

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 Request for (i) a Declaration that Rule 102(3) applies to Appeal Proceedings; and (ii) an Order for Disclosure of Witness Contact Details

Specialist Prosecutor

Jack Smith

Valeria Bolici

Matthew Halling

James Pace

Counsel for Hysni Gucati

Jonathan Elystan Rees K C

Huw Bowden

Eleanor Stephenson

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

I. INTRODUCTION

1. The Appellant joins and adopts the application made by Co-Appellant, Nasim Haradinaj, dated 2 November 2022, for an Order from the Panel of the Court of Appeals Chamber (“Panel”) to require the Specialist Prosecutor’s Office (“SPO”) to make available certain witnesses (“Requested Witnesses”), including by disclosing contact details for and/or arranging interviews with them¹.
2. The Appellant submits: (i) that Rule 102(3) of the Rules applies to Appeal Proceedings and (ii) that for the reasons set out in the Haradinaj Application, the disclosure of contact details for and/or the arrangement of defence interviews with the witnesses identified in the exculpatory material, Disclosure 1, is material to the preparation of the defence.

II. SUBMISSIONS

3. The Appellant makes the additional submissions, to be read in conjunction with the Haradinaj application.
4. Rule 102(3) of the Rules provides that the Specialist Prosecutor shall provide detailed notice to the Defence of any material and evidence in his or her possession.

¹ KSC-CA-2022-01/F00079, Defence Request for an Order for Disclosure of Witness Contact Details, Haradinaj, 2 November 2022, Confidential (“the Haradinaj Application”)

5. The Specialist Prosecutor shall thereafter disclose to the Defence any such material which is deemed by the Defence to be material to its preparation. Such material and evidence shall be disclosed without delay.
6. Rule 102(4) targets the completion of Rule 102(3) during the Pre-Trial Phase but recognises that disclosure under Rule 102(3) may occur thereafter (albeit with reasons to be provided for the late disclosure).
7. Rule 173(3) further provides that the rules governing the trial proceedings shall apply *mutatis mutandis* to proceedings before the Court of Appeals Panel.
8. Accordingly, Rule 102(3) applies, in terms of both notification and disclosure obligations, to proceedings before the Court of Appeals Panel.
9. In the present case, no update to the Rule 102(3) Notice has been provided to the Appellant by the SPO which provides notice of relevant material which has come into the possession of the SPO since the pronouncement of the Trial Judgment.
10. Moreover, given (i) that the SPO has repeatedly asserted its view that the Rule 102(3) process does not continue on appeal² and (ii) that the quality of legal understanding advanced by the SPO in these proceedings was such that it caused the Trial Panel to be concerned about the SPO's full compliance with its disclosure obligations, requiring a caution to be administered³, and (ii) noting this is the first post-judgment appeal phase at the KSC , there is a clear risk that

² E.g. KSC-CA-2022-01/F00038/CONF/RED, *Confidential redacted version of Notification on communication received by the SPO with Confidential and Ex Parte Annex 1*, Prosecutor, 23 September 2022, Confidential at paragraph 4

³ 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 48

the SPO is of the misapprehension that it is now relieved of its obligation to make disclosure under Rule 102(3), and that its duty to make disclosure is confined only to the duty to disclose Rule 103 exculpatory material.

11. In order to ensure the proper discharge of the SPO's disclosure obligations, the Court of Appeals Panel should declare that Rule 102(3) applies, in terms of both notification and disclosure obligations, to appeal proceedings before it, including the present appeal.

12. In the present case, as the Trial Panel 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 (via Rule 181 if necessary) from those witnesses capable of testifying thereto⁴.

13. The disclosure of contact information of potential witnesses to such information must be made to enable the defence to make proper investigation of the circumstances surrounding the offences with which the defendant is charged⁵. Contact information of potential witnesses to exculpatory material is itself information that is material to the preparation of the defence.

14. Disclosure 1 has been disclosed because it contains information which may reasonably suggest the innocence of the Accused under Rule 103. The

⁴ 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

⁵ *R v Heggart*, Court of Appeal (Criminal Division) of England & Wales, No. 2000/03465/Z 1, 30 November 2000

witnesses, in relation to whom further disclosure is sought by way of contact details and/or arranged defence interviews, are witnesses to that information and may be able to provide further exculpatory material to the defence. It is no answer for the prosecution to suggest that the defence and the Panel should be satisfied from the inquiries of the SPO that no further useful material could emerge from defence investigations – that misunderstands the purpose of the provision of contact details (and/or enabling defence interviews). The mere fact that the prosecution may not be able to obtain further information from the witness and in a form which is admissible does not mean that the defence may not be able to achieve those objectives⁶.

15. For example, the fact that W04730 did not provide to the SPO the [REDACTED].

III. RELIEF REQUESTED

16. Accordingly, the Appeals Panel is requested to:

- i) Declare that Rule 102(3) of the Rules applies to these appeal proceedings, in terms of both notification and disclosure obligations;
- ii) Order that an updated Rule 102(3) Notice is provided which gives detailed notice of all material relevant to the case in the possession of the SPO, to include all information as to the process through which the

⁶ *R v Heggart*, Court of Appeal (Criminal Division) of England & Wales, No. 2000/03465/Z 1, 30 November 2000, at paragraphs 9-11

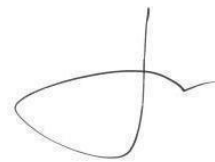
information arrived at the KLA WVA premises⁷, whether received by the SPO before or after the Trial Judgment was pronounced; and

- iii) Order pursuant to Rule 102(3) the disclosure of contact details for, and/or the arrangement of defence interviews with, the Requested Witnesses.

IV. CLASSIFICATION

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

Word count: 1073 words



JONATHAN ELYSTAN REES KC

Specialist Counsel for Mr Gucati

H U W BOWDEN

⁷ KSC -CA-2022-01/F00044/CONF/RED, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeals Panel, 15 September 2022, Confidential at paragraph 34

Specialist Co-Counsel for Mr Gucati

ELEANOR STEPHENSON

Specialist Co-Counsel for Mr Gucati

20 January 2023

Caernarfon, UK