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In: **KSC-BC-2020-07**
KSC-CA-2022-01

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: **President,** Judge Ekaterina Trendafilova

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

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Public Redacted Version of Gucati Request for Protection of Legality pursuant to Article 48(6) to (8) of the Law and Rule 193 of the Rules

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I. INTRODUCTION

1. On 18/05/2022, TP pronounced the Trial Judgment[1] in this matter, finding Gucati guilty on five counts (Counts 1, 2, 3, 5 and 6) and sentencing Gucati to a single sentence of 4 ½ years' imprisonment, with credit for time served, and €100 fine.

2. On 02/03/2023, CAP pronounced the Appeal Judgment[2], affirming the convictions on counts 1, 3, 5 and 6 (reversing the conviction on count 2) and replacing the sentence with a single sentence of 4 years 3 months' imprisonment, with credit for time served (fine affirmed).

3. Pursuant to Art.48(6)-(8) Law and RR.193 and 194 KSCR, Gucati hereby requests:

> (a) protection of legality against the Trial Judgment and the Appeal Judgment, and
>
> (b) the modification of the impugned judgments so that Gucati is acquitted of all counts, or the impugned judgments are annulled and the case returned for retrial, or otherwise the sentence is reduced.

II. PROCEDURAL BACKGROUND

[1] KSC-BC-2020-07/F00611
[2] KSC-CA-2022-01/F00114

4. The procedural background is set out comprehensively in Annex 1 to the Trial Judgment[3] and Annex 1 to the Appeal Judgment[4].

III. APPLICABLE LAW

5. The right to request protection of legality under Art.48 Law ensures the protection of rights, fair trial and of judicial review guaranteed by the Constitution[5].

6. A protection of legality request must allege

(a) A violation of the criminal law contained within this Law; or

(b) A substantial violation of the procedures set out in this Law and in the KSC-Rules[6].

7. A protection of legality request may also be filed "on the basis of rights available under this Law which are protected under the Constitution or the [ECHR]"[7].

8. A procedural violation must be "substantial", i.e. one which materially affects the judicial finding[8].

9. Art.48(7)(a) Law does not require that a violation of the criminal law is substantial.

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[3] KSC-BC-2020-7/F00611/A01
[4] KSC-CA-2022-01/F00114/A01
[5] *NV, ED & NT*, para.52
[6] Art.48(7) Law
[7] Art.48(8) Law; Art.441 KCPC- extends to the jurisprudence of the ECtHR
[8] Art.48(7)(b) Law; KSC-BC-2020-06/PL001, para.23

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

10. Art.432(1.2) and Art.384 KCPC enumerate several examples of substantial violations, for example: (1) omitting to apply a provision of the Law or the Rules; (2) incorrectly applying the Law and/or the Rules; or (3) violating the rights of the Defence in a manner which has influenced the rendering of a lawful and fair decision[9].

11. Similarly, there is a substantial violation of procedure if the court in its judgment did not fully adjudicate the substance of the charge (Art.384(1.7) KCPC) or the judgment was not drawn up in accordance with the relevant procedural code (Art.384(1.12) KCPC and below).

12. RR.159(3),164(2) and 183(3) require judgments to be reasoned. A request for protection of legality will be well-founded where the impugned judgment does not give sufficiently clear and consistent reasons or fails to address key evidence[10]. It must be clear from the decision that the essential issues of the case have been addressed and the grounds for the decision indicated with sufficient clarity[11].

13. R.194(1) provides that where the Supreme Court grants a request by the Accused, it shall:

(a) Modify the impugned judgment;

(b) Annul in whole or in part the judgment and return the case for a retrial to the competent Panel; or

[9] KSC-BC-2020-06/PL001, para.24
[10] *SM1 & SM2*, para.25-26; *NU et al*, para.11-14
[11] *OI & DD*, p.13

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

(c) Confine itself to establishing the existence of a violation of law.

IV. SUBMISSIONS

Violation 1: Count 1

14. In violation of the criminal law, TP[12] and CAP[13] (Judge Kai Ambos dissenting) misapplied Art.401 KCC by finding that the offence contained therein did *not* require threats to be directed at an official person.

15. The wording of Art.401(1) KCC cannot be reasonably interpreted to include threats directed against non-official witnesses[14].

16. The terms of Art.401(1) refer to obstruction while an official person is in the act of performance of his official duties[15].

17. The aim of Art.401 is to protect official persons performing official duties against violent or threatening actions[16]. The aim of Art.401 is not, as asserted by TP and CAP (majority), to ensure that official duties are not obstructed[17], as the offence can be committed when violent or threatening means are used to compel an official to perform their official duties.

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[12] KSC-BC-2020-07/F00611, para.146
[13] KSC-CA-2022-01/F00114, para.282
[14] KSC-CA-2022-01/F00114, PDOJKA, para.10
[15] *Salihu*,p.1166 margin no.5
[16] *MI et al* §6.3; *Salihu*,p.1142-1164 margin no.1
[17] KSC-BC-2020-07/F00611, para.146; KSC-CA-2022-01/F00114, para.282

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

18. The serious threat must be directed at the person when they are performing official duties and be of *immediate* application[18].

19. It is consistent with the above submissions that Art.401(5) specifically states that the offence is committed *against* official persons *during* the exercise of their official functions.

20. TP and CAP's interpretation of Art.401(1) KCC is excessively broad and violates the principle of legality (*lex stricta*), explicitly provided for by Art.33 Constitution and by Art.2 KCC[19].

21. Contrary to the assertion of CAP (majority)[20], the narrow interpretation of Art.401(1) dictated by legality does not produce an impunity gap[21]. Threats explicitly directed at private witnesses are covered by Art.386(1), (4) and (5) and Art.387 KCC.

22. There was no finding, nor could there be, of the use by Gucati of serious threat directed at an official person when performing official duties[22]. The *actus reus* of count 1 was not established[23]. As Judge Kai Ambos rightly found, the conviction on count 1 should be overturned and an acquittal entered.

Violation 2: Count 3

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[18] *MI et al* §6.3; *Salihu*,p.1165 margin no.2,3&4
[19] KSC-CA-2022-01/F00114, PDOJKA, para.4,7; similarly, KSC-BC-2020-07/F00611, SOJB, para.4 fn.12 in relation to Art.387 KCC
[20] KSC-CA-2022-01/F00114, para.282
[21] KSC-CA-2022-01/F00114, PDOJKA, para.15
[22] KSC-CA-2022-01/F00114, PDOJKA, para.12
[23] KSC-CA-2022-01/F00114, PDOJKA, para.14,16

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

23. In violation of the criminal law, TP[24] and CAP[25] misapplied Art.387 KCC by finding:

(a) That it was sufficient to establish the *actus reus* of Count 3 that Gucati used a serious threat towards a person who provided *evidence/information* about any crimes under SC jurisdiction, in the absence of evidence that such *evidence/information* related to the obstruction of criminal proceedings;

(b) That the *mens rea* of Count 3 did not require that Gucati was aware that such *evidence/information* related to the obstruction of criminal proceedings; and

(c) That the *mens rea* of Count 3 did not require that Gucati was aware that such *evidence/information* was true.

