

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

Before: Court of Appeal Panel
Judge Michele Picard, Presiding Judge
Judge Kai Ambos
Judge Nina Jorgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

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Classification: Public and Two Confidential Annexes

**Public Redacted Version of Haradinaj Request for Order to the SPO to Release
Video Recordings**

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I. INTRODUCTION

1. On 28 November 2022, the Court of Appeals Panel refused authorisation for the Appellant to interview two witnesses, [REDACTED].¹
2. On 01 and 02 December 2022, the Court of Appeals Panel heard the appeals of both Hysni Gucati and Nasim Haradinaj.
3. Given that the appeal proceedings have now concluded (awaiting the decision of the Court of Appeals Panel), the Haradinaj Defence makes two urgent requests for further information from the SPO.

II. BACKGROUND

4. On 19 August 2022, the Appellants filed their appeal briefs.²
5. On 15 September 2022, the Court of Appeals Panel issued a decision ordering the Specialist Prosecutor's Office ("SPO") to disclose to the Defence under Rule 103 of the Rules of Procedure and Evidence of the Kosovo Specialist Chambers ("Rules"), two interviews of [REDACTED] dated [REDACTED] and [REDACTED].³
6. On 21 September 2022, the SPO filed its brief in reply.⁴

¹ KSC-CA-2022-01/F00094, Decision on Defence Requests to Interview Witnesses, to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing, Court of Appeals Panel, 28 November 2022, Confidential at paragraphs 20 and 22

² F00035/COR2 – The Further Corrected Version of Defence Appeal Brief filed on 2 September 2022.

³ F00044/CONF/RED, Confidential Redacted version of Decision on Prosecution Notifications, 26 September 2022.

⁴ F00047, Confidential Prosecution Brief in Response to Defence Appeals with two public annexes.

7. On 18, 25, and 26 October 2022 the Appellant and/or the Gucati Defence wrote to the SPO to further request their assistance with Defence inquiries relating to Witness Interviews.
8. The SPO refused to cooperate on each and every occasion.
9. On 2 November 2022, the Gucati Defence made an Application to the Court of Appeals Panel for an Order for Disclosure of Witness Contact Details and for a declaration that Rule 102(3) applied equally to appeal proceedings.⁵ The Gucati Defence and the Appellant further applied for an extension of time to file motions pursuant to Rule 181.⁶
10. On 9 November 2022, the Appeals Panel issued its 'Decision on Defence Requests for Extension of Time to file Potential Motions Pursuant to Rule 181',⁷ authorising that any motions pursuant to Rule 181 of the Rules are to be filed "*no later than 14 days from the notification of the Panel's decision on the Requests to Contact witnesses, should the Panel decide to grant them*".⁸
11. That decision further noted at paragraph 5:

"The Panel considers that a motion to present additional evidence under Rule 181 of the Rules, to the extent that it would be the result of any potential interviews with

⁵ KSC-CA-2022-01/F00081

⁶ KSC-CA-2022-01/F00087 and KSC-CA-2022-01/F00088

⁷ KSC-CA-2022-01/F00090

⁸ *Ibid* at paragraph 7

the witnesses for which the Defence seeks contact details, would necessarily depend on the Panel's decision in relation to the Requests to Contact Witnesses."

12. On 11 November 2022, the Haradinaj Defence conducted an interview with [REDACTED] in respect of his interview with the SPO on [REDACTED].⁹
13. On 28 November 2022, the Court of Appeals Panel refused authorisation for the Appellant to interview two witnesses, [REDACTED] and [REDACTED].¹⁰
14. On 01 and 02 December 2022, the Court of Appeals Panel heard the appeals of both Hysni Gucati and Nasim Haradinaj.
15. By way of further background to the application, on 13 March 2021, the Haradinaj Defence set out a list of 39 requests for disclosure, including, but not limited to, CCTV or video footage that related to the deliveries of the three batches by persons unknown. On 23 March 2021, the SPO responded confirming that it was not in possession of any such material and that the only CCTV material in its possession was the footage seized from the premises of the Kosovo Liberation Army War Veterans Association ("KLA WVA").
16. On 27 November 2022, the Haradinaj Defence made a further request as follows:

"Dear SPO, I write in relation to our earlier correspondence concerning the inter partes request dated 13 March 2021 and your response dated 23 March

⁹ See Confidential Annex A and Annex B (TR-ENG), Interview with Witness W04349 of 11 November 2022.

¹⁰ KSC-CA-2022-01/F00094, Decision on Defence Requests to Interview Witnesses, to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing, Court of Appeals Panel, 28 November 2022, Confidential at paragraphs 20 and 22

2021, your response is set out below for ease of reference. Could you confirm by return that your response to the points under 5, 7, 9, 11, 12 and 16 of the 13 March 2021 request, related to video footage, remain unchanged and that in the intervening period since you provided your response on 23 March 2021, you have not identified, located, been provided with or otherwise come into the possession of any further CCTV, video or photographic evidence as requested for the time period under consideration, namely the period of between 7 and 25 September 2020 as set out in our earlier request. I would be grateful for a timely response. Best regards, Toby Cadman.”

