

In: KSC-BC-2020-06
The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Court of Appeals Panel
Judge Michèle Picard
Judge Emilio Gatti
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

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Public Redacted Version of Thaçi Defence Appeal of F01057 and F01058

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I. INTRODUCTION

1. Rules 95(4)(b) and (c) of the KSC Rules¹ require the Pre-Trial Judge to order the SPO to file, within a set time limit, a list of witnesses it intends to call, and a list of proposed exhibits it intends to present at trial. These lists are central to Defence preparation. In the context of the present case, where the SPO has disclosed millions of pages of material, these lists allow the Defence to focus its investigations and preparation on the witnesses and material which the SPO actually intends to present at trial.

2. In the present case, the SPO informed the Pre-Trial Judge in November 2020 that it would be in a position to provide finalised witness and exhibit lists by 31 May 2021.² The lists were filed seven months later, on 17 December 2021.³

3. Once filed, however, the SPO Witness List and SPO Exhibit List were treated as a starting point from which the SPO could continue to enlarge its proposed case.⁴ A steady stream of SPO requests has led to an additional 2,069 documents being added to the SPO Exhibit List since the original December 2021 deadline. 327 SPO witnesses were “streamlined” down to 319, before rising back up to 323. All SPO requests to add witnesses and exhibits have been granted by the Pre-Trial Judge, without exception.

4. A constantly shifting SPO Witness List and SPO Exhibit List is not without consequences. This expansion impacts the right of the accused to be informed of the

¹ KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”).

² KSC-BC-2020-06/F00076, Prosecution Submissions for first Status Conference, 13 November 2020, paras. 2, 15.

³ KSC-BC-2020-06, Transcript of Eighth Status Conference, 29 October 2021 (“Transcript of Eighth Status Conference”), pp. 725-726; 752 -753.

⁴ The current versions can be found at: KSC-BC-2020-06/F01078/A02, Annex 2 – Prosecution submission of amended witness and exhibit lists, 2 November 2022, Confidential (“SPO Exhibit List”); KSC-BC-2020-06/F01078/A04, Annex 4 – Amended List of Witnesses, Confidential (“SPO Witness List”), together “SPO Lists”.

case against him,⁵ to have adequate time and resources to prepare,⁶ and to be tried within a reasonable time.⁷ As the Pre-Trial Judge has previously correctly observed, “[t]he Defence cannot be expected to prepare a defence on a case that is constantly evolving.”⁸

5. The current appeal involves the SPO’s Sixth and Seventh Requests⁹ to add further witnesses and materials to the SPO Lists, both of which were granted.¹⁰ The appeal challenges errors in the Pre-Trial Judge’s reasoning which effectively grant an unlimited right to the SPO to add exhibits and witnesses in the pre-trial phase, in a manner incompatible with the rights of the accused.

6. Mr Thaçi has been in prison for two years. The SPO Lists should have been finalised in December 2021. Their rolling expansion undermines the ability of all parties to prepare for trial, and finally move this case forward. This expansion cannot continue indefinitely, particularly when the reasons given for the additions to the SPO Lists are grounded in irrelevant or erroneous reasoning. As such, the Defence appeals, with leave of the Pre-Trial Judge, the following four issues:¹¹

Issue 1: Whether the Pre-Trial Judge erred in setting the starting point for assessing the timeliness of SPO disclosure at the date of the SPO’s interview,

⁵ Kosovo Constitution, Article 30(1); KSC Law, Article 21(4)(a); ECHR, Article 6(3)(a).

⁶ Kosovo Constitution, Article 30(3); KSC Law, Article 21(4)(c); ECHR, Article 6(3)(b).

⁷ Kosovo Constitution, Article 31(2); KSC Law, Article 21(4)(d); ECHR, Article 6(1).

⁸ KSC-BC-2020-06, Transcript of Tenth Status Conference, 4 February 2022, p. 928.

