



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-CA-2022-01**

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 30 November 2022

Original language: English

Classification: **Public**

Public Redacted Version of Decision on Gucati Request for Full Disclosure of the Knowledge of the Court of Appeals Panel Regarding Defence Investigations

Specialist Prosecutor's Office:
Alex Whiting

Counsel for Hysni Gucati:
Jonathan Elystan Rees

Counsel for Nasim Haradinaj:
Toby Cadman

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 172 of the Rules of Procedure and Evidence (“Rules”), is seised of a request filed on 29 November 2022 by Mr Hysni Gucati (“Gucati” or “Accused”) requesting that the Panel urgently disclose to the Defence only the full extent of its knowledge of Defence investigations and the source(s) of its knowledge.²

I. BACKGROUND

1. On 18 May 2022, Trial Panel II (“Trial Panel”) issued a judgment finding the Accused guilty of five of the six counts charged and sentencing them to four and a half years of imprisonment, with credit for the time served, and to a fine of one hundred euros.³

2. Pursuant to a notification of the Specialist Prosecutor’s Office (“SPO”) of a confidential and *ex parte* communication with Witness W04730 (“Protected Witness”),⁴ the Court of Appeals Panel issued a decision on 15 September 2022 ordering the SPO to, *inter alia*, disclose to the Defence under Rule 103 of the Rules two interviews of the Protected Witness dated [REDACTED] and [REDACTED] (“Rule 103 Material”) and/or to request counter-balancing measures.⁵

¹ F00011, Decision Assigning a Court of Appeals Panel, 21 June 2022.

² F00095, Urgent Request for Full Disclosure as to Knowledge of the Court of Appeals Panel as to Defence Investigations, 29 November 2022 (confidential) (“Request”), paras 4, 9.

³ KSC-BC-2020-07, F00611/RED, Public Redacted Version of the Trial Judgment, 18 May 2022 (confidential version filed on 18 May 2022) (“Trial Judgment”), paras 1012-1017.

⁴ F00028/CONF/RED, Confidential Redacted Version of Notification on W04730 telephone contact, 23 September 2022 (confidential) (confidential and *ex parte* version filed on 7 July 2022).

⁵ F00044/CONF/RED, Confidential Redacted Version of Decision on Prosecution Notifications, 26 September 2022 (confidential) (confidential and *ex parte* version filed on 15 September 2022), paras 25-29, 38(a)-(b).

3. On 23 September 2022, the Panel granted the SPO's request for protective measures regarding the Rule 103 Material and ordered the disclosure to the Defence of a confidential redacted version of the material by 26 September 2022.⁶ The SPO abided by this order and disclosed the Rule 103 Material to the Defence.
4. On 13 October 2022, the Panel denied the Defence requests to amend their notices of appeal in order to challenge the effect of the SPO's alleged breach of its disclosure obligations under Rule 103 of the Rules.⁷
5. On 3 November 2022, the Panel dismissed the Defence requests to reconsider its Decision on Amending Notices of Appeal.⁸
6. On 7 November 2022, the Panel, *inter alia*, found no disclosure violation in relation to the Rule 103 Material.⁹
7. On 9 November 2022, the Panel authorised the Accused to file any motions pursuant to Rule 181 of the Rules no later than 14 days from the notification of the Panel's decision on the Defence Requests for Further Investigations, should the Panel decide to grant them.¹⁰

⁶ F00049/CONF/RED, Confidential Redacted Version of Decision on Specialist Prosecutor's Office Request for Protective Measures, 26 September 2022 (confidential) (strictly confidential and *ex parte* version filed on 23 September 2022), para. 15.

⁷ F00064/RED, Public Redacted Version of Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules, 13 October 2022 (confidential version filed on 13 October 2022) ("Decision on Amending Notices of Appeal"), paras 18-19.

⁸ See F00082/RED, Public Redacted Version of Decision on Defence Applications for Reconsideration of "Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules", 3 November 2022 (confidential version filed on 3 November 2022), paras 20-21.

⁹ F00083, Decision on Defence Motions for Alternate Relief Relating to Rule 103 Disclosure Violations, 7 November 2022 (confidential), paras 26, 29.

¹⁰ F00090, Decision on Defence Requests for Extension of Time to File Potential Motions Pursuant to Rule 181, 9 November 2022 (confidential), paras 5, 7. See F00079, Defence Request for an Order for Disclosure of Witness Contact Details, 2 November 2022 (confidential); F00081, Gucati Request for (i) a Declaration that Rule 102(3) applies to Appeal Proceedings; and (ii) an Order for Disclosure of Witness Contact Details, 2 November 2022 (confidential) ("Gucati Request for Further Investigations") (collectively, "Defence Requests for Further Investigations").

