosecution paid little heed to those warnings, continued to show scant regard for disclosure and believes that it can act with impunity when it comes to breaching its disclosure obligations.

38. The failure of the Prosecution to complete disclosure, four months after the Trial Panel pronounced judgment, should not be condoned and the interference with the Accused’s disclosure rights that has occurred during the

¹⁷ KSC-BC-2020-07/F00413/RED, *Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, Trial Panel II, 3 November 2021, Public at para.48

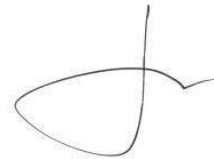
¹⁸ KSC-BC-2020-07/F00413/RED, *Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, Trial Panel II, 3 November 2021, Public at para.48

trial compounded by the further curtailment of the Appellant's right to 15 days after confirmation that disclosure is complete to consider his Brief in Reply.

V. CLASSIFICATION

39. This filing is classified as confidential as it refers to material classified as confidential. A public redacted version is filed.

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30 September 2022

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