⁹ KSC-BC-2020-06/F00890/CONF/RED, Prosecution Rule 102(2) submission and related requests, 21 July 2022 (“Sixth Request”); KSC-BC-2020-06/F00947/CONF/RED, Prosecution request to add two witnesses and associated materials, 2 September 2022 (“Seventh Request”).

¹⁰ KSC-BC-2020-06/F01057, Pre-Trial Judge, Confidential Redacted Version of Decision on Prosecution Rule 102(2) Submission and Related Requests, 27 October 2022 (“F01057”); KSC-BC-2020-06/F01058, Pre-Trial Judge, Confidential Redacted Version of Decision on Prosecution Request to Add Two Witnesses and Associated Material, 27 October 2022 (“F01058”).

¹¹ KSC-BC-2020-06/F01118, Pre-Trial Judge, Decision on Requests for Certification to Appeal F01057 and F01058, 23 November 2022 (“Certification Decision”), para. 77.

being the point at which “the SPO could fully ascertain the relevance” of the new evidence to its case (“First Issue”);

Issue 2: Whether the Pre-Trial Judge erred in his approach to the assessment of good cause by basing it, in part, on irrelevant factors, such as the [SPO’s First] Request being filed [with]in the pre-trial stage or the ongoing Defence investigations (“Second Issue”);

Issue 3: Whether the Pre-Trial Judge erred in his approach to the assessment of good cause by basing it, in part, on irrelevant factors, such as the [SPO’s Second] Request being filed in the pretrial stage (“Third Issue”); and

Issue 4: Whether the Pre-Trial Judge erred in its assessment of the impact of the late addition of [REDACTED] and [REDACTED] on the Accused’s preparation for trial, by relying on irrelevant factors, such as the fact that part of their associated material had already been disclosed to the Defence under Rule 103 or Rule 102(3) or that much of [REDACTED]'s evidence was [REDACTED] (“Fourth Issue”).

7. The Pre-Trial Judge issued a joint decision on the Defence Requests for Certification.¹² Two of the issues certified, the Second Issue and Third Issue, although arising from separate decisions, overlap in significant part. They are therefore addressed together below.

II. PROCEDURAL HISTORY

8. At the Eighth Status Conference on 29 October 2021, the SPO advised that it would be able to file its pre-trial brief, witness list and exhibit list on 17 December

¹² Certification Decision.

2021, seven months later than its own initial estimates.¹³ The Pre-Trial Judge confirmed this deadline by an oral order issued the same day.¹⁴

9. On 17 December 2021, the SPO filed strictly confidential and *ex parte* versions of its Pre-Trial Brief, SPO Exhibit List and SPO Witness List; before filing confidential redacted versions of these documents on 21 December 2021.¹⁵ Both the SPO Lists have been revised on multiple occasions since this original filing, including the addition of thousands of new items to the SPO Exhibit List.

10. On 20 July 2022, the SPO filed a request seeking the addition of two witnesses, [REDACTED] and W04043, to the SPO Witness List, and to include their associated materials on the Exhibit List (along with related measures).¹⁶ The Defence responded to this request on 3 August 2022, requesting that the Pre-Trial Judge dismiss it.¹⁷

11. On 2 September 2022, the SPO filed a request seeking the addition of another two witnesses, [REDACTED], and their associated materials to the SPO Lists (as well as related measures).¹⁸ The Defence responded to this request on 15 September 2022, again objecting to the relief sought and requesting that the Pre-Trial Judge dismiss it.¹⁹

¹³ Transcript of Eighth Status Conference, pp. 725-726.

¹⁴ Transcript of Eighth Status Conference, Oral Order 2 – pp. 752-753.

¹⁵ KSC-BC-2020-06/F00631/RED/A01/CONF/RED, Annex 1 - Confidential Redacted Pre-Trial Brief; KSC-BC-202006/F00631RED/A02/CONF/RED, Annex 2 - Confidential Redacted List of Witnesses; KSC-BC-202006/F00631/RED/A03/CONF/RED, Annex 3 - Confidential Redacted List of Exhibits.