17. On 29 November 2022, the SPO responded as follows:

“Dear Mr. Cadman, The SPO confirms that it has satisfied its disclosure obligations in relation to the items referred to in your email, including as concerns continuing Rule 103 obligations. Kind regards, [REDACTED].”

18. On 5 December 2022, a further request was made as follows:

“Dear [REDACTED], Thank you for your previous response. I just want to be sure that I understand your position before making any further application to the Appeals Panel as indicated at the hearing on 2 December. Can I confirm, irrespective of whether you consider that you have satisfied your disclosure obligations, whether there is, in the SPO’s possession, any video footage that relates to the delivery of the first, second, or third delivery, that has not previously been made

available to the defence. As part of our ongoing defence investigations we are seeking to ascertain as to whether there is any such material that may assist the defence in advancing one of its defences. Second, can you confirm whether you are in possession of any further contact notes, transcript of interview or other information that details [REDACTED] having contact with, or making reference to, representatives of the SPO, including but not limited to the former Specialist Prosecutor, or any judicial or administrative representatives of the Specialist Chambers. Kind regards, Toby Cadman”

19. On 7 December 2022, the SPO provided a final response as follows:

“Dear Mr. Cadman, The SPO has nothing to add to its 29 November 2022 response in relation to your 27 November 2022 request concerning video footage. In relation to your second request, the SPO has already responded to a version of this request (see email from the SPO dated 14 October 2022 at 13:43 in relation to Request 22) and the Appeals Panel has already determined that no additional disclosure is warranted following this exchange (see KSC-CA-2022-01/F00083, para.27). The SPO has no information concerning this person requiring notice under Rule 102(3) or disclosure under Rule 103 in this case. Kind regards, [REDACTED].”

III. Submissions

20. The Haradinaj Defence makes this application on the basis that information believed to be held by the SPO is necessary for the defence to conduct important and urgent investigative opportunities relevant to the proper presentation of their appeals in accordance with the right to adequate facilities for the preparation of the defence and the information, if held by the SPO, may be able to provide further exculpatory material, and the Defence may be able to obtain further information even if the SPO was not able.¹¹ This application for an order is therefore on the basis that it is necessary for the presentation of argument on appeal, including the advancement of a defence, and whether the proceedings, can be considered to be fair.

21. It is recognised that an appeal is not a trial de novo,¹² and that investigations should ordinarily be carried out during the pre-trial and trial stage¹³ and as the Appeals Panel has previously ruled¹⁴ “are only allowed at the appellate stage of the proceedings for exceptional reasons, for example, if the moving party demonstrates that it is in possession of specific information that needs to be further investigated in order to avoid a miscarriage of justice and that this specific information was not available at trial and could not have been discovered at trial through the exercise of

¹¹ KSC-CA-2022-01, *Decision on Defence Requests to Interview Witnesses, to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing*, para 14.

¹² Article 46(2) of the Law

¹³ Rule 136 of the Rules

¹⁴ KSC-CA-2022-01, para. 17, quoting IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, *Decision on a Motion to Order the Prosecution to Obtain and Disclose Subsequent Statements*, 10 May 2016, p. 2. See also IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, *Decision on a Motion for a Binding Order pursuant to Article 28 and on Related Requests*, 18 February 2019, p. 4, ICTR, *Gacumbitsi v. Prosecutor*, ICTR-01-64-A, *Decision on the Appellant’s Rule 115 Motion and Related Motion by the Prosecution*, 21 October 2005, para. 15

due diligence and it is shown that the investigation will not merely be a “fishing expedition.”¹⁵

22. The Panel further noted “that the assessment of requests for further investigation at the appeal stage is necessarily associated with the requirements of Rule 181 of the Rules in the sense that any investigation at the appeal stage can only be authorised with the view to proffer potential evidence under this Rule.”

Witness [REDACTED]

23. First the Haradinaj Defence seeks an order directing the SPO to confirm whether there are any further contact notes, transcript of interview or other information in its custody, control or actual knowledge, that details [REDACTED] having contact with, or making reference to, representatives of the SPO, including but not limited to the former Specialist Prosecutor, or any judicial or administrative representatives of the Specialist Chambers. Further, the Haradinaj Defence seeks an order directing, if any such information is in the possession of the SPO, that this information be disclosed upon the defence without further delay pursuant to Rule 102(3) and/or Rule 103.

Witness [REDACTED]

24. Secondly, the Haradinaj Defence seeks an order directing the SPO to respond to the Haradinaj Defence request relating to video recordings of any of the deliveries of the

¹⁵ Ibid. para. 18

batches of documents at the KLA WVA – specifically as presented to [REDACTED] in his interview dated 9 November 2021.

