

In: KSC-CA-2022-01
The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: A Panel of the Court of Appeals Chamber
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 15 October 2022

Language: English

Classification: Public

Haradinaj Re-filed Reply to SPO Brief in Response to Defence Appeal Brief

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I. INTRODUCTION

1. The Appellant seeks to Reply to the Specialist Prosecutor’s Office (“SPO”) Brief in Response (“PB”)¹ to the Appeal Brief (“AB”)² against the Trial Judgment (“TJ”) of Trial Panel II (“TP”) of 18 May 2022.³
2. The submissions in the AB are maintained except where otherwise stated.⁴

II. SUBMISSIONS*Ground 1*

3. The Appellant maintains in full the submissions under Ground 1 in the AB.
4. Nothing in the SPO’s PB causes the Appellant to substantively respond or amend its submissions, as the SPO merely mischaracterises the arguments in the AB.
5. Ground 1 is an overarching ground of appeal that considers the overall fairness of the proceedings, the equality of arms, the disclosure failings and the disproportionate and wholly unnecessary restrictions placed on the defence in the presentation of its case.
6. It is a regrettable theme in the Proceedings that the SPO appears to be ‘arguing its case by numbers’, in that where the Appellant cannot pinpoint an exact reference to the TJ which he says was ‘unfair’, and precisely why, any submissions on unfairness

¹ KSC-CA-2022-01/F00047.

² KSC-CA-2022-01/F00035/COR2.

³ KSC-BC-2020-07/F00611/RED.

⁴ This filing is made in the absence of a ruling on KSC-CA-2022-01/F00051.

are said to be without merit. It should be understood that the mere existence of procedures and guarantees does not ensure that those procedures are carried out fairly. The SPO continues to demonstrate a wilful ignorance to the fact that the test of substantive procedural fairness cannot be boiled down to paragraph numbers and footnotes. Ensuring substantive procedural fairness requires the Court to look holistically as to whether an accused has been able to fully and properly present their case without undue or unnecessary restriction. Lamentably, this was not the case during the Appellant's trial and, on the SPO's approach, risks not being the case during his appeal.

7. The SPO suggests that the Appellant has failed to "*identify a single allegedly relevant decision or to coherently set out, let alone establish, any disadvantage*".⁵ This is merely a disagreement with the arguments put forward without addressing their substance. This does not invalidate those arguments.
8. The Appellant maintains the arguments put forward, in particular the five points set out at paragraph 35 of the AB.⁶

Ground 2

9. The AB does not seek to relitigate matters already subject to a final judicial determination.⁷ The Recusal Decision was taken prior to the Defence case opening and the dissemination of the TJ. Thus, it was taken on the basis of the *risk of*

⁵ KSC-CA-2022-01/F00047, para.10

⁶ KSC-CA-2022-01/F00035/COR2, para.34

⁷ *Contra*, KSC-CA-2022-01/F00047, para.19.

actual/perceived bias and the effect that this *might have* had on the trial proceedings.⁸

The Appellant seeks to appeal his conviction and sentence on the basis that this risk of actual/perceived bias *was in fact* realised during the trial and *did affect* the actual/perceived impartiality of the proceedings and the TJ itself, which is a different issue.

10. The SPO submissions, once again, merely disagree that the evidence submitted is capable of displacing the deference due to the TP.⁹ The Appellant's submissions are not 'sweeping' or 'abstract' and highlight specific instances of unfavourable treatment that the Appellant maintains demonstrate bias.¹⁰ The position advanced and other cases cited by the SPO in this regard are without merit.

Grounds 3 and 23

11. The Appellant maintains in full the submissions under Grounds 3 and 23.

Ground 4

12. The SPO maintains that the 'Batches' are not evidence as they have not been admitted into evidence.¹¹ Even if this was the case *stricto sensu*, which is not accepted, it is entirely improper for a prosecutorial authority to hide behind a narrow and misguided definition of what is and is not evidence. The Batches are central to the charges against the Appellant; without them, the indicted offences do not arise.

⁸ See, e.g., KSC-BC-2020-07/F00272, para.16.

⁹ *Contra*, KSC-CA-2022-01/F00047, para. 22.