24. The purpose of the offence under Art.387 KCC is not to criminalise the use of serious threat to induce a person to refrain from making a statement or to make a false statement or to otherwise fail to state true information *to any person*.

25. Instead, Art.387 KCC is specifically restricted to the use of serious threat to induce a person to refrain from making a statement/make a false statement/otherwise fail to state true information *to the police, a prosecutor or a judge*.

[24] KSC-BC-2020-07/F00611, (a) para.585-586, (b) & (c) para.588,603-605
[25] KSC-CA-2022-01/F00114, (a) para.223, (b) & (c) paras.263-264

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

26. Just as the words, "to the police, a prosecutor or a judge" limit the application of the entire provision, so do the words, "when such information relates to the obstruction of criminal proceedings".

27. The relevant information which is the subject of the contemplated statement/false statement/true information otherwise failed to be stated *must relate to the obstruction of criminal proceedings* (i.e. an offence contrary to Art.386 KCC).

28. TP sought to make a comparison between the titles of the predecessor Art.310 PCCK ("Intimidation during criminal proceedings for organised crime", indicating that the offence was restricted to intimidation during criminal proceedings for organised crime) and Art.387 KCC ("Intimidation during criminal proceedings", which contained no equivalent qualifier) but the title of Art.387 KCC is of limited assistance. It refers after all to intimidation, which neither appears as a term within Art.387 KCC nor is necessary in substance (the offence being capable of commission through the promise of a gift or any other form of benefit)[26].

29. Of greater assistance is the fact that the text of Art.387 KCC is drafted in exactly the same structure, albeit "obstruction of criminal proceedings" is substituted for "organized crime".

30. The "placement and formulation" of the qualifier in Art.387 KCC is modelled upon the "placement and formulation" of the qualifier in Art.301 PCCK which unequivocally limited the application of the entire provision[27].

[26] KSC-BC-2020-07/F00611, para.114, fn.186
[27] KSC-BC-2020-07/F00611, para.114

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

31. The wording and legislative intent of Art.310 PCCK may not be determinative[28] of the correct approach to Art.387 KCC but it is a useful indicator (CAP relied upon Art.310 PCCK, albeit adversely to Gucati, in relation to whether the words "serious threat" in Art.387 KCC were confined to threat of force)[29].

32. The separation by comma of the qualifier "when such information relates to obstruction of criminal proceedings" from the preceding words (with no such separation by comma from the following words) makes it clear that the qualifier applies to the phrase "to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge" as a whole and to each of its constituent parts.

33. There is no basis, literal or purposive, to restrict the relevance of the words "when such information relates to obstruction of criminal proceedings" in Art.387 KCC to "failing to state true information to the police, a prosecutor or a judge" only. Such an interpretation leads to a distinction in Art.387 without any merit, namely:

> (a) that inducing a witness, by serious threat, to refrain from making a statement to the police, a prosecutor or judge, in non-obstruction proceedings is an offence under Art.387; but

[28] KSC-CA-2022-01/F00114, para.222
[29] KSC-CA-2022-01/F00114, para.224

(b) inducing a witness, by the same means of compulsion, to fail to state true information to the police, a prosecutor or judge, in non-obstruction proceedings is not an offence under Art.387; where

(c) what constitutes a statement of a witness for the purposes of legal proceedings is determined not by its form or the name given to it, but by its content function, purpose and source[30]; and where

(d) both 'statement' and 'information' are expected to be true.

34. TP found that the *actus reus* of the Art.387 KCC was satisfied by the use of serious threat against any person making or likely to make a statement or provide information to the police, a prosecutor or a judge[31].

35. In so finding, TP simply ignored the qualifier that the information must relate to the obstruction of criminal proceedings entirely.

36. On TP's own findings, it could only say that the acts and statements of the Accused would have created "serious fears and concerns" for "persons who gave evidence to the SC/SPO or were likely to do so, thereby constituting a strong disincentive for such persons to provide (further) information about *any crimes under SC jurisdiction*"[32].

37. The essential ingredient of Art.387, that such information related to obstruction of criminal proceedings, was absent.

[30] KSC-BC-2020-07/F00334, para.84
[31] KSC-BC-2020-07/F00611, para.109,557
[32] KSC-BC-2020-07/F00611, para.558

38. Even on TP's interpretation, the phrase "when such information relates to obstruction of criminal proceedings" qualified the third alternative in Art.387 KCC regarding the provision of information[33].

39. TP made no finding that any serious threat was used specifically against a person making or likely to make a "statement".

40. CAP's attempt to interpolate into the Trial Judgment a finding that the Accused were found guilty under the first alternative of Art.387 KCC, namely having used serious threats to induce someone to "refrain from making a statement[34] was both erroneous and inappropriate.

41. If that was the 'clear' finding of TP they could, should and would have used those explicit terms. Instead, TP never used the term "refrain from making a statement" in its findings but did use the term "information" which explicitly appears in Art.387 KCC (and "evidence", which does not).

42. Indeed, later CAP acknowledged that TP did *not* find that threats were issued against persons "making a statement", agreeing with "[TP's] finding that the *actus reus* was met because serious threats were issued against persons, encompassing [Witnesses/Potential Witnesses], who gave "evidence" or "provided information" – rather than made a "statement" – to the [SC/SPO]"[35].

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[33] KSC-BC-2020-07/F00611, para.114
[34] KSC-CA-2022-01/F00114, para.220
[35] KSC-CA-2022-01/F00114, para.223

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

43. "Witnesses" and "Potential Witnesses" were, of course, defined as "information providers" and were not restricted to those making or likely to make a "statement"[36].

44. It was not argued before CAP that TP had 'erroneously' referred to persons providing "information" or "evidence"[37]. It was argued that TP having found that Gucati had used serious threats to induce someone to fail to provide information/evidence, erred in finding Gucati guilty under Art.387 in the absence of evidence that the relevant information/evidence related to the obstruction of criminal proceedings.

45. TP used the terms "evidence" and "information" interchangeably[38].

46. The subsequent attempt by CAP to further interchange the term "evidence" (which appears in the findings of TP but not within Art.387 KCC) with the term "statement" (which appears within Art.387 KCC but not within the findings of TP) simply demonstrates the force of the submission in paragraph 33 above, that there is no material distinction to be made between "statement" and "information" (and "evidence") for the purposes of Art.387 KCC.

