

In: KSC-CA-2023-02

The Specialist Prosecutor v. Mr. Salih Mustafa

Before: A Panel of the Court of Appeals Chamber

Judge Michèle Picard, Presiding Judge

Judge Kai Ambos

Judge Nina Jørgensen

Registrar: Fidelma Donlon

Filing Participant: Defence of Salih Mustafa

Date: 22 February 2023

Language: English

Classification: Public

Defence Request for Certification to Appeal the Decision on

Modalities of Victim Participation in Appellate Proceedings

Counsel for Salih Mustafa:

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Specialist Prosecutor's Office:

Alex Whiting

I. Introduction

1. On 13 February 2023 the Defence submitted a Motion regarding Victims' Counsel Participating in Pre-Appeal Conference and further appeal proceeding (hereafter "the Motion"¹. In the Motion the defence submitted that: "the Victims' counsel be excluded from participating in the Pre-Appeal Conference and the further Appeal proceedings".
2. The Panel of the Court of Appeal rendered a Decision (hereafter the Decision or the Impugned decision) on the Motion on 15 February 2023;² In it, the Panel of the Court of Appeal dismissed the motion and adopted the modalities for Victims participation in appellate proceedings set out in its decision;³
3. Where there is further mention of the "Law" and the "Rules" in this motion, it is meant the Law on the Specialist Chambers and Specialist Prosecutor's office and the Rules of Procedures and Evidence before the Kosovo Specialist Chambers.
4. The Defence submits that the decision is subject to Article 45 (2) of the law and Rule 173 (3) of the Rules of Procedure and Evidence.

¹ F00009, Motion regarding Victims' Counsel participating in Pre-Appeal Conference and further appeal proceedings, 13 February 2023 (confidential and *ex-parte*)

² KSC-CA-2023-02, 15 February 2023/F00011, Decision on the modalities of Victim Participation in Appellate Proceedings (7 PM)

³ KSC-CA-2023-02, 15 February 2023/F00011, Decision on the modalities of Victim Participation in Appellate Proceedings, para. 7-14

II. Applicable Law

5. To appeal the Impugned Decision, certification is required.
6. Article 45 (2) of the Law provides, in the relevant part, that the Trial Panel shall grant certification where an appeal: “involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceeding.”
7. Rule 77 (2) provides that: “The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by a Court of Appeals Panel may materially advance the proceedings.”
8. Rule 173 (3) provides that: “the Rules governing the Trial Proceedings shall apply *mutatis mutandis* to proceedings before the Court of Appeals Panel”. In the impugned decision the Court of Appeals Panel itself appeared to regard Rule 173 (3) as having the effect of applying not only the Rules governing trial proceedings *mutadis mutandis* to proceedings before the court of Appeals Panel, but also articles of the law governing trial proceedings (e.g. article 22 (6) of the Law which on its face applies only to Pre Trial and Trial proceedings). As interlocutory appeals form clearly part of trial proceedings, the law and Rules governing them following the Court of Appeals panels logic in the impugned decision ought to apply *mutatis mutandis* to proceedings before the court of Appeals Panel.
9. The following specific requirements, as confirmed by the jurisprudence of the Kosovo Specialist Chambers (“KSC”), therefore apply:

- (a) Whether the matter is an “appealable issue”;

- (b) Whether the issue at hand would significantly affect:
 - (i) The fair and expeditious conduct of the proceedings, or
 - (ii) The outcome of the trial;
- (c) Whether, in the opinion of the Trial Panel (or Court of Appeals Panel), an immediate resolution by the Court of Appeals Panel (or Supreme Court Panel) may materially advance the proceedings”;⁴

10. An “issue” is “an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion.”⁵

11. The applicant must articulate “clearly discrete issues for resolution by the Court of Appeals Panel that emanates from the ruling concerned and do not amount to abstract questions or hypothetical concerns”.⁶

12. The discrete issue is for resolution by the Supreme Court that emanates from the ruling concerned and does not amount to abstract questions or a hypothetical concern is:

“Whether the Court of Appeals Panel erred in finding that the combination of articles 22 (6) and rules 114 and 173 (3) permit the participation of victims counsel in appeal proceedings before it other than in an appeal under article 46 (9)”.

