

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

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**Public Redacted Version of Gucati Response to Prosecution Notice of Additional
Item 206 and Challenge to Disclosure**

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I. INTRODUCTION

1. On 19 September 2022, the Appellant received notification of a “Confidential Redacted Version of Prosecution Notice of Additional Item 206 and Challenge to Disclosure” of the same date (“Disclosure Challenge”)¹.
2. On 20 September 2022, the Appellant requested disclosure of Item 206 by email to the SPO. No further communication has been received from the SPO as a result.
3. The Appellant hereby replies to the Disclosure Challenge, submitting that Item 206 should be disclosed pursuant to Rule 102(3) and/or Rule 103.

II. LAW

4. Rule 102(3) requires the disclosure of items in the possession of the Prosecution which are material to the preparation of the Defence.
5. That test of materiality does not require that the item requested might reasonably suggest the innocence or mitigate the guilt of the Accused. Such information (for example, information *supporting* “entrapment allegations”) falls, instead, to be disclosed under Rule 103².
6. Instead, an item requested is material to the preparation of the defence if: (i) it is relevant or possibly relevant to an issue in the case; (ii) it raises or possibly

¹ KSC-CA-2022-01/F00046/CONF/RED

² KSC-BC-2020-07/IA005-00008,para.53; KSC-CA-2022-01/F00044/CONF/RED,para.26

raises a new issue; (iii) holds out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (i) or (ii)³.

7. The quality of the information, and an evaluation of its reliability or weight, are irrelevant⁴.
8. What must be “real” rather than “fanciful” is thus the prospect of the material or information in question providing a lead on evidence that is either relevant or possibly relevant to an issue in the case⁵.
9. If there is a real prospect of the information in question providing a lead on evidence that is relevant, there is no further requirement to show that the evidence that might be obtained following that lead will exonerate or undermine the prosecution or support a line of argument of the defence - the test of materiality does not require that the item requested is directly linked to exonerating evidence or would either directly undermine the prosecution case or support a line of argument of the defence⁶.
10. Of course, if the material in question might support a line of argument of the defence, it will fall to be disclosed as exculpatory material under Rule 103.
11. It is also sufficient to meet the test for disclosure under Rule 103 if the information may reasonably mitigate the guilt of the Accused. Again, an assessment of the weight or reliability of the material is irrelevant⁷. It is sufficient if the information points, in some logical manner, to a mitigating or

³ KSC-BC-2020-07/F00413,para.45

⁴ KSC-BC-2020-07/F00413,para.46

⁵ KSC-BC-2020-07/F00413,para.46

⁶ KSC-BC-2020-07/IA005-00008,para.41

⁷ KSC-BC-2020-07/IA005-00008,para.43

exculpatory factor or circumstance, regardless of whether the SPO finds the information reliable or “fanciful”⁸.

III. SUBMISSIONS

A. ISSUE 1

12. The process through which the “Batches”⁹ arrived at the KLA WVA premises is a relevant issue in the case¹⁰.

13. The information in item 206, which appears to be an account of the process through which the Batches arrived at KLA-WVA premises is relevant to the above issue and falls to be disclosed under Rule 102(3) accordingly.

14. Item 206 holds out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to the issue of the process through which the Batches arrived at the KLA WVA premises.

15. The witness referred to in item 206 asserts detailed knowledge of the process through which the Batches arrived at the KLA WVA premises. It is a real prospect that the Author (or the detail of the Author’s communication) can provide to the defence further leads on evidence in relation to that process.

16. The Author’s suggestion of the certain and deliberate involvement of Vladimir Vukčević and [REDACTED] in that process demands further investigation by

⁸ KSC-BC-2020-07/IA005-00008,para.43

⁹ KSC-CA-2022-01/F00044/CONF/RED,para.3

¹⁰ KSC-BC-2020-07/IA005-00008,para.47

the defence, given the close collaboration of the SITF/SPO with those two Serbian officials.