47. It was insufficient, even on TP's analysis of Art.387 KCC, to find that serious threat was used against any person likely to provide information about *any* crimes under SC jurisdiction. Only information which related to the obstruction of criminal proceedings was sufficient. There was no finding of the same, nor any evidence upon

[36] KSC-BC-2020-07/F00611, para.511-512; KSC-CA-2022-01/F00114, para.167-168
[37] Contra KSC-CA-2022-01/F00114, para.212
[38] KSC-BC-2020-07/F00611, para.581,585

which TP could have found that the Accused used a serious threat to induce another person to fail to state information (or refrain from making a statement) relating to the obstruction of criminal proceedings.

48. The narrow and correct interpretation of Art.387 KCC advanced does not result in an impunity gap. Threatening witnesses is widely covered by Art.386(1), (4) & (5). In any event, it is not for a criminal court to close or remedy loopholes in the law that were – consciously or unconsciously – left open by the legislator through excessive interpretation[39]. That prohibition is just as apposite when the 'loophole' to be remedied arises due to a failure by the Prosecution to charge the correct offence.

49. The error of TP, repeated by CAP, invalidates the findings on the *actus reus* for count 3. The conviction on count 3 should be overturned and acquittal entered.

50. Regarding the *mens rea* of Art.387 KCC, a person acts with direct intent when he is aware that he uses serious threat to induce another person to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings, and he desires the commission of that offence[40].

51. Nowhere did TP find that the Accused acted with awareness of, and desire for, inducing a person specifically to refrain from making a "statement".

[39] KSC-BC-2020-07/F00611, SOJB, para.4,fn.12
[40] Art.21 KCC

52. TP did find that the Accused acted with awareness of, and desire for, inducing Witnesses/Potential Witnesses who were identified in the Protected Information to refrain from giving evidence to the SC/SPO, but TP used the terms "evidence" and "information" interchangeably (see above).

53. Even on TP's analysis the words "when such information relates to obstruction of criminal proceedings" limited the third alternative, namely where a person is induced to refrain from giving information (or evidence).

54. TP simply ignored those qualifying words for the purposes of consideration of the *mens rea*.

55. There was no evidence from which a finding could be made that Gucati acted with awareness of, and desire for, inducing Witnesses/Potential Witnesses to refrain from giving information/evidence to the SC/SPO *which related to obstruction of criminal proceedings*.

56. Further, whilst TP referred to the fact that Art.387 is concerned with 'true' information when setting out how it would assess *mens rea* for the purposes of Count 3[41], when it came to its conclusions on *mens rea* it once again simply ignored that requirement of Art.387 KCC. TP did not find, nor could it, that Gucati acted with awareness of, and desire for, inducing Witnesses/Potential Witnesses to refrain from giving *true* information/evidence to the SC/SPO.

[41] KSC-BC-2020-07/F00611, para.588

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

57. As TP held, albeit regarding Art.388(1) KCC, "establishing that the Accused knew that the information might be true or that they were indifferent as to the truth of the information is not enough"[42].

58. The SPO adduced no evidence to show that the Accused were aware that "the information of the Witnesses" given, or to be given, to the SC/SPO was, at least to a certain extent, truthful[43].

59. For the reasons set out above, CAP's dismissal of these arguments on the basis that the qualifiers "when such information relates to obstruction of criminal proceedings" and "true information" relate to the third alternative in Art.387 KCC only and that this was an alternative under which Gucati was not convicted is both erroneous in law and inaccurately represents the findings of TP[44].

60. Accordingly, direct intent for the purposes of count 3 was not established. The conviction should be overturned and replaced with an acquittal.

61. If the Supreme Court agrees that TP and CAP erred in relation to direct intent as submitted above, eventual intent was not a sufficient alternative *mens rea* under Art.387 KCC [45].

[42] KSC-BC-2020-07/F00611, para.621
[43] KSC-BC-2020-07/F00611, para.623
[44] KSC-CA-2022-01/F00114, para.263-264
[45] KSC-BC-2020-07/F00611, SOJB, para.2

62. The use of the words "to induce" in Art.387 indicates a goal-orientated activity, namely that the purpose of the use of serious threat was *to induce* another person to refrain from making a statement etc.[46].

63. The offence under Art.387 KCC is properly restricted to those cases where threat is used with the specific purpose of inducing another to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, prosecutor or judge when such information relates to obstruction of proceedings.

64. As Judge Barthe held in his dissenting opinion, direct intent only is sufficient[47].

Violation-3: Count 5

65. In violation of the criminal law, TP[48] and CAP[49] misapplied Art.392(1) KCC by finding that disclosure for the purposes of Art.392(1) KCC was not restricted to disclosure to the alleged perpetrator in an official proceeding.

66. Art.392(1) KCC requires that the information declared to be secret must have been disclosed to the perpetrator in an official proceeding[50]. That interpretation is

[46] KSC-BC-2020-07/F00611, SOJB, para.2
[47] KSC-BC-2020-07/F00611, SOJB, para.
[48] KSC-BC-2020-07/F00611, para.75
[49] KSC-CA-2022-01/F00114, para.131
[50] *Salihu*, p.1141 margin no.8: "A condition for the existence of this criminal offence is that it concerns information…made known during the…proceedings [and] is related to people who take part in a particular proceeding…"

consistent with the plain meaning of the provision which requires that the information revealed was "disclosed in an official proceeding".

67. By contrast, protected information overheard, for example, on a train by a third party is not information 'disclosed in any official proceedings' – the disclosure in that example takes place on a train[51].

68. The target of the offence is quite properly "the initial recipient of the information" (i.e. the person who having been made privy to the protected information by authorization, then discloses it publicly without authorization), not the person who 'overhears' it.

69. The strict construction of Art.392 KCC advanced does not result in an impunity gap.

70. A person who comes, other than through disclosure in the official proceedings, into possession of court-protected information may commit the offence of contempt of court pursuant to Art.393 KCC if he fails to comply.

71. Other offences may apply also e.g. Art.199(1) KCC, Art.200 KCC and Art.236 KCPC (the KCC and the KCPC not being the sole preserve of the KSC).

72. In any event, it is not for a criminal court to close or remedy loopholes in the law that were left open by the legislator through excessive interpretation[52].

[51] Consider KSC-BC-2020-07/F00611, para.75
[52] KSC-BC-2020-07/F00611, SOJB, para.4, fn.12

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

73. The offence contrary to Art.392(1) KCC acts to bind those who are given lawful access to secret material, so as not to abuse that privilege i.e. to prevent those participating in the proceedings from "violating" the secrecy of the proceedings to which they are privy.

74. The perpetrator of an offence under Art.392(1) KCC may be anyone to whom information has been disclosed in an official proceeding (eg. investigator, suspect, judge, counsel, court official).