⁴ KSC-BC-2020-06/F00534, Decision on Defence Applications for Leave to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment, 18 October 2021, para. 14; KSC-BC2020-07/F00169, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021, (“Gucati and Haradinaj Decision on Leave to Appeal”) para. 6; KSCBC-2020-06/F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021 (“Thaçi Decision on Leave to Appeal”), para. 10.

⁵ KSC-BC-2020-07/F00169, “Gucati and Haradinaj Decision on Leave to Appeal, para. 12”, 1 April 2021; KSC-BC-2020-06/F00172, “Thaçi Decision on Leave to Appeal, para. 11”, 11 January 2021)

⁶ Ibid

13. Arguments on the merits or as to the substance of the Appeal are not factors to be considered at the certification stage. Rather these are factors that may properly be considered by the Supreme Court in the event that certification is granted.⁷

III. The impugned decision

14. The defence submits that the issue concerns the modalities for victim participation in appellate proceedings set out in the decision. It will significantly affect the fair and expeditious conduct of the proceedings. An immediate resolution may advance the proceedings.
15. The impugned decision provides that the Counsel for Victims may, without seeking prior leave from the Panel, make oral and written submissions on any point of law or fact, and to file responses and replies, as the case may be, to any submissions made before the Panel, including appellate briefs. However, the Panel stresses that Counsel for Victims must explicitly set out how the submissions are related to the participating victims' personal interests. Failure to satisfy the Panel of this relationship may therefore lead to the summary dismissal of the submissions.⁸
16. The defence submits that if counsel for victims is permitted to make, without prior leave from the Panel, oral and written submissions on any point of law or fact, and to file responses and replies, as the case may be, to any submissions made before the Panel, including appellate briefs, significantly affects the fair conduct and expeditious conduct of proceedings.
17. The Panel has set in its decision a fifth personal interest. That-fifth-personal interest is

⁷ KONY, ICC-02/04-01/05-20, decision on Prosecutor's application for leave to appeal in part Pre Trial Chamber II decision on the prosecutor's applications for Warrants of Arrest under article 58, 19 august 2005, para. 22

⁸ KSC-CA-2023-02/F00011, 15 February 2023/ Decision on Modalities of Victim Participation on Appellate Proceedings, para 13.

that the victims' counsel can, without seeking prior leave, make oral and written submissions on any point of law or fact and to file responses and replies as the case may to any submission made before the Panel. This type of participation goes beyond the personal interests as set forth in Article 22 (3) of the Law as well as the fourth personal interest (the protection of victims' safety, physical and psychological well-being, dignity and privacy).

18. In addition, as the modality set forth by the Panel sets no criterion as to when the submissions are even "related to" the victims' personal interests, the proceedings will be significantly affected as each time the victims' counsel will make submissions, replies, oral or written, each of these submissions will have to be put at this test. This will cause significantly delay and will affect the fair and expeditious conduct of the proceedings.
19. The defence submits that the participation to this extent in appellate proceedings is outside the boundaries of the personal interests as enumerated above. It makes the victims' counsel an extra participant in the proceedings. Appellant will be obliged to respond to the veracity of each of the submissions of victims' counsel. For example: to each submission on a point of fact needs to be replied and in addition it needs to be determined as being "related to" the alleged personal interests.
20. The defence submits that it is unfair for the Appellant that whenever he makes submissions on whatever topic, victims' counsel is permitted to respond. Enabling victims' counsel to submit any oral or written submission towards issues identified by the defence, is unfair as it consumes extra time and effort for the defence to reply to more than just the judgment which is the core of the appeal of the Appellant. It is unfair to the Appellant as he is the single Party appealing the Judgement. Other submissions from participants regarding his submissions bear no relevance to his submissions in the appeal.

21. The Appellant, as the single Party appealing the Judgment of his case, is with this part of the Decision tasked with replying to responses to its own briefs coming from the side of the Victims' Counsel, even though there are no criteria which determine whether the submissions from the Victims' Counsel are within the scope ("how they are related to the personal interests") of the Decision, as the Decision does not set any standard for it.
22. The impugned decision affects the Appellant to the extent that the Appellant must for each and every submission determine whether the submission of the victims' counsel bears any relevance as to the personal interests of the victims
23. The Appropriate Panel of the Supreme Court and an immediate resolution by it may materially advance proceedings.

IV. RELIEF SOUGHT

24. For the above reasons, the defence respectfully requests that the Panel of the Court of Appeals grant leave to appeal the issue pursuant to article 45 (2) of the law and Rule 77 (2).

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The Hague, the Netherlands



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