¹⁰ KSC-CA-2022-01/F00035/COR2, paras.40-47.

¹¹ *Contra*, KSC-CA-2022-01/F00047, para.25

13. The position that “[t]here can be no violation of fair trial rights when a court does not rely, for any purpose, on non-disclosed information”,¹² may in principle be correct, but the SPO’s case did not reflect this principle, as regardless of whether disclosed, the contents were (in substance) relied upon for each count. Evidence was heard in respect of witnesses whose details are said to have been released, despite no details of those witnesses being provided, whilst the SPO were permitted to rely upon the fact that all documents were confidential despite the fact that neither the Pre-Trial Judge, TP, nor either defence team were afforded the opportunity to confirm this.
14. The TP’s failure to rectify this position by ordering disclosure was therefore such a fundamental error of law, in that it infringed the most basic principles of fairness.

Ground 5

15. It is incorrect that the Appellant has not provided reasoning as to why the TP’s failure to rule on the ‘elements of crime and modes of liability issue’ prejudiced the Defence.¹³ The position is dealt with at paragraphs 70-71 of the AB.¹⁴
16. It is correct that an evaluation of the elements of crime and modes of liability is intrinsically connected to an evaluation of guilt.¹⁵ However, this mischaracterises the position, in which the TP sought submissions on a previously untested issue so as to understand what the elements and modes of liability for the relevant charges *were*, rather than *how they were satisfied*, creating a legitimate expectation on the part of the

¹² *Ibid.*

¹³ *Contra*, KSC-CA-2022-01/F00047, para.37.

¹⁴ KSC-CA-2022-01/F00035/COR2, para.70.

¹⁵ KSC-CA-2022-01/F00047, para.40.

Appellant that these issues would be clarified, at the very least, prior to the presentation of evidence. Regrettably, they were not, and the Defence was left to speculate what the prosecution needed to prove as to the constitutive elements of the offence(s). This was nothing less than gravely prejudicial to his ability to fully and properly prepare his defence.

Ground 6

17. The SPO mischaracterises the position; again, simply because it does not agree with the defence submissions – that does not mean they are without merit.
18. The SPO fails to engage with the substance, instead seeking to argue that it has been litigated and therefore finalised.¹⁶ The Appellant is not seeking to relitigate, but rather, highlight how the TP were erred by restricting the evidence the Defendant was allowed to present.

Ground 7

19. The TP did not hear evidence from a single individual as to how they had been intimidated by the Appellant, despite the SPO knowing the names and whereabouts of each such individual it alleged was subject to intimidation.¹⁷
20. Instead, there was a(n) (incomplete) reliance on (partially disclosed) ‘contact notes’ (which are not a verbatim transcript of what was discussed) but merely the author’s recollection and/or interpretation of what another individual had said,¹⁸ and at times

¹⁶ *Contra*, KSC-CA-2022-01/F00047, para. 41.

¹⁷ *Contra*, KSC-CA-2022-01/F00047, para. 54.

¹⁸ KSC-CA-2022-01/F00047, para. 56.

months after the encounter had taken place. This is untested hearsay evidence on any definition.

21. The fact that numerous notes were rendered inadmissible also does not mean that those that were admitted or considered were not hearsay, nor does the fact the Appellant was acquitted of a single count of retaliation have any bearing on whether the process in terms of that evidence was fair or otherwise.¹⁹ One is not dependent on the other.

Ground 8

22. The SPO infer that the *“only specific errors alleged”* concern three discrete issues with regard to the evidence of Witnesses W04841, W04876, and W04842.²⁰ This is incorrect; in fact, the reliance on those errors in the AB is phrased in terms of *“a broader context of concern regarding serious and systematic deficiencies in the SPO’s chain of custody records over the seized documents”*,²¹ with the subsequent reference to the FTB drawing in and specifying numerous specific issues²² in respect of which Witnesses W04841, W04876, and W04842, are symptomatic.

¹⁹ *Ibid*, para. 55.

²⁰ *Contra*, KSC-CA-2022-01/F00047, para.58.

²¹ KSC-CA-2022-01/F00035/COR2, para.102.

²² *Ibid*, paras.264-301.