75. Consistently with the above approach to Art.392(1) KCC, Art.392(2) continues that the information said to be revealed must be of a person under protection in *the* criminal proceedings, that is, the criminal proceedings in which the information was disclosed to the perpetrator.

76. The observation of CAP, that Art.392(1) KCC refers to "[w]hoever without authorization reveals […] information […]", pointedly omits the words "disclosed in an official proceeding"[53].

77. The mistake on behalf of TP and CAP is made demonstrated by CAP's assertion that[54]:

> "Applied to the circumstances of this case, disclosure covers the conduct of the direct perpetrator of the offence – meaning the person passing confidential

[53] KSC-CA-2022-01/F00114, para.131
[54] KSC-CA-2022-01/F00114, para.134

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

information to Gucati and Haradinaj – as well as the subsequent dissemination of such information…"

78. But 'disclosure' for the purposes of Art.392(1) KCC does not cover that conduct – the disclosure by the person passing confidential information to the Accused was not a disclosure in an official proceeding (or at least the SPO denied that it was). Nor was the subsequent dissemination of that information by the Accused.

79. The disclosure required must be disclosure in an official proceeding. That is the wording and the plain meaning of the text of the provision.

80. Accordingly, the *actus reus* was not satisfied. The conviction should be overturned and replaced with an acquittal.

Violation 4: Count 6

81. In violation of the criminal law, TP[55] and CAP[56] misapplied Art.392(2) KCC by finding that the *actus reus* of the offence was established in the absence of proof that the persons whose data was revealed were persons under protection in SC/SPO proceedings.

[55] KSC-BC-2020-07/F00611, para.511-512
[56] KSC-CA-2022-01/F00114, para.167,168,171

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

82. The offence in Art.392(2) KCC protects "persons under protection in *the* criminal proceedings".

83. TP correctly limited such proceedings to proceedings of the SC/SPO[57].

84. In order to identify a person protected under the proceedings of the SC and/or SPO, TP adopted the definitions of Ms. Pumper (an SPO officer) as to 'Witness' and 'Potential Witness'[58].

85. Although TP's definition did not include a reference to the requirement that the witness or potential witness be able to provide information relating to a crime or other important circumstances relevant to SC/SPO proceedings, CAP, in otherwise upholding TP's approach, held that the Trial Judgment was nevertheless to be understood as limiting the scope of that definition to "matters related to crimes or other important circumstances relevant to the Specialist Chambers' proceedings" (quoting from Ms. Pumper's evidence that in her view, a witness is "someone who the SITF has met and whom we sought to obtain information from which is related to our mandate, to the investigation")[59].

86. The Trial Judgment did not identify what crime any individual had information about, or what perpetrator, or what other circumstances relevant to SC proceedings that person might have had information about, and why those circumstances were important to SC proceedings. TP heard no such evidence.

[57] KSC-BC-2020-07/F00611, para.10
[58] KSC-BC-2020-07/F00611, para.511-512
[59] KSC-CA-2022-01/F00114, para.167-168

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

87. Faced with this submission, CAP noted that whereas the SPO asserted that the trial record contained such evidence, it had notably failed to "point to any concrete example"[60].

88. Having conducted its own review, however, CAP, relied upon the indication from Ms. Pumper that Batch 1 "contained 35 statements or parts of statements of victims and witnesses taken by the Serbian authorities, which included personal data and detailed information about "serious crimes"" to satisfy itself that "the trial record contains evidence referring to persons who provided information about crimes within the Specialist Chambers' jurisdiction"[61].

89. That indication, however, was insufficient to establish that such persons fell within the protection of Art.392(2) KCC.

90. Information about "serious crimes" does not establish that such information relates to crimes within the Specialist Chambers' jurisdiction (there will be many serious crimes reported to Serbian authorities every day, week, month and year in relation to which the Specialist Chambers' has no jurisdiction).

91. Moreover, TP had earlier held that it was not able to verify whether the Serbian Documents [which included the 35 statements or parts of statements of victims and witnesses taken by the Serbian authorities] had become part of the SITF/SPO records and were thus to be treated, in the performance of SITF/SPO functions as confidential"[62]

[60] KSC-CA-2022-01/F00114, para.171
[61] KSC-CA-2022-01/F00114, para.171
[62] KSC-BC-2020-07/F00611, para.336,345,346,467

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

92. The classification of such documents, and the protection of the persons named within, was controlled by an authority other than the SITF/SPO and TP quite rightly held that it had no competence to sanction violations of confidentiality ordered by a third party[63]. That is, a person protected under the authority of Serbia was not a "person protected in *the* criminal proceedings".

93. There was no evidence (or insufficient evidence at least) that the 'victims' and 'witnesses' in the Serbian Documents were "under protection in the [SITF/SPO/SC] criminal proceedings" within the meaning of Article 392(2) KCC.

94. There was no other evidence as to what crime any individual had information about, or what perpetrator, or what other circumstances relevant to SC proceedings that person might have had information about, and why those circumstances were important to SC proceedings, such that a "person under protection in *the* criminal proceedings" could be properly identified.

95. Accordingly, the *actus reus* was not satisfied. The conviction should be overturned and replaced with an acquittal.

Violation 5: All Counts

96. In substantial violation of Art.21(6) Law, RR.102(3) and 103 KSCR, and Art.6 ECHR, (i) the SPO failed to comply with its obligation to disclose the interviews of

[63] KSC-BC-2020-07/F00611, para.468

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

W04730 dated 01/10/2020 and 22/04/2022[64] immediately and before the end of the trial; (ii) TP failed to ensure that the SPO complied with its obligations; and (iii) CAP erred in refusing a remedy in relation to those disclosure violations.

97. The effect of Art.21 Law and RR.102 and 103 KSCR is to require the SPO to disclose immediately (without delay) any information in its possession which is exculpatory or otherwise material to preparation of the defence.

98. The SC disclosure regime is based on a presumption of disclosure with limited exceptions set out in the Rules – it is for the SPO rather than the defence to establish the existence of an exception to its general obligation of disclosure[65].

99. The evaluations of relevance and of materiality must necessarily be broad, erring on the side of disclosure, referring to information in any form and accounting for the nature of the case put forward by the Defence[66].

100. Defence "preparation" is also a broad concept and need not be limited to what is directly linked to exonerating or incriminating evidence or related to the SPO's case[67].

101. In relation to R.103, the phrase 'reasonably suggests' requires the application of an objective test that involves no assessment of the weight or reliability of the material or the credibility of a witness. Instead, it means only that the information in question

[64] 082095-TR-ET Part 1-5, 105694-TR-ET Part 1
[65] KSC-BC-2020-07/F00304, para.304
[66] KSC-BC-2020-07/F00304, para.17,37
[67] KSC-BC-2020-07/F00413, para.37

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

must point, in some logical manner (a sufficient material connection), towards the innocence or mitigated guilt of the Accused[68].

