

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

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 19 April 2023

Language: English

Classification: Public

Public Redacted Version of 'Thaçi Defence Motion regarding the testimony of W02652'

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I. INTRODUCTION

1. On 18 April 2023, the SPO elicited evidence from its second witness, W02652, regarding the alleged involvement of Mr Hashim Thaçi in the arrest and detention of [REDACTED].¹ At the time, the Defence for Mr Thaçi (“Defence”) raised an oral objection to the SPO’s use of W02652’s evidence in this manner, and proposed filing a substantive objection in writing. The Trial Panel ordered the Defence to file its objection within five days.² The Defence hereby submits the foreshadowed objection to the use of the identified portions of W02652’s evidence.

II. SUBMISSIONS

2. The Indictment in this case³ sets out each of the alleged incidents pled to support each of the charged crimes, organised by location.⁴ Where one or more of the four accused is implicated in events at a particular location, their names are noted in bold, and their alleged involvement is explicitly pleaded.

3. In relation to the incident in question, the Indictment reads as follows:⁵
[REDACTED].

4. Mr Thaçi is not alleged to have been involved. The SPO Pre-Trial Brief then provides further details as to the SPO’s case on this incident, and explicitly [REDACTED]:⁶
[REDACTED].

¹ KSC-BC-2020-06, Transcript of Hearing – Testimony of W02652, 18 April 2023, pp. 3075-3077.

² *Ibid*, p. 3077.

³ KSC-BC-2020-06/F00999/A01, Annex 1 - Amended Indictment, 30 September 2022, Confidential (“Indictment”).

⁴ Indictment, paras. 58-175.

⁵ Indictment, paras. [REDACTED].

⁶ KSC-BC-2020-06/F00709/A02, Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief, 24 February 2022 (“SPO Pre-Trial Brief”), para. [REDACTED]. *See also*, paras. [REDACTED].

5. At the time of drafting its Pre-Trial Brief, the SPO had already interviewed W02652 [REDACTED].⁷ In his [REDACTED] SPO interview, W02652 raised hearsay evidence allegedly linking Mr Thaçi to this allegation.⁸ As such, at the time of drafting its Pre-Trial Brief, the SPO had considered, and disregarded, W02652's account linking Mr Thaçi to this event. Instead, the SPO chose to put forward its case, relying on other witnesses' alleged accounts. W02652's evidence is not referenced in any of the footnotes for this alleged event in the SPO's Pre-Trial Brief.

6. Importantly, rather than relying on W02652's evidence, the SPO explicitly limited Mr Thaçi's role in these events to having been informed about the detention of [REDACTED] **after the event**.⁹

7. Having decided to call W02652 to testify *viva voce*, the SPO provided two summaries of W02652's evidence. In the first, the SPO stated that W02652 would be examined on [REDACTED], and made no reference to Mr Thaçi's alleged involvement.¹⁰ The incident involving [REDACTED] was not even mentioned in W02652's second summary, let alone any mention of Mr Thaçi's involvement.¹¹

8. As such, the SPO has put forward an affirmative case that [REDACTED].¹² To put forward this case while still harbouring an intention to elicit hearsay evidence of the alleged direct involvement of Mr Thaçi, is misleading, and distinctly prejudicial. The prejudice is heightened by the fact that the SPO had the opportunity to put the Trial Panel and the Defence on notice, through W02652's two witness summaries, that

⁷ [REDACTED].

⁸ See, e.g., 051954-TR-ET Part 11, pp. 22-23.

⁹ SPO Pre-Trial Brief, para. [REDACTED].

¹⁰ KSC-BC-2020-06/F01243/A01, Annex 1 to Prosecution submission of list of first 12 witnesses and associated information, 1 February 2023, Confidential, p. 4, para. 6.

¹¹ KSC-BC-2020-06/F01296/A02, Annex 2 – Lesser Redacted List of Witnesses, 15 February 2023, Confidential, pp. 161-162.

¹² SPO Pre-Trial Brief, para. [REDACTED].

it would be attempting to implicate Mr Thaçi directly in this event. The SPO chose not to, deciding instead to introduce this aspect through W02652's *viva voce* testimony in the absence of any notice.

9. While the Defence agrees with the SPO and Trial Panel that “a summary has to remain a summary”,¹³ a significant shift in the SPO’s case which departs from the Indictment and Pre-Trial Brief, and concerns the acts and conduct of the accused and his alleged direct involvement in a pleaded incident, is precisely the kind of information that should be included in a summary. Importantly, the inclusion of this kind of information gives the parties a timely opportunity to make submissions about the propriety of this shift in the SPO case, **in advance of** the evidence being elicited.