23. The Appellant does not “[fail] to substantiate how these alleged errors affect specific findings in the Judgment”,²³ as the effect(s) of the errors are fully set out in paragraphs 104-107 of the AB.
24. The Appellant does not fail to establish “why the convictions would not stand on the basis of the remaining evidence”²⁴. Whilst the merit of the Grounds advanced may be assessed in isolation where appropriate, their cumulative effect can only be properly assessed having evaluated the AB as a whole. Thus, even if it is found that Ground 8 does not itself obviate the basis for the Appellant’s conviction, it does play an important role in the cumulative effect of the Grounds advanced, and the safety of the convictions.
25. It is noted in any event that the testimonies focussed on in Ground 8 are centrally important to the *actus reus* of the offence(s) alleged against the Appellant, as they go to the heart of disputes surrounding the content of the (undisclosed) Batches and the names of and effects upon the (unidentified) witnesses allegedly intimidated by his conduct.
26. Submissions that “the Trial Panel gave detailed explanations for how it evaluated all three witnesses”²⁵ obscure the fact that these explanations were incorrect and failed to address a number of important issues. This includes, for example, the fact that no explanation was given as to why the TP did not challenge Witness W04842’s

²³ KSC-CA-2022-01/F00047, para.58.

²⁴ KSC-CA-2022-01/F00047, para. 58.

²⁵ KSC-CA-2022-01/F00047, para. 59.

testimony that '100 witnesses' had been contacted and intimidated, despite the fact that the TP was presented with no evidence in support and, this being a central and disputed element of the *actus reus* of the intimidation offences, should therefore have excluded this allegation entirely, or made it clear as to why it did not.²⁶

Ground 9

27. The Appellant does support his allegation²⁷ that the TP erred in law in determining that the public interest defence was unavailable under Kosovo law at paragraph 110 of the AB, which states that the TP failed to infer that acts which would otherwise be criminal are not where they are compatible with the right to freedom of expression guaranteed by the Constitution and the ECHR.
28. The Appellant does provide reasons²⁸ why the TP should have taken into account 'the stance that Serbia has taken over the years towards Kosovo' at paragraph 113 of the AB.
29. The SPO's reference to paragraph 814 of the TJ to support its claim that the TP considered Defence arguments regarding Serbian authorities²⁹ is erroneous, as this paragraph focuses only the association of the SITF/SPO Serbian interlocutors with previous regimes and the criminal acts that they may or may not have committed.

²⁶ In the TJ, the TP claim that they will revisit challenges to Mr. Jukic's testimony "*under Count 6*" (KSC-BC-2020-07/F00611/RED, para. 54). However, all that the TP does is to find that "*it is not in a position to evaluate...how many witnesses were called or contacted by the SPO*" (KSC-BC-2020-07/F00611/RED, para.540) demonstrating a willingness to accept the evidence at face value with no corroboration, thereby in effect reversing the burden of proof for the Appellant.

²⁷ *Contra*, KSC-CA-2022-01/F00047, para.133.

²⁸ *Ibid*, para.136.

²⁹ *Ibid*, para.135.

Crucially it does not reflect the broader context of the acute long-standing Serbian enmity towards Kosovo and the sheer weight of the dependence of the SITF/SPO investigations on Serbian sources, which again paragraph 113 of the AB outlines.

Ground 10

30. SPO submissions fail to consider the parallel between Dick Marty's allegations and the case set forth in paragraphs 117/121 of the FTB.
31. The SPO incorrectly claim that the unverified nature of the allegations was not central to the TP's decision,³⁰ as it is evident from the wording of the decision that the TP's determination that their "*unverified*" nature was a reason for its conclusion that they were irrelevant.³¹ Further, the suggestion that they were "*unverified*" is erroneous. The allegations were made by Dick Marty himself and the allegations supported a central issue at trial – the active, and improper, involvement of Serb officials.

Ground 11

32. The SPO's reference to paragraphs 811-817 and 910 of the TJ to assert that the TP considered the Defence arguments concerning the allegation of impropriety in SITF/SPO cooperation with the Serbian authorities "*in the context of the case before it*"³² is erroneous, as those paragraphs make no reference to the mono-ethnic nature of the court.