17. The defence are entitled to question and investigate further the alleged motive of Belgrade in so participating, particularly given the revelations from Senator Dick Marty ("Senator Marty") and the Office of the Attorney General of Switzerland in April 2022 that the Serbian authorities ordered the assassination of Senator Marty in 2020 so that "the murder should be presented as being attributable to the Kosovar/Albanian government (ex-KLA) in order to discredit it internationally"¹¹.
18. The defence are entitled to consider and investigate further how the account in item 206 of the involvement in the process by which the Batches arrived at the KLA WVA premises of senior Serbian officials, with whom the SITF/SPO has a long established and close collaboration, might fit with the assertion in the same account that the files were taken, not from Serbia where they are based, but from "the Hague" where their close collaborators at the SPO are based. As the Trial Panel held, the third Batch must have come from the SPO records¹².
19. Item 206 (or indeed the direct product of any defence investigation of item 206) may not itself refer to any involvement of the SITF/SPO, but it may contribute when combined with other evidence to an overall picture which does suggest the involvement of the SITF/SPO (with or without Serbian officials) in the process by which the Batches arrived at the KLA WVA premises.

¹¹ See Annex 1; KSC-BC-2020-07/F00605, para.3-4

¹² KSC-BC-2020-07/F00611, para.860

20. Rule 102(3) does not, in any event, require that the information in item 206 suggests the involvement of the SPO in the provenance of the Batches – such material would fall within the scope of Rule 103¹³.

21. The assertion by the SPO that item 206 “contains no information or opinion regarding any role or involvement the SPO would have had in the provenance of the Batches” amounts only to an argument that item 206 does not fall to be disclosed under Rule 103 as exculpatory material¹⁴. The test of materiality does not require that the material is exculpatory.

B. ISSUE 2

22. The material disclosed on 26 September 2022 (“Disclosure 1”) was material which might reasonably suggest the innocence of the Appellant and was disclosed accordingly under Rule 103¹⁵.

23. Within that material, W04730 alleged that another senior Serbian official, [REDACTED], was a key participant in the process by which the Batches arrived at the KLA WVA premises but predicted that an attempt would also be made to blame [REDACTED]¹⁶. W04730 made that prediction on 1 October 2020; a prediction that subsequently proved correct when the Author of item 206 blamed [REDACTED] on 27 January 2022.

¹³ KSC-CA-2022-01/F00044/CONF/RED,para.26

¹⁴ KSC-CA-2022-01/F00044/CONF/RED,para.26

¹⁵ KSC-CA-2022-01/F00044/CONF/RED,para.29

¹⁶ Disclosure 1, 082095-TR-ET Part 1 at page 14 and 082095-TR-ET Part 3 at page 13

24. The credibility of W04730, who has implicated the SPO in the process by which the Batches arrived at the KLA WVA, is in issue¹⁷. Item 206 appears capable of supporting the credibility/reliability of W04730 as consistent with W04730's anticipation of the identification of [REDACTED] as a participant. Material which can assist in the assessment of the credibility and reliability of a witness will meet the test of materiality¹⁸.

C. ISSUE 3

25. The issue of impropriety in the conduct of SITF/SPO investigations is an issue in the case¹⁹.

26. 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)²⁰.

27. 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 offences²¹.

¹⁷ KSC-CA-2022-01/F00028/CONF/RED,para.8-9

¹⁸ KSC-BC-2020-07/IA005-00008,para.41(iii)

¹⁹ KSC-BC-2020-07/F00611,para.812

²⁰ KSC-BC-2020-07/F00470,para.59

²¹ KSC-BC-2020-07/F00470,para.59-60 and footnote 87; KSC-BC-2020-07/F00611,para.814

28. Item 206 apparently provides an account in which two of those named in the Gucati Pre-Trial Brief, Vladimir Vukčević and [REDACTED]²², are implicated in a deliberate and direct attempt to interfere with the administration of justice and the investigations of the SPO²³. Such information could not be more pertinent to the issue of the independence, impartiality and integrity of investigations conducted by the SITF/SPO with their close collaboration. Item 206 is material to the preparation of the defence relating to the issue of public interest.

