

**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 Application for Reconsideration of Decision  
F00064**

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**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 13 October 2022, the Appellant received notification of the Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules (“the Decision”)<sup>1</sup>.
2. The Appellant hereby applies for reconsideration of the Decision under Rules 79(1) of the Rules.

## II. LAW

3. Rule 79(1) of the Rules provides that in exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice a Panel may upon request by a Party reconsider its own decisions.
4. Rule 173(3) of the Rules provides that the rules governing the trial proceedings shall apply mutatis mutandis to proceedings before the Court of Appeals Panel.

## III. SUBMISSIONS

5. The Decision is based on two clear errors.

### *Error 1*

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<sup>1</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

6. At paragraph 16 of the Decision it is stated that “the alleged disclosure violation occurred after the filing of the Trial Judgment and outside the trial process”. That statement is false.
7. The alleged disclosure violation occurred before the Trial Judgment and inside the trial process, as set out in paragraphs 19 and 21 of the Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3) of the Rules<sup>2</sup> and paragraphs 5 and 6 of the Gucati Reply to Consolidated Prosecution Response to Defence Requests concerning the Response Brief and amendment to Notices of Appeal<sup>3</sup>.
8. The material disclosed in Disclosure 1 as exculpatory material under Rule 103 (pursuant to an order of the Court of Appeals Panel to that effect<sup>4</sup>) consisted of [REDACTED].
9. The Trial Panel did not file the Trial Judgment until 18 May 2022.
10. [REDACTED] and fell to be disclosed under Rule 103 of the Rules as exculpatory material<sup>5</sup>.
11. Rule 103 of the Rules provides that where information falls to be disclosed under Rule 103, it shall be disclosed *immediately*.

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<sup>2</sup> KSC -CA -2022-01/F00053, Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3) of the Rules, Gucati, 30 September 2022, Confidential

<sup>3</sup> KSC-CA-2022-01/F00058, Gucati Reply to Consolidated Prosecution Response to Defence Requests concerning the Response Brief and amendment to Notices of Appeal, Gucati, 6 October 2022, Confidential

<sup>4</sup> KSC-CA -2022-01/F00044, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeals Panel, 15 September 2022, Confidential

<sup>5</sup> KSC-CA-2022-01/F00044, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeals Panel, 15 September 2022, Confidential at paragraphs 27, 29

12. The disclosure violation occurred at the moment that the Specialist Prosecutor failed to *immediately* disclose the material, namely by 22 April 2022 at the very latest.

13. Accordingly, the alleged disclosure violation occurred *before* the Trial Judgment and inside the trial process, as set out in paragraphs 19 and 21 of the Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3) of the Rules<sup>6</sup> and paragraphs 5 and 6 of the Gucati Reply to Consolidated Prosecution Response to Defence Requests concerning the Response Brief and amendment to Notices of Appeal<sup>7</sup>.

*Error 2*

14. Paragraph 16 of the Decision continues: "... the Accused have not and would not have been able to identify a specific finding of the Trial Panel they wish to challenge through their Notices of Appeal". That statement was also false.

15. The Appellant had identified, by reference to paragraph 851 of the Trial Panel in the footnote to draft Ground-19C , the specific finding of the Trial Panel at paragraph 851 of the Trial Judgment which the Appellant wished to challenge, namely, the finding that:

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<sup>6</sup> KSC-CA-2022-01/F00053, Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3) of the Rules, Gucati, 30 September 2022, Confidential

<sup>7</sup> KSC-CA-2022-01/F00058, Gucati Reply to Consolidated Prosecution Response to Defence Requests concerning the Response Brief and amendment to Notices of Appeal, Gucati, 6 October 2022, Confidential

“the Defence was afforded a full and fair opportunity to put forward its Entrapment Claim in compliance with the standards laid down by the ECtHR”<sup>8</sup>.

16. That finding by the Trial Panel was in error.

17. The standards laid down by the ECtHR require the prosecuting authority “to disclose information relevant to entrapment to permit the Defence to argue a case on entrapment in full at trial, otherwise, the proceedings will fail to comply with the principles of adversarial proceedings and equality of arms and the right of the accused to a fair trial, in violation of Article 6(1) of the ECHR”<sup>9</sup>.

18. The material in Disclosure 1, however, had not been disclosed to the Appellant during the trial. The Defence had *not* been afforded a full and fair opportunity to put forward its Entrapment Claim in compliance with the standards laid down by the ECtHR, as the Prosecution had withheld exculpatory material (Disclosure 1) relevant to the Entrapment Claim from the Accused.

19. The Appellant also identified the specific finding of the Trial Panel refusing disclosure of Items 186-190<sup>10</sup> within Disclosure 1 as a finding that it wished to challenge. The Trial Panel had specifically ordered non-disclosure of items 186-190 in circumstances where the Appellant had no effective opportunity before

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<sup>8</sup> KSC-CA-2022-01/F00053/A01, *Annex 1 to Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3) of the Rules*, Gucati, Confidential at page 19 fn50

<sup>9</sup> KSC-BC-2020-07/IA005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Panel, 29 July 2021, Confidential at paragraph 52

<sup>10</sup> KSC-BC-2020-07/F00413, *Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, Trial Panel II, 3 November 2021, Confidential at paragraph 95(a), identified by the Appellant in KSC-CA-2022-01/F00053, *Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3) of the Rules*, Gucati, 30 September 2022, Confidential at paragraph 21 fn.16 and KSC-CA-2022-01/F00058, *Gucati Reply to Consolidated Prosecution Response to Defence Requests concerning the Response Brief and amendment to Notices of Appeal*, Gucati, 6 October 2022, Confidential at paragraph 11

the Trial Panel (nor before the Court of Appeals Panel) to argue that in fact *those* interviews contained exculpatory material, namely, that the passages at [REDACTED].

#### IV. CONCLUSION

20. The reasoning of the Decision was based upon the two clear errors above.

21. The circumstances are exceptional given the extraordinary result which prevents the Appellant from arguing on appeal the consequences of a disclosure violation which occurred before the Trial Judgment was pronounced (consider by contrast, the Appeals Chamber in the "*Mugenzi and Mugiraneza Appeal Judgement*"<sup>11</sup> which recognized that the importance of the Prosecution's disclosure obligations and accordingly considered the arguments raised as to the consequences of non-disclosure within the context of the appellant's Grounds of Appeal as set out in his notice of appeal).

22. The Court of Appeals Panel is requested to reconsider the Decision accordingly.

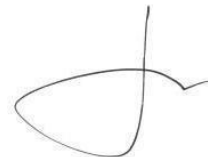
#### V. CLASSIFICATION

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

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<sup>11</sup> *Mugenzi and Mugiraneza v Prosecutor*, IC TR-99-50-A, Judgement 4 February 2013 ("*Mugenzi and Mugiraneza Appeal Judgement*")

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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

10 November 2022

Cardiff, UK