¹⁶ Sixth Request, paras. 1, 20.

¹⁷ KSC-BC-2020-06/F00909, Thaçi Defence Response to Prosecution Rule 102(2) submission and related requests (F00890), 3 August 2022, para. 2.

¹⁸ Seventh Request.

¹⁹ KSC-BC-2020-06/F00974, Thaçi Defence Response to Prosecution request to add two witnesses and associated materials (F00947), 15 September 2022, paras. 2, 39.

12. On 27 October 2022, the Pre-Trial Judge issued two decisions authorising the SPO to add the four requested witnesses to the SPO Witness List, and amend the SPO Exhibit List to include the associated materials.²⁰

13. On 3 November 2022, the Defence requested certification to appeal four issues arising from each of the decisions.²¹ On 16 November 2022, the SPO responded to the Certification Requests filed by the Defence.²² On 23 November 2022, the Pre-Trial Judge issued a decision granting leave to appeal four issues, which are the subject of the present appeal.²³

III. STANDARD OF REVIEW

14. The standard of review applicable to interlocutory appeals is the standard provided for appeals against judgments, as specified in the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law").²⁴

15. In relation to an **error of law**, a party "must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision."²⁵ For **errors of fact**, a party must demonstrate that no reasonable trier of fact

²⁰ F01057; F01058.

²¹ KSC-BC-2020-06/F01080, Thaçi Defence Request for Certification to Appeal the "Decision on Prosecution Rule 102(2) Submission and Related Requests" (F01057 Request), 3 November 2022; KSC-BC-2020-06/F01085, Thaçi Defence Request for Certification to Appeal the "Decision on Prosecution Request to Add Two Witnesses and Associated Materials" (F01058 Request), 3 November 2022 (collectively, "Certification Requests").

²² KSC-BC-2020-06/F01106, Prosecution Response to Thaçi Defence Requests for Certification to Appeal Decision F01057, 16 November 2022; KSC-BC-2020-06/F01107, Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F01058, 16 November 2022.

²³ Certification Decision, para. 77.

²⁴ KSC, *Prosecutor v. Gucati*, KSC-BC-2020-07/IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati Appeals Decision*"), para. 10.

²⁵ *Gucati Appeals Decision*, para. 12.

could have made the impugned finding and only an error that has caused a miscarriage of justice will cause the Panel to overturn a decision.²⁶

16. In relation to a **discretionary decision**, a party must demonstrate that the lower level panel has committed a discernible error, in that the exercise of discretion is based on an erroneous interpretation of the law; it is exercised on a patently incorrect conclusion of fact; or where the decision is so unfair and unreasonable as to constitute an abuse of discretion.²⁷ The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations.²⁸

IV. GROUNDS OF APPEAL

A. FIRST ISSUE

17. The SPO has known about [REDACTED] and W04034 for years. The SPO was aware of [REDACTED]'s relevance to the case in February 2020, and has been in possession of further material about [REDACTED] since August 2021.²⁹ The SPO had identified the relevance of W04034 to the present case by February 2021.³⁰

18. The Pre-Trial Judge found that, regardless, the SPO request to add W04043 and [REDACTED] to the SPO Witness List on 20 July 2022, six months after the expiry of the deadline, was timely. The Pre-Trial Judge reached this conclusion by starting his assessment of timeliness from the date on which the SPO **interviewed** [REDACTED] and W04043, being the weeks of [REDACTED] 2022 and 21 April 2022, respectively.³¹

²⁶ *Gucati* Appeals Decision, para. 13.

²⁷ *Gucati* Appeals Decision, para. 14.

²⁸ *Gucati* Appeals Decision, para. 14; KSC-BC-2020-07/IA002/F00005, Appeals Panel, Decision on Nasim Haradinaj's Appeal against Decision Reviewing Detention, 9 February 2021, para. 14.