D. ISSUE 4

29. 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”)²⁴.

30. 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”²⁵.

31. 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 feature²⁶.

²² KSC-BC-2020-07/F00258, para. 72

²³ Disclosure 1 provides similar information in relation to a third person named in the Gucati Pre-Trial Brief, [REDACTED]

²⁴ *R v L(T)*, para. 26-28 and 32

²⁵ *R v L(T)*, para. 32

²⁶ *Tonnessen* at page 329-330

32. Item 206 appears to suggest that the revelation of the Batches was planned and instigated by the most high-ranking state officials within the criminal justice system of “Belgrade”, specifically the Serbian War Crimes Prosecutor and [REDACTED], two officials with whom the SITF/SPO has worked closely and who have played an intimate and integral part of the SPO’s investigations²⁷.

33. Material suggesting such serious and gross misconduct on their part, *with or without the involvement of the SPO*, is reasonably capable of supporting an argument that reliance upon the product of their misconduct 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).

34. Material (such as item 206) suggesting involvement of the Serbian War Crimes Prosecutor and [REDACTED] (and other high-ranking Serbian officials such as [REDACTED], [REDACTED], as suggested in Disclosure 1) in the provenance of the Batches, should be made available to the Defence under Rule 103 of the Rules (or otherwise Rule 102(3)) accordingly).

IV. CONCLUSION

35. For the reasons set out above, item 206 should be disclosed immediately under Rule 102(3) and/or Rule 103.

36. Whether or not item 206 could have been a decisive factor in reaching a decision at trial within the scope of Rule 181(3) is irrelevant²⁸. Rule 181(3) is not concerned with disclosure, and in any event applies only in circumstances where additional evidence was not available at the time of trial and could not have been discovered with the exercise of due diligence. Instead, this material *was* available at the time of trial and only failed to see the light of day because of the SPO's own lack of due diligence or worse²⁹.
37. Item 206 was in the possession of the SPO on Thursday 27 January 2022, almost four months before the Trial Panel pronounced judgment on 18 May 2022. Rules 127(1) and 136(3) provided the parties with the potential opportunity to make further argument and adduce further evidence before the Trial Panel up to and until 18 May 2022.
38. Until 17 March 2022 at least, the SPO were unequivocally obliged to comply with disclosure Rules 102(3) and 103.
39. Until 18 May 2022, the SPO were unequivocally obliged to continue to comply with Rule 103 (and arguably Rule 102(3) also).
40. Item 206 should have been notified via the Rule 102(3) Notice and disclosed during the course of the trial.
41. The test for disclosure during the appeal phase involves no additional hurdle, such as a requirement that the material could have been a decisive factor in reaching a decision at trial³⁰.

²⁸ *Contra* paragraph 3 of the Prosecution Disclosure Challenge

²⁹ KSC-CA-2022-01/F00038/CONF/RED,para.1

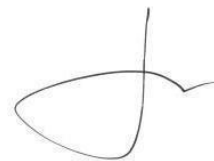
³⁰ KSC-CA-2022-01/F00044/CONF/RED,para.27

42. Indeed, the invitation by the SPO to imply such an additional hurdle is unconscionable in circumstances where the same material was in the hands of the Prosecution during the trial phase, and they erroneously failed to give the defence notice of it.
43. In relation to Rule 108(1)(a)-(b), apparently similar material in the form of the interviews of W04730 (Disclosure 1) have been disclosed in full, save for limited redactions. There is nothing in the Prosecution Disclosure Challenge which justifies why a similar approach cannot be taken with item 206. The assertion that “no information from item 206 can be disclosed beyond that contained in the Rule 102(3) notice” is unexplained and unsupported.
44. Rule 108 is, of course, subject to the Appellant’s Article 6 rights (see Rule 108(4)). If the disclosure test for Item 206 is met, and no other counterbalancing measures such as redaction are appropriate (none are proposed by the SPO), then the SPO must disclose or concede the appeal in accordance with Rule 108(4).

V. CLASSIFICATION

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

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