

**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:** 10 November 2022

**Language:** English

**Classification:** Public

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**Public Redacted Version of Gucati Request for Oral Hearing of the Appeal**

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## I. INTRODUCTION

1. The Appellant hereby requests that the Court of Appeals Panel orders an appeal hearing (date to be fixed), pursuant to Rules 72(3) and 180 of the Rules.

## II. LAW

2. Rule 180 provides that after the expiry of the time limits for the filing of briefs provided for in Rule 179, the Court of Appeals Panel may set the date of an appeal hearing, if necessary.
3. Rule 72 provides that appeals against a Judgment by a Trial Panel under Article 15(2) of the Law *may* be determined entirely on the basis of written submissions. Rule 72 does not provide that such appeals *shall* be determined entirely on the basis of written submissions. Rule 72(3) provides that the Court of Appeals Panel may order otherwise.

## III. SUBMISSIONS

4. The Court of Appeals Panel has recognised that the length and complexity of the Trial Judgment when compared to judgments in other cases concerning offenses against the administration of justice warrants an exceptional approach to the appeal<sup>1</sup>.

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<sup>1</sup> KSC-CA-2022-01/F00007, *Decision on Haradinaj's Request for Variation of Word Limit to File Notice of Appeal*, Court of Appeals Panel, 15 June 2022, Public at paragraph 6

5. Since the Court of Appeals Panel recognised the same, the Prosecution has belatedly made disclosure of exculpatory material under Rule 103 which has been in possession of the Prosecution since October 2020 and April 2022, and which was not disclosed immediately in accordance with Rule 103 (“Rule 103 Material”).
6. That breach of Rule 103 (and the content of the material belatedly disclosed) was not known to the Appellant at the time that his grounds of appeal were filed, nor when his Appeal Brief was filed (the same having only been disclosed some weeks after).
7. Further, there is an outstanding issue of disclosure relating to item 206, which should have been notified to the defence under Rule 102(3) during the course of the trial but was not (“Rule 102(3) Material”).
8. The Court of Appeals Panel has stated that the Rule 103 Material and Rule 102(3) Material relate to issues which the Appellant has developed in his Appeal Brief<sup>2</sup>.
9. However, the Appellant has had no opportunity in his grounds of appeal or Appeal Brief to make submissions in writing as to the specific consequences relating to the issues which the Appellant has developed in his Appeal Brief which follow from the late disclosure, in particular, in relation to grounds 4-(4G), 4-(4H), 17, 18, 19 and 20.
10. For example, the issue of impropriety in the conduct of SITF/SPO investigations is an issue in the case<sup>3</sup>.

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<sup>2</sup> KSC-CA-2022-01/F00064, *Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules*, Court of Appeals Panel, 13 October 2022, Confidential at paragraph 17

<sup>3</sup> KSC-BC-2020-07/F00611, *Trial Judgment*, Trial Panel II, 18 May 2022, Confidential at para.812

11. The public interest is engaged where there is evidence of improprieties that would affect the independence, impartiality or integrity of the SITF/SPO's investigation(s)<sup>4</sup>.
12. The Trial Panel rejected the submission that the SITF/SPO collaboration with certain Serbian state officials named in the Gucati Pre-Trial Brief raised questions about the independence, impartiality and integrity of SITF/SPO investigations, such that collaboration with those persons amounted to impropriety, partly on the basis that the Trial Panel had not heard evidence of the involvement of those Serbian state officials in relevant offences<sup>5</sup>.
13. The Rule 103 Material and the Rule 102(3) Material Item 206 [REDACTED], [REDACTED] and [REDACTED]<sup>6</sup> ([REDACTED] according to the Rule 103 Material at least), [REDACTED].
14. A violation of Article 6 of the European Convention on Human Rights can occur in the case of "private entrapment": that is, entrapment by actor who is not an agent of the prosecuting state ("non-state agent")<sup>7</sup>.
15. It will be an abuse of the court's process, such that a stay of proceedings is required, for the state to rely on the product of misconduct by a non-state actor, where the conduct of the non-state actor is "so serious... that reliance upon it in the court proceedings would compromise the court's integrity"<sup>8</sup>.

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<sup>4</sup> KSC-BC-2020-07/F00470, *Decision on Prosecution Requests in Relation to Proposed Defence Witnesses*, Trial Panel II, 3 December 2021, Public at para.59

<sup>5</sup> KSC-BC-2020-07/F00470, *Decision on Prosecution Requests in Relation to Proposed Defence Witnesses*, Trial Panel II, 3 December 2021, Public at para.59-60 and footnote 87; KSC-BC-2020-07/F00611, *Trial Judgment*, Trial Panel II, 18 May 2022, Confidential at para.814

<sup>6</sup> KSC-BC-2020-07/F00258, *Defence Pre-Trial Brief on behalf of Hysni Gucati*, Gucati, 12 July 2021, Confidential at para.72

<sup>7</sup> *R v L(T)* [2019] 1 Cr App R 1 at para.26-28 and 32

<sup>8</sup> *R v L(T) ante* at para.32

16. Where the misconduct of the non-state agent is not so serious as to require a stay, it may nevertheless amount to a significant mitigating feature<sup>9</sup>.
17. The Rule 103 Material and the Rule 102(3) Material suggest that [REDACTED]<sup>10</sup>.
18. Material suggesting [REDACTED], is reasonably capable of supporting an argument that reliance upon [REDACTED] amounts to a violation of Article 6 of the Convention, such that a stay of proceedings or equivalent remedy is required, or otherwise should be taken into account as a mitigating circumstance.

#### IV. CONCLUSION

19. An oral hearing of the appeal should be ordered to allow the Appellant to (i) expand upon the matters in the Notice of Appeal and Appeal Brief given the length and complexity of the Trial Judgment when compared to judgments in other cases concerning offenses against the administration of justice, and (ii) address the consequences of the late disclosure on the grounds of appeal, in particular in relation to grounds 4-(4G), 4-(4H), 17, 18, 19 and 20.

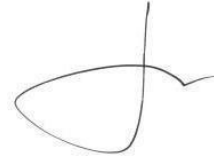
#### V. CLASSIFICATION

20. This filing is classified as confidential in accordance with Rule 82(4).

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<sup>9</sup> *Tonnessen* [1998] 2 Cr App R (S) 328 at page 329-330

Word count: 1066 words



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10 November 2022

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