102. Where there is a real prospect of the information in question providing a lead on evidence that is possibly relevant to an existing issue that material should be disclosed (without any reliability or weight evaluation of the information)[69].

103. Where exculpatory evidence is withheld the Accused's right to a fair trial and the equality of arms principle is violated[70].

104. In particular, where a plea of entrapment is raised 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 thereto[71].

105. The prosecuting authorities have to disclose information relevant to entrapment to permit the Defence to argue a case on entrapment in full at trial, otherwise, the proceedings will fail to comply with the principles of adversarial proceedings and equality of arms and the right of the accused to a fair trial, in violation of Art.6(1) ECHR[72].

[68] KSC-BC-2020-07/F00413, para.43
[69] KSC-BC-2020-07/F00413, para.46
[70] KSC-BC-2020-07/F00413, para.43
[71] KSC-BC-2020-07/F00413, para.53
[72] KSC-BC-2020-07/IA005/F00008, para.52

106. Information was material under R.102(3) KSCR in the context of the Entrapment Allegations if, *inter alia,* the information could assist with the Defence claim or its investigations of entrapment (without assessing the weight, reliability or credibility of that information) or had any prospect of providing a lead on evidence that was relevant to the entrapment claim[73].

107. Initially, TP found that [REDACTED] (Items 186-190 on the R.102(3) Notice) were, *prima facie*, subject to disclosure under RR.102 and/or 103 KSCR[74].

108. TP later reversed that finding[75].

109. They were wrong to do so. [REDACTED]

110. [REDACTED]

111. [REDACTED]

112. [REDACTED]

113. [REDACTED]

114. [REDACTED]

115. [REDACTED]

[73] KSC-BC-2020-07/F00413, para.56-57
[74] KSC-BC-2020-07/F00304, para.23
[75] KSC-BC-2020-07/F00413, para.58-60

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

116. [REDACTED]

117. [REDACTED]

118. [REDACTED]

119. The only information that the Defence had received about [REDACTED] was the description on the R.102(3) Notice which simply read:

> [REDACTED]

120. That description was misleading [REDACTED] and stated nothing about [REDACTED].

121. The R.102(3) Notice description certainly did not include all information in relation to which a reasonable claim of relevance could be made[76] and was insufficient to allow Gucati to effectively participate in the disclosure process at trial.

122. [REDACTED], confirming that there was always a real prospect that [REDACTED] provided a lead on evidence that was relevant or possibly relevant to the issue of entrapment.

123. The SPO still failed to disclose the [REDACTED] immediately or at all before TP pronounced Judgment on 18/05/2022.

124. Indeed, the SPO provided no notice whatsoever of the fact of [REDACTED]

[76] KSC-BC-2020-07/F00304, para.18

until the [REDACTED] was received by Gucati on 26/09/2022.

125. No explanation, or no explanation that withstands any scrutiny, has been given for why the information provided in [REDACTED] not identified for disclosure immediately, despite the fact that:

(a) The SPO were aware of each as far back as [REDACTED];

(b) Ms. Pumper's evidence demonstrates that she was aware of the importance of the issue as to how the Batches arrived at the KLAWVA[77]; and

(c) She assured that she would bring relevant material to the attention of the Specialist Prosecutor or Deputy Prosecutor immediately[78].

126. On 29/07/2021, CAP had made clear that all material concerning the process through which the Batches arrived at the KLA WVA premises was relevant to the case[79].

127. Moreover, TP had warned the SPO about its disclosure conduct.[80] The SPO were cautioned that the disclosure obligations stemming from the guarantee of a fair trial were not duties to be circumvented through sophistries, but legal obligations to be fulfilled with the greatest care, urgency and diligence[81].

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[77] E.g. Transcript 21/10/2021 p.1226 lines 7-22, p.1237 lines 4-17, p.1249 lines 5-12; Transcript 26/10/2021 p.1450 lines 1-5, p.1477 lines 8-25, p.1478 line 19 to p.1479 line 2; Transcript 15/12/2021 p.2622 lines 10 to line 15 referring to 1D33 [REDACTED]

[78] Transcript 21/10/2021 p.1193 lines 17-25 (albeit within a broader passage of the evidence suggesting that the SPO does not regard a systematic approach to disclosure as a necessary part of its work - see Transcript 21/10/2021 p.1179 line 22 to 1196 line 18)

[79] KSC-BC-2020-07/IA005/F00008, para.47

[80] KSC-BC-2020-07/F00413, para.48,53

[81] KSC-BC-2020-07/F00413, para.53

128. Despite those warnings, the SPO did not complete its disclosure obligations with urgency or at all during the trial.

129. As a result of the Prosecution's failure to comply with RR.102(3) and 103, Gucati was unaware of the breach until 26 September 2022, over 3 months after he was obliged to file his Notice of Appeal and over one month after he was obliged to file his Brief in Appeal.

130. Permission to vary the grounds of appeal was refused by CAP on the basis that: "in the present circumstances the alleged disclosure violation occurred after the filing of the Trial Judgment and outside the trial process, and that the Accused have not, and would not have been able to identify a specific finding of TP they wish to challenge through their Notices of Appeal"[82].

131. Both assertions were incorrect. The [REDACTED] were in possession of the Prosecution *before* the filing of the Trial Judgment on 18/10/2022 and the application to vary the notice of appeal identified the specific finding of TP that the applicant sought to challenge, namely, the finding of the TP that "the Defence was afforded a full and fair opportunity to put forward its Entrapment Claim in compliance with the standards laid down by the ECtHR"[83].

132. The subsequent attempt by CAP to make good it errors, asserting that (i) "even if there was a disclosure violation with respect to the Rule 103 Material … the identification thereof could only have occurred following the trial process"[84]

[82] KSC-CA-2022-01/F00064, para.16
[83] KSC-CA-2022-01/F00053/A01 at draft ground 19C and fn.50; KSC-BC-2020-07/F00611, para.851
[84] KSC-CA-2022-01/F00082, para.15

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

and (ii) "there could not have been an alleged disclosure violation before [CAP] decided to order the disclosure of this material under R.103 KSCR on 15 September 2022, after the closure of the trial proceedings"[85] are nonsensical.

133. Firstly, the SPO could (and should) have identified their own disclosure violation and raised it before TP pronounced Judgment – that is the demand made by R.103. Secondly, the idea that a disclosure violation does not occur unless/until it is subsequently identified by CAP is akin to the false logic of the subjective idealist (that if a tree falls in a forest and no one is around to hear it, it does not make a sound).