²⁹ Sixth Request, paras. 6-7.

³⁰ *Ibid.*, para. 16.

³¹ F01057, paras. 23, 32.

With this truncated time period as his frame of reference, the Pre-Trial Judge held that the time taken to finalise and process the transcripts of interview was not unreasonable, and “[a]ccordingly [...] the SPO has made the Request in a timely manner”.³²

19. The problem with this reasoning is the following: assessing the timeliness of an SPO request with regard to the period between the SPO interview and the request, means that if the SPO can finalise the interview transcript and file the request within a reasonable period, the request to add witnesses will always be timely. Practically, this gives the SPO unlimited scope to interview new witnesses and add them to the SPO Witness List.

20. The timeliness of an SPO request to add new witnesses, after the expiry of the deadline, is at the heart of the Pre-Trial Judge’s inquiry. The requirement of timeliness exists to preclude a situation where the SPO has sat on information for years, while the accused remain in prison, before conducting interviews. In accordance with the standard set by the Pre-Trial Judge, if the SPO decided to interview a batch of new witnesses this week (a year after filing its SPO Witness List), a subsequent request to add these witnesses would be considered timely if the SPO was able to process and disclose the interviews and file the request within a reasonable period. Regardless of how long the SPO has known about the existence of the witnesses in question.

21. The relevant time period is not, and cannot be, the time between the SPO interview and the filing of a request. In order to have any meaning, the time period must start from when the SPO first learned about the potential evidence. Delays which are out of the SPO’s control can obviously be assessed on a case by case basis. However, the entire process cannot be circumvented by simply looking to how quickly the interview was transcribed and processed, and the SPO request was

³² F01057, paras. 26, 35.

drafted. To do so gives the SPO an unlimited scope for amendment to its Exhibit and Witness Lists, which undermines the purpose of the deadline in Rules 95(4)(b) and (c).

B. SECOND AND THIRD ISSUES

22. When assessing the late addition of [REDACTED] and his prior statements and associated material, the Pre-Trial Judge found that the SPO had demonstrated good cause on the basis that, *inter alia*, “the SPO has filed the Request while the pre-trial phase is still ongoing, [and] the Defence continues its investigations”.³³ Similarly, when assessing the late addition of [REDACTED] and his prior statements and associated material, the Pre-Trial Judge again relied on the fact that “the SPO has filed the Request while the pre-trial phase is still ongoing”.³⁴

23. In doing so, the Pre-Trial Judge based his finding, in part, on irrelevant factors, being the (protracted) continuation of the pre-trial proceedings, and the fact that the Defence is investigating the case.

24. The SPO’s original estimate, presented to the Pre-Trial Judge and the parties in November 2020, was that it anticipated be ready to commence the presentation of its evidence in the summer of 2021.³⁵ There is no link between the fact that this case remains in the pre-trial phase 18 months later, and apparent good cause for continuing to expand the SPO Lists. The deadline for their finalisation was 17 December 2021. The fact that - almost inconceivably - the case is still in the pre-trial phase in December 2022, cannot operate as a factor which plays in the SPO’s favour and counts as contributing to a finding of “good cause” on its part to continue to add witnesses and

³³ F01057, para. 28.

³⁴ F01058, para. 27.

³⁵ KSC-BC-2020-06/F00097, Prosecution submissions further to the status conference of 18 November 2020, 23 November 2020, para. 14.

exhibits to the SPO Lists. In reality, it is precisely these kinds of expansions and delays that have kept the proceedings from moving to trial.

25. Nor does the fact that Defence investigations are ongoing support a showing of good cause by the SPO. The Defence is entitled to commence investigations during the pre-trial phase. Investigations will continue during the trial phase, and will likely continue into any subsequent appeal phase. The fact that the Defence is investigating is irrelevant to whether the SPO should be entitled to continue to add witnesses and exhibits to the SPO Lists long past the deadline. The Pre-Trial Judge's reasoning effectively penalises the Defence for the diligent exercise of its duties. In relying on the fact that the case remains in the pre-trial phase, and the fact that the Defence is investigating, in support of a finding of "good cause" for the continued expansion of the SPO Lists, the Pre-Trial Judge erred.

