

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 to Amend the Notice of Appeal
pursuant to Rule 176(3) of the Rules**

Specialist Prosecutor

Jack Smith

Valeria Bolici

Matthew Halling

James Pace

Counsel for Hysni Gucati

Jonathan Elystan Rees KC

Huw Bowden

Eleanor Stephenson

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

I. INTRODUCTION

1. On 26 September 2022, the Appellant received disclosure of seven items (“Disclosure 1”) under Rule 103 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), pursuant to orders of the Court of Appeals Panel dated 15 September 2022 and 23 September 2022¹.
2. Each of those items were in the possession of the Prosecution prior to the pronouncement of Judgment by the Trial Panel, and the failure to disclose them prior to pronouncement of Judgment was in breach of Rule 103.
3. The Appellant accordingly applies for authorisation to vary the grounds of appeal pursuant to Rule 176(3) of the Rules, so as to add a further ground of appeal relating to the failure of the Prosecution to comply with Rule 103 during the trial².

II. CHRONOLOGY

4. On [REDACTED], the Prosecution [REDACTED]³.
5. On [REDACTED], the Prosecution received item 206⁴.

¹ KSC-CA-2022-01/F00044, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeals Panel, 15 September 2022, Confidential; KSC-CA-2022-01/F00049, *Confidential Redacted Version of Decision on Specialist Prosecutor’s Office Request for Protective Measures*, Court of Appeals Panel, 23 September 2022, Confidential

² See Annex 1 at draft Ground 19C

³ Disclosure 1, ERN 082095-TR-ET Parts 1 to 5 (“Items 186-190”)

⁴ KSC-CA-2022-01/F00046, *Confidential Redacted Version of Prosecution Notice of Additional Item 206 and Challenge to Disclosure*, Court of Appeals Panel, 19 September 2022, Confidential

6. On [REDACTED], the Prosecution further [REDACTED]⁵.
7. On 18 May 2022, the Trial Judge pronounced Judgment⁶.
8. On 17 June 2022, the Appellant filed his Notice of Appeal⁷ pursuant to Rule 176 of the Rules.
9. On 11 July 2022, the Appellant refiled his Notice Appeal⁸ pursuant to the direction of the Court of Appeals Panel⁹.
10. On 19 August 2022, the Appellant filed his Appeal Brief¹⁰ pursuant to Rule 179 of the Rules.
11. 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 item¹¹.
12. On 26 September 2022, the Appellant received Disclosure 1 pursuant to orders of the Court of Appeals Panel dated 15 September 2022 and 23 September 2022¹². Disclosure 1 is exculpatory material which fell to be disclosed under Rule 103.

⁵ Disclosure 1, ERN 105694-TR-ET Part 1

⁶ KSC-BC-2020-07/F00611, *Trial Judgment*, Trial Panel II, 18 May 2022, Confidential

⁷ KSC-CA-2022-01/F00009, *Gucati Notice of Appeal*, Gucati, 17 June 2022, Confidential

⁸ KSC-CA-2022-01/F00030, *Re-Filed Gucati Notice of Appeal*, Gucati, 11 July 2022, Confidential

⁹ 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

¹⁰ KSC-CA-2022-01/F00036, *Gucati Appeal Brief*, Gucati, 19 August 2022, Confidential

¹¹ KSC-CA-2022-01/F00046/CONF/RED, *Confidential Redacted Version of Prosecution Notice of Additional Item 206 and Challenge to Disclosure*, Prosecutor, 19 September 2022, Confidential

¹² 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

13. On 29 September 2022, the Appellant filed his response to the Prosecution's challenge to disclosure of item 206¹³. A decision in relation to disclosure of item 206 is outstanding at the time of filing.

III. LAW

14. Rule 176(2) provides that a party may appeal against Trial Judgment by filing a notice of appeal setting forth the grounds of appeal within 30 days.

15. 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 within 60 days thereafter.

16. Rule 176(5) provides that the Court of Appeals Panel may authorise a variation of the grounds of appeal where there is good cause.

17. Rule 103 of the Rules requires the Prosecution to immediately disclose to the Defence any information as soon as it is in his custody, control or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the Accused.

18. The obligation on the Prosecutor to disclose Rule 103 material is an obligation which continues up to the pronouncement of the Trial Judgement (and beyond)¹⁴ and is an "essential and fundamental element of the guarantee of a fair trial"¹⁵.