25. In the Court of Appeal’s Decision on Defence Requests to Interview Witnesses, to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing,¹⁶ it is stated that the Defence “chose not [...] to follow up [on an official note documenting what was said by another witness, [REDACTED]] with further investigations.”¹⁷ In this regard it is noted that the Appeals Panel could not have been aware at the stage of making its ruling of further investigations ongoing in respect of [REDACTED] and other lines of enquiry being pursued to obtain evidence in respect of the delivery of the batches.

26. It has been consistently argued throughout the proceedings that the SPO has provided no cooperation in assisting the defence and complying with its disclosure obligations under the Rules, adopting instead to hide behind a veil of secrecy that such information, by its own assessment, is not relevant to the present proceedings, or the information is, again on its own assessment, not credible, or the information is relevant to ongoing investigations. As a result of such an approach, the defence has been required to conduct its own investigations unassisted, which has necessarily resulted in delay and an inability to pursue certain lines of enquiry. Accordingly, any criticism of the defence for any delay in making this application must take these factors into account.

¹⁶ F00094, Decision on Defence Requests to Interview Witnesses, to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing, 28 November 2022 (confidential) (“Decision on Further Investigations.”)

¹⁷ Ibid.

27. The official note being referred to concerns a redacted interview transcript with [REDACTED] [REDACTED] which was disclosed upon the defence on 16 November 2021.¹⁸ However, this transcript was heavily redacted including multiple pages that were blacked out in their entirety. As such, it cannot be said that the defence were made fully aware of the contents of this interview transcript – and hence could not be in an informed position to be able to follow up with further investigations. In essence, had the Haradinaj Defence known that the redacted sections of this transcript referred to such video recordings of the deliveries, as now appears to be apparent, then the Haradinaj Defence would have certainly conducted further investigations, including potentially calling [REDACTED] as a witness at trial and inspecting the video footage that [REDACTED] confirms in his statement as having been presented to him in interview.

28. On 11 November 2022, the Haradinaj Defence carried out a further interview with [REDACTED], following further investigations that had been carried out as a result of information volunteered by [REDACTED] of the existence of video footage and a statement signed 10 December 2022.

29. [REDACTED] sets out in his statement, at paragraph 9, that he was shown video footage during his interview, a matter was not previously disclosed to the defence, and may have been redacted from his transcript of interview. It is not known whether the unredacted transcript was put before the Trial Panel prior to the SPO

¹⁸ KSC-BC-2020-07-104127-TR-ET Part 1 (RED)

disclosure or whether the redacted portions of the interview were also withheld from the Trial Panel.

30. On 13 March 2021, the Haradinaj Defence set out a detailed list of 39 requests for disclosure to the SPO, including, but not limited to, CCTV or video footage that related to the deliveries of the three batches by persons unknown. This request was made following defence field investigations. In particular the Haradinaj Defence sought disclosure of whether the SPO had secured CCTV from the surrounding area, including those cameras that pointed directly towards the premises of the KLA WVA. The SPO responded on 23 March 2021, addressing each of the 37 requests, that they were not in possession of any video footage. In respect of the 5 separate requests concerning CCTV the SPO responded as follows:

“ The SPO is not in possession of the information sought by the Defence. The Defence has been duly notified of the only CCTV device seized in connection with KSC-BC-2020-07, namely the CCTV device located within the premises of the KLA WVA.”

31. This request was made some time prior to the SPO interview of [REDACTED] on [REDACTED]. The SPO did not provide an updated notice following that interview and therefore the Haradinaj Defence could not have been aware of the existence of any video footage during the trial. It was not until several months after the end of the trial, and after the notice of appeal had been filed, that the Haradinaj Defence was made aware of the possible existence of material not previously noticed or disclosed to defence.

32. The Haradinaj Defence has requested information that relates to the manner in which the batches were delivered to the KLA WVA and whether the SPO was in possession of video footage on a number of occasions, including whether the KLA WVA was placed under surveillance as requested by the Appellant, via *inter partes* communications – but such attempts have been futile and have only resulted in vague and evasive responses from the SPO.
33. Given the fact that previous *inter partes* communications on such video recordings, have yielded no result and the late stage in proceedings (the fact that the Appeal hearing concluded on 02 December 2022), the Haradinaj Defence have no other option but to request that the Court of Appeals Panel order the SPO to respond accordingly. As such Haradinaj Defence seeks an order for the SPO to release any such video recordings (or any other relevant previously undisclosed evidence) relating to the delivery of the documents at the KLA WVA – as this goes directly to the issue of entrapment in this case.

IV. Classification

34. This filing is classified as confidential because it relates to information in other filings that are classified as confidential.

Word Count: [2,434] words



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