134. CAP had earlier accepted that there was a disclosure violation in relation to the separate failure of the SPO to give notice of Item 206 until after delivery of the Trial Judgment, when it had been received by the SPO on 27/10/2022[86].

135. In that instance, CAP rejected the SPO's explanation for belatedly giving notice of Item 206 (that it had not 'come across' the English translation until 23/08/2022)[87].

136. CAP's subsequent acceptance, of the SPO's explanation for failure to disclose the [REDACTED] before the Trial Judgment was pronounced, is starkly inconsistent.

137. In rejecting a motion for alternate relief, having noted the fact of the "disclosing party's obligation to disclose the evidence in English"[88], CAP held

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[85] KSC-CA-2022-01/F00082, para.16
[86] KSC-CA-2022-01/F00075, para.44
[87] KSC-CA-2022-01/F00075, para.44
[88] KSC-CA-2022-01/F00083, para.25

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

that:

> "In view of the fact that the SPO notified the Panel on 7 July 2022, only three days after the finalisation of the English translation, the Panel considers that the SPO acted as soon as possible after the information was in its actual knowledge. Therefore, the Panel finds that the SPO demonstrated good faith in this instance and did not violate Rule 103 of the Rules"[89].

138. This was perplexing, giving that [REDACTED] were conducted in English, with simultaneous interpretation, and they were video and audio recorded.

139. CAP itself had acknowledged that, "…The SPO representatives at [REDACTED] must have been able to sufficiently understand what was said during [REDACTED] already at that time…"[90].

140. CAP held that the requirement to disclose potentially exculpatory material immediately was subject to an implied exception where justifiable reasons prevent immediate disclosure[91]. There was nothing, however, in the SPO's purported explanation which could be said to have *prevented* immediate disclosure.

141. The recording could/should have been immediately disclosed.

142. A draft [REDACTED] could/should have been disclosed earlier, with a corrected version to follow if necessary (as was done with other [REDACTED]).

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[89] KSC-CA-2022-01/F00083, para.26
[90] KSC-CA-2022-01/F00083, para.24
[91] KSC-CA-2022-01/F00083, para.26

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

143. The two ICC judgments cited by CAP[92], to support their interpretation that the requirement of 'immediate' disclosure in R.103 KSCR was subject to an implied exception where "justifiable reasons prevent immediate disclosure", were both given in the context of Article 67(2) Rome Statute which has the *explicit* caveat that disclosure is required to be made "as soon as practicable". Moreover, both judgments stress that early disclosure, on a rolling basis if necessary, must be made to allow the Defence to make effective use of their rights[93].

144. Further, whereas CAP accepted the SPO's explanation on the basis (erroneous as it was) that the SPO acted as soon as possible after the information was in its actual knowledge, R.103 requires immediate disclosure as soon as the disclosable material is in the Prosecutor's "custody, control or actual knowledge" in the alternative. There is no doubt that the disclosable information was in the Prosecutor's custody or control on [REDACTED].

145. Finally, CAP appeared incorrectly to regard the test for a violation of R.103 as requiring bad faith. The existence or otherwise of a disclosure violation does not require bad faith to be established. It is no answer to the charge that the SPO failed to comply with R.103 that it was acting in good faith.

146. Having refused permission to vary the grounds of appeal, and having refused the motion for alternate relief, CAP then prevented the Defence from investigating the belated disclosure.

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[92] KSC-CA-2022-01/F00083, para.25, fn.53
[93] E.g. *Yekatom,* para.16

147. CAP acknowledged that any motion to present additional evidence before CAP under R.181 KSCR, arising from the disclosure, would necessarily depend on the Panel's decision in relation to the Defence request to contact the [REDACTED][94].

148. CAP treated the Defence requests as requests to conduct further investigations on appeal and examined whether the Defence had demonstrated that [REDACTED] was warranted at the appeal stage[95].

149. CAP refused permission to the Defence to [REDACTED][96].

150. CAP noted that "…investigations should be carried out during the pre-trial and trial stage and are only allowed at the appellate stage of the proceedings for exceptional reasons"[97].

151. But the Defence were unable to carry out investigations into the [REDACTED] during the pre-trial and/or trial stage because the defence were unaware of their contents until months after the Trial Judgment had been pronounced.

152. CAP also noted that "given the corrective nature of appeal proceedings, its powers to provide judicial assistance shall be exercised restrictively"[98].

[94] KSC-CA-2022-01/F00090, para.5
[95] KSC-CA-2022-01/F00094, para.16
[96] KSC-CA-2022-01/F00094, para.20,22
[97] KSC-CA-2022-01/F00094, para.17
[98] KSC-CA-2022-01/F00094, para.17

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

153. CAP further held that the assessment of requests for further investigation at the appeal stage was necessarily associated with the requirements of R.181 KSCR. Pursuant to R.181(3) KSCR, the admission of additional evidence during the appeal proceedings requires that, in addition to the general conditions for admitting evidence, the Panel is satisfied *inter alia* that the proposed evidence could have been a decisive factor in reaching a decision at trial. To satisfy the requirement of "decisive factor" under R.181 KSCR, the evidence must be such that it could have had an impact on the verdict, i.e. it could have shown that a conviction was unsafe[99].

154. In so holding, CAP 'put the cart before the horse', considering the admissibility of the possible fruit of investigations that had not yet been conducted (and which CAP refused to authorise), and highlighted the unfairness to Gucati that arose from late disclosure of the [REDACTED].

155. If disclosure had properly been made before pronouncement of the Trial Judgment, neither the requirement on appeal to exercise powers to provide judicial assistance restrictively, nor the limitation of requests for investigative assistance, to circumstances where it can be shown that the proposed evidence that might result therefrom could be a decisive factor at trial, would have applied.

156. Additionally, the comparisons made by TP and CAP between [REDACTED] were inappropriate[100].

[99] KSC-CA-2022-01/F00094, para.18
[100] KSC-CA-2022-01/F00094, para.22

157. CAP expressed the view that "where the Defence seeks to investigate the information provided [REDACTED], while it had not followed-up on similar information provided during the trial, it has failed to demonstrate that investigations should be facilitated at this stage"[101].

158. CAP subsequently clarified that the phrase "nor to follow up with further investigations" referred to the fact that Gucati had requested judicial assistance to facilitate [REDACTED] but did not do so at the trial stage with respect to [REDACTED] and that TP also pointed to the fact that the Defence did not seek to interview or call [REDACTED][102].

159. However, whereas CAP knew that the Defence could not contact [REDACTED] without assistance, CAP had no information on the record as to whether or not the Accused had contact details for [REDACTED], nor whether or not the Accused had interviewed [REDACTED], and if so when.

160. There was no lawful basis to use a 'failure' to call [REDACTED] adversely to the defence on an application to interview [REDACTED]. They are entirely different individuals, with different information and different sources, requiring different assessments of credibility and reliability. There was no evidence of any connection at all between [REDACTED].