10. The SPO was on notice that the Defence was concerned about this issue. In the Status Conference on 20 March 2023, Counsel for Mr Selimi submitted that:¹⁴

We are concerned if the Prosecution attempts to lead anything beyond the summaries. And we will put the Prosecution on notice, and, obviously, the Trial Panel on notice as well, that if we believe that evidence falls outside the scope of those summaries, we will contest it, and we'll do so as early as we can... And if anything falls outside that scope, they would need to notify the Defence and the Chamber well in advance and, I would suggest, seek authorisation to lead that evidence, because the scope of the case, as I understand it, is set out by those summaries and that's the scope of notice of the Prosecution case.

11. Counsel for Mr Krasniqi then raised the specific issue of witness summaries not including a reference to the acts and conduct of the accused, when the accused was mentioned in the witness’ underlying statements and transcripts.¹⁵

¹³ KSC-BC-2020-06, Transcript of Status Conference, 20 March 2023 (“Transcript of March Status Conference”), p. 2064.

¹⁴ Transcript of March Status Conference, p. 2069.

¹⁵ Transcript of March Status Conference, pp. 2070-2071.

12. When asked to address this issue, the SPO indicated that it considered that paragraph 29 of the Trial Panel's decision regarding the first Rule 154 witnesses was of "general applicability", such that "when we are dealing with evidence of the acts and conduct of the accused, we're going to proceed in the manner specified in that paragraph".¹⁶ Paragraph 29 of the Rule 154 Decision provides as follows:¹⁷

The Panel further notes that the SPO has produced several summaries of the proposed evidence of Rule 154 witnesses, that help identify the evidence of these witnesses which the SPO seems intent on relying upon, in its amended list of witnesses ("Amended List of Witnesses"), its List of First 12 Witnesses, and its Motion. In respect of certain witnesses, the SPO has also helpfully limited the offered records to those parts on which it seeks to rely rather than the entire record of testimony. **Where the SPO intends to rely upon aspects of a witness's evidence contained in the offered statements/transcripts which is not specifically flagged either in the SPO Pre-Trial Brief and/or in any of the above summaries, the SPO is expected to discuss with the witness in court the aspects of his/her statement/transcript that pertain to the issue in question.**

13. As such, the SPO has taken a Trial Panel ruling which concerns the presentation of Rule 154 witnesses, and is attempting to broaden its applicability to all SPO witnesses in this case. Concretely, the SPO is asserting that the Rule 154 decision would allow it to discuss the alleged acts and conduct of an accused, with any SPO witness in court, in the absence of any notice to the Trial Panel, the Victims' Counsel or the Defence.

14. This approach is erroneous. The Trial Panel's ruling, on its face, relates only to the specific procedure of the SPO seeking to elicit evidence from a Rule 154 witness that was not otherwise contained in their proposed evidence or other summaries. Moreover, the SPO's approach would circumvent all existing SPO requirements to provide notice, and undermine entirely the purpose of witness summaries. More importantly, it cannot be reconciled with the Trial Panel's response to the SPO that

¹⁶ Transcript of March Status Conference, p. 2064.

¹⁷ KSC-BC-2020-06/F01380, Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, 16 March 2023 ("Rule 154 Decision"), para. 29 (emphasis added).

“what is very important, I think, both to us, again, and certainly to the Defence and Victims' Counsel, is we need to understand what part of a witness's evidence you intend to rely upon so that everyone is on the same page.”¹⁸

15. The parties were certainly not on the same page with W02652. The Defence was entitled to rely on the SPO's decision to disregard W02652's hearsay claim that Mr Thaçi's was allegedly involved in this incident, as represented by its absence from the Pre-Trial Brief, and relevant witness summaries. The Defence was also entitled to assume that the SPO's case regarding this incident was as pleaded in the Indictment and Pre-Trial Brief.

III. RELIEF SOUGHT

16. Accordingly, the Defence respectfully requests the Trial Panel to:

STRIKE the testimony of W02652 about Mr Thaçi's alleged involvement in the alleged arrest and mistreatment of [REDACTED] from the record of the case; and

FIND that the SPO is precluded from relying on this evidence.

[Word count: 1,748 words]

Respectfully submitted,



Gregory W. Kehoe

¹⁸ Transcript of March Status Conference, p. 2064.

Counsel for Hashim Thaçi

Wednesday, 19 April 2023

At The Hague, The Netherlands