³⁰ *Ibid*, para.45.

³¹ KSC-BC-2020-07/F00610, para.16.

³² KSC-CA-2022-01/F00047, para.138.

33. The SPO misrepresent the Appellant's clarification of the nature of "*the imminent and unprovoked danger*"³³ by suggesting that the AB differs from the position taken at trial that he acted to avert an imminent and unprovoked danger to others in the form of malicious prosecution.³⁴ This is incorrect as in the AB, the Appellant was simply stating that he was *not* preventing any *specific prosecutions* that were about to take place, but that he was averting an imminent and unprovoked *danger* of such prosecutions. As such, he was performing an act under Art.13(b) KCC.

Grounds 12 and 13

34. Regrettably, an administrative filing error means that submissions in the AB have omitted those relevant to Ground 12.

35. It will be appreciated, however, that relevant argumentation is contained in Ground 13, which should not therefore be dismissed *in limine*.

36. The Appellant does not substantively engage with the SPO's response that his arguments are "*unfounded*"³⁵ "*alternative*"³⁶ or "*riddled with inaccuracies*",³⁷ save to say that these matters are merely a disagreement with his position that takes the matter no further.

³³ KSC-CA-2022-01/F00035/COR2, para.131.

³⁴ KSC-CA-2022-01/F00047, para. 139.

³⁵ *Ibid*, para.146.

³⁶ *Ibid*.

³⁷ *Ibid*, para.147.

Grounds 14 and 15

37. In relation to Ground 14, the Appellant no longer raises the failure to investigate the impropriety of the SPO's investigation as a separate head of appeal, as it is a recurring theme that runs through the entire case. This is without prejudice to his ability to raise such issues in all other relevant Grounds, including, but not limited to, allegations of entrapment.
38. In relation to Ground 15, the SPO states³⁸ that the Appellant never raised the argument that his conduct constituted an act of minor significance within the meaning of KCC Art.11 and that this argument did not feature at trial. Whilst it is correct that the TP references only the Gucati PTB, it nonetheless references the fact that 'Defence' has argued these issues,³⁹ as opposed to using the conventional distinction between the 'Haradinaj' and 'Gucati' Defence.⁴⁰ Reference to the 'Parties'' submissions on this issue in the index is also made in the plural,⁴¹ reflecting the understanding between all parties that relevant submissions had been raised on the this point by both Defendants.⁴²
39. In Ground 15, the Appellant makes the point that even if he had committed the criminal offences of which he was found guilty, they would have been of minor significance because the confidentiality of the protected information had been

³⁸ *Ibid*, para. 151.

³⁹ KSC-BC-2020-07/F00611/RED, para.921.

⁴⁰ *See, e.g.*, KSC-BC-2020-07/F00611/RED, paras.56, 302, 419, 556, 610, 718, 801, 802, 803, 826. *See also*, fn.1689, 1691.

⁴¹ *Ibid*, p.ix.

⁴² *See e.g.*, KSC-BC-2020-07/F00566/RED/1, paras.120(e)-(g), 182-188.

violated before it reached him.⁴³ In other words, irrespective of the dissemination of the information, the confidentiality of the Batches had already been compromised as a result of their removal from the SPO before they reached the KLA WVA,⁴⁴ thereby diminishing the gravity of the offences that the TP found that the Appellant committed in relation to confidential material. This is distinct from the argument of the information already being in the public domain and it is not addressed in the consideration of Art.11 KCC in the TJ⁴⁵ or in the submissions in the Prosecution Response to Ground 15.⁴⁶

Ground 16

40. Submissions under this Ground are not undermined by the absence of reference to specific 'material determinations of fact' made during *ex parte* hearings held between the SPO and the TP regarding disclosure issues relevant to the evidence of entrapment.⁴⁷ Plainly, the Appellant is not in a position to give such references as he and his representatives were prevented from participating.
41. If the SPO takes issue with characterising what may or may not have been discussed at those hearings as 'material determinations of fact', the Appellant is willing to accept that those discussions may instead have been relevant to 'material

⁴³ KSC-CA-2022-01/F00035/COR2, para.154.