C. FOURTH ISSUE

26. When additional witnesses are added to the SPO Witness List, and new material is included on the SPO Exhibit List, this impacts on Defence preparation for trial. The new material must be analysed, and compared to material on the SPO Exhibit List which addresses the same subject matter. The new witnesses must be investigated, and their prior statements and proposed testimony compared against that of witnesses already on the SPO Witness List who speak about the same events or aspects of the indictment.

27. The Defence opposed the late addition of [REDACTED] and [REDACTED], and their associated material, on the basis that this would prejudice Defence preparations for trial. The Pre-Trial Judge acknowledged that the addition of [REDACTED] and [REDACTED] and their associated materials might require the Defence to "refocus its

investigations”.³⁶ However, he dismissed the Defence concerns on the basis that part of [REDACTED] and [REDACTED]’s associated material had already been disclosed to the Defence under Rule 103 or Rule 102(3), and that much of [REDACTED]’s evidence was already accessible [REDACTED]. As such, the Pre-Trial Judge concluded that the SPO had demonstrated good cause for their late addition.³⁷ In doing so, he relied on irrelevant factors, which was an error.

28. The SPO has disclosed over 52,000 documents to Mr Thaçi’s Defence team alone, totalling millions of pages of disclosure. The fact that the new material can be found among this disclosure, or exists in the public domain, cannot circumvent the fact that Defence preparations are affected by the late addition of witnesses and exhibits to the SPO Lists. From 17 December 2021, the Defence was entitled to focus its preparation and investigations on the witnesses and proposed exhibits that the SPO indicated it would present at trial. The Defence cannot be presumed to have focused its investigations on millions of pages of material, or hundreds of witnesses, which were not included on the SPO Lists on 17 December 2022, nor to have anticipated the late addition of certain witnesses or items from this wide range of material to the SPO Lists.

29. The addition of these new witnesses, and new material, means more work for the Defence. The fact that this new material can be found among the millions of pages of SPO disclosure, or can be found in the public record [REDACTED], does not change this reality. By considering these factors circumvented or mitigated Defence concerns about the impact on preparation, the Pre-Trial Judge erred.

³⁶ F01058, paras. 27, 31.

³⁷ F01058, paras. 27-28, 31-32.

V. CONCLUSION & RELIEF SOUGHT

30. The rolling enlargement of the SPO Witness List and SPO Exhibit List cannot continue indefinitely. The deadline of 17 December 2021 should never have been considered a starting point from which the SPO could expand its proposed evidence, by over 2,000 documents (and counting), throughout the course of the next 12 months. Rather, it was the date by which the SPO was required to present its intended evidence in a form on which the parties could rely.

31. In granting the SPO's Sixth and Seventh Requests, the Pre-Trial Judge has relied on irrelevant factors. The continuation of the pre-trial phase, the fact that the Defence is investigating, and the existence of the new material in the public domain are factors that cannot reasonably be relied upon to establish good cause for yet another enlargement of the SPO Lists. Nor can the timeliness of the SPO Requests date from the moment it decides to interview witnesses it has known about for years.

32. The Pre-Trial Judge's reasoning puts no meaningful limits on the SPO's ability to expand its Exhibit List and Witness List, even now, twelve months past the relevant deadline. The errors which undermine this reasoning warrant the intervention of the Court of Appeals Panel, for the reasons set out above. The Defence accordingly requests that the Court of Appeals Panel:

GRANT the present appeal; and

REMAND the Sixth and Seventh Requests to the Pre-Trial Judge.

[Word count: 3,249 words]

Respectfully submitted,



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Monday, 5 December 2022

At London, United Kingdom