¹³ KSC-CA-2022-01/F00050, *Gucati Response to Prosecution Notice of Additional Item 206 and Challenge to Disclosure*, Gucati, 29 September 2022, Confidential

¹⁴ Rule 112 of the Rules

¹⁵ 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

IV. SUBMISSIONS

19. The decision of the Court of Appeals Panel dated 15 September 2022 established that a breach of Rule 103 of the Rules had occurred prior to the pronouncement of the Trial Judgement.
20. The Appellant had no knowledge of that breach until notified of that decision on 26 September 2022.
21. The Appellant had sought disclosure of Items 186-190 during the trial but disclosure had been refused, despite the Trial Panel having previously indicated that those items were at least *prima facie* subject to disclosure¹⁶.
22. Having had no access to Items 186-190, and only the blandest of descriptions of the same on the Rule 102(3) Notice during the trial, the Appellant was unaware of any grounds to challenge non-disclosure until notification of the decision of the Court of Appeals Panel dated 15 September 2022, and disclosure of the documents themselves.
23. The belated disclosure of items 186-190 reveal that (i) such notice was not “detailed notice” as required by Rule 102(3) and that (ii) such description as was provided was misleading and insufficient to allow the Appellant to effectively participate in the disclosure process at trial.
24. The Appellant had no notice of the fact of [REDACTED] until the transcript of it was received on 26 September 2022, let alone grounds to challenge its non-

¹⁶ 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.23; 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.95(a)

disclosure (the same applies to item 206). No explanation has been given for why the information provided [REDACTED] 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 provided¹⁷; (ii) that her evidence in October and December 2021 demonstrates that [REDACTED]¹⁸; and (iii) of her assurance during her evidence that she would bring relevant material to the attention of the Specialist Prosecutor or his Deputy immediately¹⁹. The strong inference must be that 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”²⁰.

25. As a result of the Prosecution’s failure to comply with Rule 103, the Appellant was unaware of the breach of Rule 103 until 26 September 2022, over 3 months after he was obliged to file his Notice of Appeal and over one month after he was obliged to file his Brief in Appeal (albeit the Prosecution had notified the Court of Appeals Panel of this material in an *ex parte* “Notification” on 7 July 2022²¹).

26. Resolution of the prosecution challenge to disclosure of item 206, an item in the possession of the Specialist Prosecutor since [REDACTED], remains

¹⁷ Disclosure 1 at 105694-TR-ET Part 1, page 1

¹⁸ 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]

¹⁹ 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)

²⁰ 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

²¹ 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

outstanding to date (the Prosecution having notified the Court of Appeals Panel of this material in an *ex parte* "Notification" only on 7 September 2022).

27. 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 that all material relating to [REDACTED] was to be subject to detailed notice under Rule 102(3)²²; and (ii) the information, [REDACTED] disclosure challenge relating to material dealing with items 203-205 on the same topic²³.
28. Neither the breach of Rule 103, nor its very late identification, are the fault of the Appellant.
29. There is no doubt now that a breach of Rule 103, an essential and fundamental element of the guarantee of a fair trial, has occurred.
30. Authorisation to vary the grounds of appeal should be granted to permit the Appellant to argue the effect of that breach, namely, that it invalidated the Judgment or occasioned a miscarriage of justice.
31. If the Prosecution had made disclosure of this Rule 103 material after the Trial Judgment was pronounced, but before the time for the Appellant to file his Notice of Appeal, the Appellant would have included this ground in his original Notice.
32. The failure of the Prosecution to complete disclosure, four months after the Trial Panel pronounced judgment, should not be condoned and the

²² 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

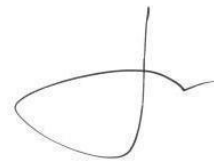
²³ KSC-BC-2020-07/F00533, *Decision on the SPO Request Regarding Items 203 and 204*, Trial Panel II, 25 January 2022, Confidential; KSC-BC-2020-07/F00541, *Decision on the SPO Request Regarding Item 205*, Trial Panel II, 28 January 2022, Confidential

interference with the Accused's disclosure rights that has occurred during the trial compounded by the further curtailment of the Appellant's rights by obstructing the Appellant from raising the breach of Rule 103 on appeal, to the Prosecution's undeserved advantage.

V. CLASSIFICATION

33. This filing is classified as confidential as it refers to material classified as confidential. A public version is also filed.

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JONATHAN ELYSTAN REES KC

Specialist Counsel for Mr Gucati

HUW BOWDEN

Specialist Co-Counsel for Mr Gucati

ELEANOR STEPHENSON

Specialist Co-Counsel for Mr Gucati

30 September 2022

Cardiff, UK