⁴⁴ See KSC-BC-2020-07, Opening Statements, 7 October 2021, p. 790 lines 8-16.

⁴⁵ KSC-BC-2020-07/F00611/RED, paras.921-926.

⁴⁶ KSC-CA-2022-01/F00047, paras.150-154.

⁴⁷ *Contra*, KSC-CA-2022-01/F00047, para.155.

determinations of law', as this does not affect the substance of the submissions in Ground 16, which the SPO ignores.

42. It is equally irrelevant that "*no item was admitted into evidence that the Defence was barred from commenting on or challenging.*"⁴⁸ The submissions under Ground 16 make it clear that the Appellant's elementary fair trial rights demanded that *he*, not the TP, have knowledge of and be afforded the ability to comment upon all evidence adduced or observations filed. Even if not tendered by the SPO, therefore, the Appellant's fair trial rights required that he be admitted into the hearings to at least be aware of the SPO's (actual or intended) case.
43. Again, whilst it is not accepted that the failure to do so did not cause prejudice, the existence of any such prejudice is not determinative of whether this one sided and exclusionary approach had the effect of breaching those fair trial guarantees, which, it is submitted, it did. The simple fact is that regardless of the TP's intentions in holding them, the Appellant should have been able to participate in those hearings, but he was not.

Ground 17

44. The Appellant does not fail to make submissions not already considered and properly dismissed by the TP,⁴⁹ and the SPO's submissions in this regard again

⁴⁸ KSC-CA-2022-01/F00047, paras.157.

⁴⁹ KSC-CA-2022-01/F00047, para.159.

amount to simple disagreement; they also fail to take account of the key submission in paragraph 172 of the AB.⁵⁰

45. The Appellant is not at fault for being unable to show how the information the TP authorised the SPO to redact or withhold could have assisted him,⁵¹ as it is precisely because of these redactions/reservations that the ability of the Appellant to show this was limited. The information from which the Appellant was excluded could have had a significance for his defence that was not apparent to the TP. Failing to disclose the information *in toto* without redactions was therefore an error of law.

Ground 18

46. The SPO's submissions regarding the TP's finding that a serious threat against third parties could be sufficient for a crime under Article 401(1) KCC⁵² reiterate the TP's inference on the basis of the wording of the provision and claim that the commentary cited by the Appellant "*admits that the threat can be addressed against other persons or even objects*".⁵³ However, they fail to address the reasons for rejecting both in paragraph 176 and footnote 171 of the AB.

⁵⁰ KSC-CA-2022-01/F00035/COR2, para.172.

⁵¹ KSC-CA-2022-01/F00047, para.160.

⁵² *Ibid*, para.110.

⁵³ *Ibid*.

Ground 19

47. The Appellant did not intend his comments as an express or inferred threat and SPO allegations to the contrary again amount essentially to a mere disagreement with the Appellant's position.
48. For the avoidance of doubt, it is maintained that the passages quoted in fact go to the Appellant's well-accepted and public opposition to the *modus operandi* of the SPO/KSC, the holding and espousing of which is not a criminal offence and should not be taken to automatically fulfil the requirements of inducement set forth in Art. 387.
49. Superficial and hyperbolic submissions such as the fact that the Appellant "*made a point in stating that the public now knew who the (potential) witnesses are and that the KSC/SPO was unable to guarantee their privacy and security*"⁵⁴ are particularly unhelpful in resolving the issue at hand. At the time of the comments, the SPO/KSC had just permitted multiple leaks of documents containing (allegedly) sensitive data relating to witnesses and potential witnesses involved in proceedings. Therefore, the Appellant was correct: the SPO/KSC could *not* and had *not* protected its witnesses; this does not mean, however, that the Appellant intended, in pointing it out, to use this fact as a threat.

⁵⁴ KSC-CA-2022-01/F00047, para. 66.