161. TP was the guarantor of a fair trial, and a failure to ensure compliance with disclosure obligations in RR.102(3) and 103 is the responsibility of the SC.

[101] KSC-CA-2022-01/F00094, para.22
[102] KSC-CA-2022-01/F00096, para.11

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

162. TP's finding[103] that the Defence was afforded a full and fair opportunity to put forward its Entrapment Claim in compliance with the standards laid down by the ECtHR was wrong.

163. The Prosecution had failed to disclose exculpatory information relevant to entrapment to permit the Defence to argue a case on entrapment in full at trial.

164. The proceedings accordingly failed to comply with the principles of adversarial proceedings and equality of arms and the right of the accused to a fair trial in violation of Art.6(1) ECHR[104].

165. The Defence did not receive [REDACTED] during the trial and were not permitted to conduct effective investigations thereon during appeal.

166. The finding of TP that the Entrapment Allegation was wholly improbable[105] is invalid because it was made in circumstances where the Prosecution had failed to disclose exculpatory information relevant to entrapment to permit the Defence to argue a case on entrapment in full at trial and the proceedings failed to comply with the principles of adversarial proceedings and equality of arms and the right of the accused to a fair trial in violation of Art.6(1) ECHR[106].

167. Where there is a violation of Art.6 ECHR, the court must demonstrate a capacity to deal with the violation, such as offering a substantive defence or the exclusion of evidence obtained as a result or other similar consequences[107].

168. In further violation of Art.6 ECHR, CAP took no step to deal with the earlier

[103] KSC-BC-2020-07/F00611, para.851
[104] KSC-BC-2020-07/IA005/F00008, para.52
[105] KSC-BC-2020-07/F00611, para.890
[106] KSC-BC-2020-07/F00413, para.53
[107] *Ramanauskas*, para.60

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

violations of R.103 and Article 6, paying lip-service only to the importance of disclosure.

169. The Supreme Court should overturn the convictions as the trial proceedings failed to comply with the principles of adversarial proceedings and equality of arms and the right of the accused to a fair trial in violation of Art.6(1) ECHR.

170. Given that Gucati has been in custody since September 2020, it is submitted that the Supreme Court should pronounce a judgment of acquittal on all counts. In the alternative, the Supreme Court should order a retrial.

Violation 6: All Counts

171. In substantial violation of Gucati's rights under Art.6 ECHR, TP[108] and CAP[109] erroneously approached the assessment of the plea of incitement by requiring the Defence to provide *prima facie* evidence of entrapment.

172. As TP and CAP acknowledged[110], it fell to the prosecution to prove there was no entrapment, provided only that the allegation was not wholly improbable[111].

173. All that was required to raise the issue was the making of an 'allegation' of incitement which was not 'wholly improbable'.

[108] KSC-BC-2020-07/F00611, para.837
[109] KSC-CA-2022-01/F00114, para.363
[110] KSC-BC-2020-07/F00611, para.837(iv); KSC-CA-2022-01/F00114, para.363
[111] *Ramanauskas*, para.70; *Pătraşcu*, para.38

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

174. Neither the making of an 'allegation' nor meeting the assessment of that allegation as other than 'wholly improbable' requires *prima facie* evidence.

175. It was inappropriate to import requirements upon Gucati to adduce evidence which 'compelled' the inference that Gucati was entrapped[112], or to establish a reasonable basis to conclude/infer that there was entrapment[113]. The finding of TP that the Entrapment Claim was wholly improbable was invalidated by the improper standard that TP applied to that assessment[114].

176. CAP agreed that TP's requirement that the Defence provide *prima facie* evidence of entrapment was not supported by the ECtHR judgments cited by TP[115]. Nor, however, did the ECtHR cases cited by CAP[116]. None of those three cases support a requirement that the Defence provide *prima facie* evidence of entrapment:

(a) In *Matanovic*, the ECtHR said only that the applicant's *complaint* must fall *prima facie* within the *category* of 'entrapment cases' - the focus being on the nature of the *allegation*[117];

(b) In *Trifontsov*, a bribery case, the applicant's complaint did not fall within that category; it was clear in that case, on the evidence that was before the Court, that 'VK', who paid him the bribe, did not become an agent of the ISS until *after* the applicant had already solicited a bribe[118]; and

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[112] KSC-BC-2020-07/F00611, para.870,871
[113] KSC-BC-2020-07/F00611, para.180,860,861,864,877,878,889-890
[114] KSC-BC-2020-07/F00611, para.890
[115] KSC-CA-2022-01/F00114, para.363
[116] KSC-CA-2022-01/F00114, para.364, fn.811
[117] *Matanovic,* para.131-132
[118] *Trifontsov,* para.3-5,32-33

(c) In *Lyubchenko*, another bribery case, the applicant never actually admitted to soliciting or accepting the bribe. Instead, the applicant's allegation was properly characterised as one of "being framed" - where the officers had planted money in his safe and forged evidence to have him convicted of the corruption-related offence[119].

177. In *Bannikova,* the key issue was whether the applicant's allegation that her dealings with 'Vladimir' (who was unknown to her) had been part of an undercover operation – an allegation which was not wholly improbable *although denied by the Prosecution* and where there was *no prima facie evidence* of a link between 'Vladimir' and the authorities[120].

178. Confronted with that allegation, the Court held that the trial court was under an obligation to take the necessary steps to uncover the truth, while bearing in mind the burden of proof falling on the prosecution to prove that there had been no incitement.

179. Likewise, the only burden upon Gucati was to raise an allegation of incitement that was not wholly improbable. That low threshold was properly crossed. As TP, itself, conceded a deliberate leak by an SPO staff member could not be excluded[121].

180. It then fell upon the Prosecution to prove that there was no entrapment. The Prosecution failed to do so, as TP impliedly acknowledged[122]. Where the Prosecution

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[119] *Lyubchenko,* para.33
[120] *Bannikova*, para.10,72,76
[121] KSC-BC-2020-07/F00611, para.877
[122] KSC-BC-2020-07/F00611, para.889: "…the SPO showed reluctance to engage fully with the Entrapment Claim…"

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

fails to do so, a violation of Art.6 ECHR will be established requiring evidence obtained as a result of entrapment to be excluded or a procedure with similar consequences applies[123].

181. In the present case, the Prosecution evidence in its entirety resulted from the delivery of the three Batches to the KLAWVA HQ (it could not have occurred without it) and, failing proof that those deliveries did not occur in circumstances amounting to entrapment, ought to have been excluded under R.138(2) KSCR.