8. On 28 November 2022, the Panel rejected, *inter alia*, the Defence requests that interviews with certain witnesses, including Witnesses W04730 and [REDACTED], be facilitated or their contact details be disclosed.¹¹

II. DISCUSSION

A. SUBMISSIONS OF GUCATI

9. Gucati submits that the Panel's "allegation" in its Decision on Further Investigations that the Defence "chose not [...] to follow up [on an official note documenting what was said by another witness, [REDACTED] with further investigations" was "wholly remarkable".¹² Gucati argues that it is assumed that the Court of Appeals Panel has some basis beyond mere speculation for making this allegation, despite the fact that defence investigations are protected by litigation privilege, which is an essential component of a fair adversarial trial, along with the right to an independent and impartial tribunal.¹³

B. ASSESSMENT OF THE COURT OF APPEALS PANEL

10. The Panel notes that the relief sought by Gucati has no legal basis nor a substantiated foundation.¹⁴ The Panel observes that the finding to which Gucati refers concerns the Panel's assessment of his request to interview [REDACTED].¹⁵ As part of this assessment, which concluded with finding that not authorising the Defence to interview [REDACTED] will not result in a miscarriage of justice, the Panel considered that: (i) [REDACTED] is not a SPO witness; and (ii) any information that this person could bring does not concern a topic new to the Defence which would reasonably

¹¹ 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").

¹² Request, paras 2-3, referring to Decision on Further Investigations, para. 22.

¹³ Request, paras 6-8.

¹⁴ In this respect, the Panel reminds the Parties of Rule 75(4) of the Rules.

¹⁵ Cf. Request, para. 1 (referring to both Witness W04730 and [REDACTED]).

prompt investigations at this stage.¹⁶ In relation to the second consideration, the Panel noted that in another instance where the Defence was given access to an official note documenting what was said by another witness, [REDACTED], [REDACTED] as the source of the leak of the documents, it chose not to seek the admission of the note, nor to call the witness in question to testify at trial, nor to follow up with further investigations.¹⁷

11. In the Panel's view, Gucati takes this last phrase out of context and ignores the fact that the Panel clearly set out the context within which it considered the Defence Requests for Further Investigations, including the fact that given the corrective nature of appeal proceedings, a panel's powers to provide judicial assistance shall be exercised restrictively¹⁸ and any further investigations at the appeal stage can be authorised with the view to proffer potential evidence under Rule 181 of the Rules.¹⁹ In the present case, Gucati requested judicial assistance to facilitate interviews with [REDACTED] and other witnesses.²⁰ He did not do so at the trial stage with respect to [REDACTED] and this is a fact which was within the Panel's knowledge based on the trial record and within its discretion to consider when assessing Gucati's request. The Trial Panel in the Trial Judgment also pointed to the fact that the Defence did not seek to interview or call this individual as a witness.²¹ To insinuate that the Panel had access to any information other than what is available on the record is unacceptable.²²

¹⁶ Decision on Further Investigations, para. 22.

¹⁷ Decision on Further Investigations, para. 22.

¹⁸ Decision on Further Investigations, para. 17.

¹⁹ Decision on Further Investigations, para. 18.

²⁰ Gucati Request for Further Investigations, paras 1, 16(iii).

²¹ Trial Judgment, para. 878.

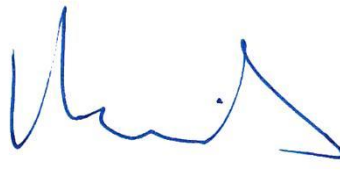
²² The two transcripts cited by the Panel in its Decision on Further Investigations directly support the remainder of the sentence singled out by Gucati, namely that the Defence chose not to seek the admission of the note, nor to call the witness in question to testify at trial. See Decision on Further Investigations, para. 22, referring to [REDACTED]; KSC-BC-2020-07, Transcript, 16 March 2022, p. 3675. Contra Request, para. 5.

12. The Panel finally notes that it is in the interests of justice to dispose of the Request immediately, without waiting for the SPO to respond, given that no prejudice will be caused to it and considering the imminence of the appeal hearing.²³

III. DISPOSITION

13. For these reasons, the Court of Appeals Panel:

DENIES the Request.



**Judge Michèle Picard,
Presiding Judge**

Dated this Wednesday, 30 November 2022

At The Hague, the Netherlands

²³ F00074, Order Scheduling an Appeal Hearing, 20 October 2022, p. 2. See also F00084, Order for the Preparation of the Appeal Hearing, 7 November 2022.