Ground 20

50. Claims that the Appellant's submissions regarding the *mens rea* alleged in Count 3⁵⁵ are a "mere disagreement" with the TP's interpretation⁵⁶ misstate the Appellant's position.
51. After enumerating the evidence on the basis of which the TP reached a conclusion as to his state of mind,⁵⁷ the Appellant points out that the evidence does not contain anything that reveals a *desire to change* what witnesses and potential witnesses may say to the KSC and/or SPO and that it could only be given interpretations other than the one made by the TP.⁵⁸ This is a demonstration of a factual error on the TP's part.
52. The Appellant does not "[acknowledge] that there is some evidence supporting the TP's interpretation".⁵⁹ In fact, he submitted that the evidence concerned⁶⁰ "could at first sight be viewed as supporting the proposition that the Appellant had the requisite intention".⁶¹ In other words, he was stating that on a superficial reading it could be misinterpreted in the manner indicated, and proceeded to give the correct interpretation and the reasons for it.⁶²

⁵⁵ KSC-CA-2022-01/F00035/COR2, paras.182-187.

⁵⁶ KSC-CA-2022-01/F00047, para.76.

⁵⁷ KSC-CA-2022-01/F00035/COR2, para.183.

⁵⁸ *Ibid*, para.184.

⁵⁹ KSC-CA-2022-01/F00047, para.76.

⁶⁰ P00008, pp.31-32.

⁶¹ KSC-CA-2022-01/F00035/COR2, para.185.

⁶² KSC-CA-2022-01/F00035/COR2, para.186.

53. The failure to understand the Appellant's position is further demonstrated by the Prosecution's treatment of his assertion that the TP's findings indicate that he was "hostile to witnesses and potential witnesses, that he realised that harm could come to them and that he sought the collapse of the SPO/KSC and the protection of KLA WVA members from conviction".⁶³ The SPO describes this as an acknowledgement with the implication that it supports the TP's conclusion.⁶⁴ This is incorrect, as what the Appellant actually asserts here is that the TP's findings fall short of a possible factual basis for the presence of the *mens rea* alleged in Count 3.

Ground 21

54. The Appellant's interpretation of the term "secret" in Art.392(1) KCC in light of the definition in Art.6(1)(2) of the Law on the Classification of Information and Security Clearances is not erroneous.⁶⁵

55. Referring to Article 3(4) of the Law, the Prosecution submits that no Kosovo law or regulation which has not been expressly incorporated into the Law, shall apply to the functions and jurisdiction of the Specialist Chambers.⁶⁶ The Prosecution fallaciously infers from this that the *interpretation* of the KCC should only be governed by the statutory framework set forth in the Law.⁶⁷ That runs contrary to the fact that the KSC is a domestic court and does not operate in a vacuum.

⁶³ KSC-CA-2022-01/F00047, para.76.

⁶⁴ KSC-CA-2022-01/F00047, para.76.

⁶⁵ KSC-CA-2022-01/F00047, para.83.

⁶⁶ KSC-CA-2022-01/F00047, para.79.

⁶⁷ KSC-CA-2022-01/F00047, paras 79,83.

56. Furthermore, the assertion that the term ‘secret’ must be interpreted in accordance with its ordinary meaning in no way supports SPO arguments. This is demonstrated by the self-evident falsity of the Prosecution statement that “[a] competent authority like the SITE/SPO marking or treating information as confidential is naturally understood as declaring this information secret by a decision within the meaning of KCC 392(1)”.⁶⁸ Only a tiny subset of the information in an official proceeding that must not be revealed according to law is “secret”, as that term is ordinarily understood.

Ground 22

57. The SPO’s submissions are misconceived. Whilst this Ground of appeal is different to that of Ground 4 and is therefore independent, the submissions are intrinsically related and therefore it is an inefficient use of the narrow word limit to simply repeat the position.

Ground 24

58. The Appellant maintains in full the submissions under Ground 24 and merely repeats that the sentence imposed was grossly disproportionate to the findings of fact.

III. RELIEF SOUGHT

59. The Appellant maintains that the errors identified, either individually or in combination, invalidate and/or have occasioned a miscarriage of justice with respect to the totality of the convictions imposed on the Appellant and invite the AP to direct

⁶⁸ KSC-CA-2022-01/F00047, para.84.

an acquittal on all counts. In the alternative, should the AP dismiss the appeal against conviction on one or more of the counts, the Appellant seeks a reduction in sentence as set out in paragraph 235 of the AB.

Word Count: 4,000 words



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