182. The convictions on all counts should be overturned and replaced by acquittals.

Violation 7: Sentencing

183. In substantial violation of the procedures set out in Art.44(5) and 46 Law and R.163 KSCR, TP erred in sentencing on the wrong factual basis, namely that more than two persons suffered serious consequences[124], and CAP erred by failing to adjust the sentence to reflect that error.

184. It is axiomatic that the Panel shall only consider aggravating factors such as the consequences of the offence and the number of victims when such factors are properly established factually.

[123] KSC-BC-2020-07/F00611, para.837
[124] KSC-BC-2020-07/F00611, para.541,

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

185. Where TP considers aggravating factors which are based on incorrect conclusions of fact, CAP should intervene and adjust the sentence accordingly[125].

186. In the present case, TP sentenced Gucati on the basis that the Accused's revelation of the identity and personal data of Witnesses and Potential Witnesses resulted in serious consequences for:

(a) the two Witnesses who were relocated,
(b) for the Witnesses who were subject to emergency risk planning and
(c) for the person who was publicly named as a Witness[126].

("Witnesses at Risk")

187. It is clear that TP regarded those three categories of Witnesses at Risk as separate, and that their numbers were accumulative.

188. TP made a distinction between the two persons relocated and others who were subject to emergency risk planning[127]. According to TP, "apart from the two relocations"[128], emergency risk planning was undertaken in relation to a "*number*" of Witnesses.

189. TP acknowledged that the overall number of Witnesses at Risk, who suffered "serious consequences" or were "significantly affected", could not be determined with

[125] KSC-CA-2022-01/F00114, para.414
[126] KSC-CA-2022-01/F00114, para.547
[127] KSC-BC-2020-07/F00611, para.536 which deals specifically with the two relocated witnesses, whereas para.537 deals with the *number* of witnesses who were subject to emergency risk planning
[128] KSC-BC-2020-07/F00611, para.537 fn.115

precision. In contrast, the smaller number of witnesses who were relocated was determined with precision (2), as was the number of persons who were publicly named as a Witness (1)[129].

190. TP, nevertheless, took into account that there were a *number* of Witnesses who had suffered serious consequences when assessing the gravity of the offences[130].

191. That serious consequences are suffered, and the number of persons suffering them, are statutory aggravating factors for the offence contrary to Art.392(3) KCC and R.163(1)(b)(iv) KSC-Rules and must be inferred to have had an impact on the sentence for Count 6 accordingly.

192. Moreover, TP's finding that a *number* of persons suffered serious consequences as a result of the Accused's revelation of the identity and personal data of Witnesses/Potential Witnesses had a clear impact on TP's assessment of the gravity of Count 3 also.

193. In assessing seriousness under count 3, and having recalled its finding that TP had found that the Accused's revelation of the identity and personal data of Witnesses/Potential Witnesses resulted in serious consequences for the Witnesses at Risk, TP concluded that serious fears and concerns were created for *many* Witnesses/Potential Witnesses[131].

[129] KSC-BC-2020-07/F00611, para.968
[130] KSC-BC-2020-07/F00611, para.968
[131] KSC-BC-2020-07/F00611, para.583,585,586; KSC-CA-2022-01/F00114, para.245

194. Given that the consequences and number of victims is a statutory aggravating factor for the offence contrary to Art.44(5) Law and R.163(1)(b)(iv) KSC-Rules, it must be inferred that the above findings had an impact on the sentence for Count 3 accordingly.

195. TP was wrong, however, to find that more than two persons had suffered serious consequences.

196. On the evidence, it could only be properly established that two persons (the two witnesses who were relocated) suffered serious consequences[132].

197. The evidence as to persons subject to emergency risk planning, the second category of Witnesses at Risk identified by TP, was insufficiently precise to make a determination[133].

198. Further, TP had regarded fear and concern as capable of amounting to "serious consequences"(for the purposes of Count 6)[134]. Yet, only one Witness/Potential Witness – the person who was publicly named as a Witness - was found to have suffered fear and concern which could be described as "substantial interference with the safety, security, well-being, privacy or dignity of protected persons or their families"[135]; that finding was not supported by the available evidence and could not be sustained[136].

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[132] KSC-CA-2022-01/F00114, para.203,205,206
[133] KSC-CA-2022-01/F00114, para.203
[134] KSC-BC-2020-07/F00611, para.538
[135] KSC-BC-2020-07/F00611, para.100,541
[136] KSC-CA-2022-01/F00114, para.205 (allowing Ground 11 of the Gucati Appeal)

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

199. The finding of TP that *many* persons had been caused serious fears and concerns was both inconsistent with its own conclusion in relation to serious consequences and was unsustainable on the evidence.

200. CAP agreed that TP had erred in finding that serious consequences were made out for more than two persons.

201. However, that error ought to have been reflected by CAP in a downward adjustment of the sentence, where TP had erroneously approached the matter on the basis that, apart from the two relocated witnesses, there was also:

(a) An unspecified *number* of Witnesses who were subject to emergency risk assessments such that their ensuing awareness that they were at risk of harm and imminent relocation amounted to serious consequences[137];

(b) Fear and concern suffered by the person named publicly as a Witness which amounted to serious consequences; and

(c) *Many* people who had been caused "serious fears and concerns".

202. Instead CAP:

(a) simply stated that the error in relation to the person named publicly as a Witness had no impact on sentencing, without giving any reasons[138]; and

[137] KSC-BC-2020-07/F00611, para.537
[138] KSC-CA-2022-01/F00114, para.422

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

(b) ignored entirely the impact of finding that it was not available to TP to approach the issue of serious consequences on the basis that an unspecified number of Witnesses subject to emergency risk assessments suffered the same, over and above the two relocated witnesses.

203. Taking into account aggravating features which were not properly established amounted to a substantial procedural violation of Art.44(5) Law and R.163 KSC-Rules by TP, as does the failure of CAP to adjust the sentence to reflect those errors. The failure to give a reasoned opinion for not adjusting the sentence also amounts to a substantial procedural violation of Art.46(7) Law, when TP clearly approached the facts for sentencing on a different and erroneous factual basis relating to a *number* or *many* persons suffering serious consequences when CAP said the evidence established only two had.

V. CONCLUSION

204. In light of the above, it is submitted that the Supreme Court should modify the judgments of TP and CAP so as to:

(i) To reverse the convictions on counts 1, 3, 5 and 6 and enter acquittals;

or otherwise

(ii) Annul the judgments and return the case for a retrial;

PUBLIC
Date original: 03/05/2023 19:18:00
Date public redacted version: 04/05/2023 16:37:00

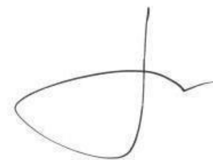
or otherwise

(iii) Reduce the sentence.

VI. CLASSIFICATION

205. This filing is classified as confidential.

Word count: 9,000 words



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