

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: 20 January 2023

Language: English

Classification: Public

**Public Redacted Version of Gucati Reply to Prosecution Consolidated Response
to Defence Rule 103 Requests and Related Reconsideration Requests**

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

I. INTRODUCTION

1. This Reply only addresses new issues arising from the Consolidated Response¹.

The Consolidated Response is rejected in its entirety and the absence of a reply to any part of it reflects only that the Requests² fully address the relevant matter(s).

II. SUBMISSIONS

2. The SPO refuses to accept the binding ruling of the Court of Appeals Panel as to the significance of the exculpatory material in Disclosure 1. The two interviews were ordered to be disclosed because they fell within Rule 103 of the Rules, that is, exculpatory material which might reasonably support the innocence of the Accused. Rather than acknowledge the importance of exculpatory material, the SPO instead makes clear that it regards its disclosure obligations as vexatious.

3. The SPO did not act transparently with the 22 April 2022 interview. The SPO did not notify the Appeals Panel of that interview until 7 July 2022, and, more importantly, did not notify the Trial Panel of that interview *at all*. The SPO has provided no explanation as to why the Trial Panel was not immediately notified of the 22 April 2022 interview.

4. Nor was any detailed notice of the 22 April 2022 Interview provided to the

¹ KSC-CA-2022-01/F00076

² KSC-CA-2022-01/F00066 & F00068

Defence in accordance with the obligation in Rule 102(3).

5. The SPO cannot claim to have acted 'in an abundance of caution to ensure proper compliance with its disclosure obligations' during *the trial* as it gave no notice to the Trial Panel of the 22 April 2022 interview.
6. The defence have not 'proposed appellate additions in the form of the Requests' in 'circumvention of the New Grounds of Appeal Decision'. The defence have made the Requests in accordance with paragraph 16 of the New Grounds of Appeal Decision which provided that the defence "may seek alternate relief by filing a motion before the Appeals Panel".
7. The Appeals Panel has not made any determination that the First Interview does not [REDACTED] in the provenance of the Batches which is binding upon the defence. As with the Trial Panel's consideration of the First Interview, the Appeals Panel has only previously considered that interview on an *ex parte* basis and the Defence had no opportunity to make representations as to the contents of the First Interview prior to the Decision on Prosecution Notifications³.
8. At paragraph 16 of the Consolidated Response, the SPO seek yet again to engage in sophistries as an excuse to avoid disclosure obligations. An account that [REDACTED] in that transaction. Likewise, an account that [REDACTED] (knowledge implying participation).
9. The SPO had no grounds, reasonable or otherwise, to consider that the Second Interview did not fall under Rule 103. At paragraph 19, the SPO resort again to

³ KSC-CA-2022-01/F00044

their own unilateral assessment of the credibility of the information (comparing it to their own unilateral and unfavourable assessment of the credibility of the information provided by W04349). A unilateral assessment by the SPO of credibility is not a reasonable, or proper, ground to consider that material does not fall to be disclosed under Rule 103, as the Trial Panel had previously warned the SPO.

10. The Trial Panel was not empowered to reach a contrary conclusion to the SPO on disclosure of the Second Interview because the SPO withheld the existence of it from the Trial Panel⁴. No explanation has been provided as to why the Trial Panel was not immediately notified of the Second Interview.

11. In relation to the information provided by W04349, the Trial Panel had ordered that information to be disclosed to the Defence. That the SPO recognised ‘commonalities’ or ‘similarities’ between the information ordered to be disclosed by the Trial Panel from W04349 and the Second Interview demonstrates that the SPO were – at the very least - on notice that the material was very likely to be disclosable, and – at the very least - should have been raised immediately with the Trial Panel and notice provided to the Defence (the defence do not concede that it was anything other than obvious that the Second Interview was immediately disclosable and, for the reasons set out in the Requests, that the First Interview should also have been recognised by the SPO as disclosable).

⁴ By contrast, the Prosecution in *Ruto & Sang* ensured that disclosure was completed before the Trial Chamber (ICC, *Prosecutor v Ruto & Sang*, Decision on Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of other Remedies for Disclosure Breaches of 9 January 2015 (ICC-01/09-01/11-1774-CONF), ICC -01/09-01/11-1774-Red, 16 February 2015)

12. The unequivocal result is that the SPO failed to complete Rule 103 disclosure during the trial. Whether that failure, or disclosure violation, occurred in good or bad faith is a matter which could only be determined by evidence from those responsible, which the SPO has elected not to provide. In any event, whether or not the failure was due to good or bad faith does not alter the fact that the SPO failed to complete Rule 103 disclosure during the trial.
13. The Rule 79 test is met as the decision of the Appeals Panel in the New Grounds of Appeal Decision was based on a clear error, namely that the alleged disclosure violation occurred *after* the filing of the Trial Judgment.
14. The Appellant sought relief within four days of receipt of Disclosure 1, complaining that the disclosure failure invalidated the Judgment and seeking acquittal or retrial⁵.
15. The Defence did adduce evidence that the witness W04349 had implicated a named, serving SPO officer in the process by which the Batches arrived at the KLA WVA. It was the SPO which chose to call no evidence to challenge that evidence.
16. The findings of the Trial Panel, referred to in paragraph 25 of the Consolidated Response, were made on the erroneous basis that disclosure of all Rule 103 material was complete. The test applied by the Trial Panel, that is, whether there was a reasonable basis for a defence of entrapment, is itself challenged in the Appeal Brief as an erroneous standard.

⁵ KSC-CA-2022-01/F00053 and F00053/A 01 at paras.1, 2 and 19C

17. Ms Pumper's answer in evidence that she was not aware of any information suggesting SPO involvement in the disclosure of the Batches was given *before* she was involved in the interview with W04730 on 22 April 2022. If she had been asked the same question after that date, her answer (if truthful) would have been different.

III. CONCLUSION

18. The SPO fails to address its disclosure failure within the specific context of the jurisprudence of the ECtHR and the particular procedural importance of full disclosure where a plea of entrapment is raised.

19. As the Trial Panel had stated, the Defence must be permitted to receive, as part of the disclosure process, relevant and disclosable information that could assist the Entrapment Allegations, to conduct effective investigations thereon and to elicit evidence from those witnesses capable of testifying thereto⁶. In the present case, that did not occur during the trial.

20. That prejudice has been compounded by the SPO's continuing refusal to engage with the Defence and explore whether a practical remedy can be achieved now by: (i) disclosing contact details for the [REDACTED] (ii) enabling [REDACTED], and (iii) enabling a defence interview with W04730 using measures designed to protect his/her identity in accordance with the

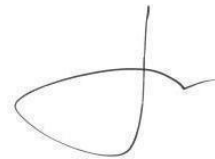
⁶ KSC-BC-2020-07/F00413, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and *ex parte* annex at paragraph 53

previous ruling of the Appeals Panel (such by way of video link using digital face and voice distortion).

IV. CLASSIFICATION

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

Word count: 1336 words



JONATHAN ELYSTAN REES QC

Specialist Counsel for Mr Gucati

HUW BOWDEN

Specialist C o-Counsel for Mr Gucati

ELEANOR STEPHENSON

Specialist C o-Counsel for Gucati

20 January 2023

Cardiff, UK