

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 Nasim Haradinaj

Date: 11 November 2022

Language: English

Classification: Public

**Public Redacted Version of Haradinaj Application for Reconsideration of
Decision F00064**

Specialist Prosecutor

Jack Smith

Alex Whiting

Matthew Halling

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

Almudena Bernabeu

Counsel for Hysni Gucati

Jonathan Elystan Rees KC

Huw Bowden

Eleanor Stephenson

I. INTRODUCTION

1. Pursuant to Rule 79(1) Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”),¹ the Appellant hereby applies for Reconsideration of the ‘Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules’ (“Impugned Decision”).²

II. LAW

2. 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.
3. 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.

¹ KSC-BD-03/Rev3/2020.

² 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.

III. SUBMISSIONS

4. The Appellant submits that there are sufficient grounds within the meaning of Rule 79(1) for reconsideration in that there is a clear error of reasoning or in the alternative reconsideration is necessary to avoid injustice.

(i) The disclosure violation occurred within the trial period

5. The Impugned Decision claims that “*the alleged disclosure violation occurred after the filing of the Trial Judgment and outside the trial process.*”³ This is incorrect as is clearly argued in the ‘Haradinaj Application to Amend the Notice of Appeal pursuant to Rule 176(3)’⁴ and paragraphs 19 and 21 of the Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3) of the Rules⁵ 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, which the Appellant adopts and endorses without qualification.⁶

³ Impugned Decision, para. 16.

⁴ KSC-CA-2022-01/F00055, *Haradinaj Application to Amend the Notice of Appeal pursuant to Rule 176(3)*, Court of Appeals Panel, 4 October 2022, Confidential, paras. 31-37.

⁵ 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

⁶ 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

6. The alleged disclosure violation concerns [REDACTED] Witness W04730 [REDACTED] which the Appellant received as Disclosure 1⁷ pursuant to orders of the Appeals Panel dated 15 September 2022⁸ and 23 September 2022.⁹
7. [REDACTED] were relevant to the Defence's claim of entrapment and thus fell to be disclosed under Rule 103 of the Rules as exculpatory material.
8. Rule 103 requires that exculpatory material be *immediately* disclosed. In this case, that would have meant that disclosure was required [REDACTED] at the latest. However, the Appellant had no notice of [REDACTED] W04730 until [REDACTED] was received on 26 September 2022, following two confidential and *ex parte* communications on 7 July 2022,¹⁰ and 7 September 2022,¹¹ and the Appeals Panel decision on 15 September 2022 ordering, *inter alia*, the SPO to disclose to the Defence under Rule 103 of the Rules [REDACTED] Witness W04730, deemed Rule 103 material.¹²
9. The disclosure violation occurred as soon as the SPO failed to disclose the exculpatory material, i.e., at the very latest [REDACTED]. Trial judgment was

⁷ Disclosure 1, ERN 082095-TR-ET Parts 1 to 5 ("Items 186-190") and ERN 105694-TR-ET Part 1.

⁸ KSC-CA-2022-01/F00044, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeal Panel, 15 September 2022, Confidential.

⁹ 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

¹⁰ F00028/CONF/RED,

¹¹ F00038/CONF/RED

¹² F00044/CONF/RED

handed down in this case on 18 May 2022, nearly one full month [REDACTED], notwithstanding [REDACTED] relevant to the claim of entrapment and fell to be disclosed under Rule 103.¹³

10. Accordingly, contrary to the position taken in the Impugned Decision, the alleged disclosure violation was well within the trial period.

11. The Impugned Decision should be reconsidered on this basis.

(ii) *The Appellant identifies a specific finding of the Trial Panel he wishes to challenge through his Notice of Appeal*

12. Paragraph 16 of the Impugned Decision states that: "...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. Rather, the Panel considers that if a party identifies a potential disclosure violation alleged after the conclusion of trial proceedings and during the appellate phase of the case, it may seek alternate relief by filing a motion before the Appeals Panel.". This is incorrect.

13. First, for the reasons noted above, the potential disclosure obligation did not occur after the conclusion of trial.

¹³ 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

14. Second, the Appellant would restate his position that there is no requirement for him to state what his proposed variation may be; rather, all that is required is that there is good cause to permit variation.¹⁴ The analysis in his Request to Amend his Notice of Appeal is replete with discussion as to the 'good cause' for permitting his request, namely the fundamental importance of disclosure obligations to the fairness of trials generally,¹⁵ and the impact that the SPO's violation of those standards has on the fairness of his trial specifically.¹⁶ Those submissions are restated here.

15. Third, and in any case, the Appellant notes that he raised in his Request to amend his Notice of Appeal that the disclosure violations are of direct relevance to:

*"Ground 4 wherein it is argued that the Trial Panel erred by allowing the SPO to withhold and/or excessively redact material; Grounds 10, 11, and 12 which argues the trial panel erred in terms of the issue of public interest and 'whistleblowing'; Ground 13 dealing with the investigation into the 'leaks' themselves' and Ground 15 and 16 dealing with the errors made in terms of the defence of entrapment."*¹⁷

¹⁴ KSC-CA-2022-01/F00055/RED, para. 42.

¹⁵ *Ibid, inter alia* at paras 38-41.

¹⁶ *Ibid, inter alia* at para. 32.

¹⁷ *Ibid*, para. 44.

16. The Appellant also specifically raises, in his Draft Ground 4A, that, aside from strict disclosure issues, those violations meant that the Trial Panel: failed to test and evaluate the totality of evidence, contrary to Rule 139 of the Rules; failed to take account of relevant exculpatory evidence; and failed to ensure that the Appellant had received a fair trial, contrary to Article 6 of the European Convention on Human Rights.¹⁸
17. Contrary to the position taken in the Impugned Decision, those Grounds represent 'specific findings of the Trial Panel they wish to challenge through their Notices of Appeal'.
18. The Impugned Decision should be reconsidered on these grounds.

IV. CONCLUSION

19. The reasoning of the Decision was based upon the reasoning extracted above which, for the reasons stated in this Request for Reconsideration, was erroneous.
20. The disclosure violations are also directly relevant to points that the Appellant has or wishes to raise to raise on appeal and are exculpatory in nature. Failing to reconsider these rulings will lead to a failure to permit the Appellant to

¹⁸ *Ibid*, para. 52.

raise on appeal serious issues that undermined the fairness of his trial, which would give rise to a risk, if not a likelihood, of injustice.

21. The circumstances are exceptional given the extraordinary attempt to prevent the Appellant from arguing the consequences of a disclosure violation which occurred before the Trial Judgment was pronounced, and which went to the heart of the fairness of proceedings faced by him at trial.
22. The Court of Appeals Panel is requested to reconsider the Decision accordingly.

Word count: 1,317 words



Toby Cadman
Specialist Counsel for Nasim Haradinaj



Almudena Bernabeu
Specialist Co-Counsel



Carl Buckley
Specialist Co-Counsel