



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

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

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

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Prosecution response to ‘Veseli and Krasniqi Defence request for certification to appeal the “Second Decision on Specialist Prosecutor’s Bar Table Motion”’

Specialist Prosecutor’s Office

Alex Whiting

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Request¹ should be rejected because it fails to meet the requirements² for leave to appeal under Article 45 of the Law³ and Rule 77 of the Rules.⁴ In particular, VESELI and KRASNIQI fail to demonstrate that the two issues alleging errors in the Decision⁵ – which, *inter alia*, admitted into evidence documents seized from KRASNIQI's residence – would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that immediate resolution of either issue by a Court of Appeals Panel may materially advance the proceedings.

II. SUBMISSIONS

2. The Trial Panel has broad discretion in relation to the admissibility of evidence.⁶ This has recently been emphasised by the Appeals Panel in *Gucati and Haradinaj*, which relied on well-established jurisprudence of international criminal tribunals when concluding that appellate intervention in decisions relating to the admission of evidence is warranted only in very limited circumstances.⁷ Likewise, in the course of the trial, certification of admissibility decisions must be the absolute exception.⁸ The circumstances set out in the Request warrant no such exceptional relief.

¹ Veseli and Krasniqi Defence request for certification to appeal the "Second Decision on Specialist Prosecutor's Bar Table Motion", KSC-BC-2020-06/F01624, 23 June 2023, Confidential ('Request').

² The applicable law has been set out in prior decisions. *See* Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses, KSC-BC-2020-06/F01237, 30 January 2023, para.8 and the sources cited therein.

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁵ Second Decision on Specialist Prosecutor's Bar Table Motion, KSC-BC-2020-06/F01596, 9 June 2023, Confidential ('Decision').

⁶ Articles 40(2) and (6)(h); Rule 138(1).

⁷ *Special Prosecutor v. Guçati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023, para.35.

⁸ ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para.5.

3. As noted by the Trial Panel,⁹ admission of evidence is not the same as deciding what weight, if any, the Panel will give that evidence. Nor is a *prima facie* determination of probative value by the Panel the same as the assessment of the probative value of the evidence that the Panel will perform at the end of the trial pursuant to Rule 139(2).¹⁰ The Decision concerns the admissibility of the items addressed therein, not their weight. The mere admission of these items does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. No appellate resolution is warranted.

A. ISSUE 1 FAILS TO MEET THE CERTIFICATION TEST

4. The first issue challenges the Trial Panel's interpretation of Rule 39(4), with specific regard to the requirement that the inventory must contain 'a detailed description of and information regarding each item seized'.¹¹

5. The Defence assertion that the Trial Panel provided no reasons for its interpretation of this provision¹² misrepresents the Decision. The Trial Panel duly considered the merits of the challenges raised by the Defence¹³ and adequately and correctly reasoned its interpretation by citing to the *Gucati and Haradinaj* case and concluding that the records of the searches fulfil the requirements of Rule 39(4) for an itemised and detailed inventory.¹⁴ The Defence fails to explain what other considerations should have been taken into account in the Decision.

6. Further, the Defence fails to demonstrate any, let alone significant, impact on the fairness and expeditiousness of the proceedings, instead relying on hypotheticals.¹⁵ The speculation that the Panel will continue to admit and rely on evidence obtained from an allegedly unlawful search and seizure is both

⁹ Decision, KSC-BC-2020-06/F01596, para.178.

¹⁰ See Decision, KSC-BC-2020-06/F01596, para.178.

¹¹ Request, KSC-BC-2020-06/F01624, para.2(i).

¹² Request, KSC-BC-2020-06/F01624, para.17.

¹³ Decision, KSC-BC-2020-06/F01596, paras 101-121.

¹⁴ Decision, KSC-BC-2020-06/F01596, paras 109-110.

¹⁵ Request, KSC-BC-2020-06/F01624, paras 20-23.

unconvincing and insufficient to satisfy the requirements of the third prong of the certification test. Significantly, the Defence completely ignores the safeguards duly considered by the Trial Panel in its Decision.¹⁶

7. Finally, the Defence entirely fails to explain why the Trial Panel's discretionary decision to admit evidence requires prompt resolution by the Appeals Panel in order to correct an error that may taint the judicial process. No such error has been identified, nor can it when admissibility, not weight, is the subject of the Decision. The Defence's mere disagreement with the Decision does not warrant certification.

B. ISSUE 2 FAILS TO MEET THE CERTIFICATION TEST

8. The second issue challenges the Trial Panel's finding that the inventory produced by the SPO on the day of the search and seizure operation fulfils the requirements of Rule 39(4).¹⁷

9. The Request repeats prior Defence submissions and expresses mere disagreement with the Panel's findings in relation to the admissibility of the seized items. The Request also misrepresents the Decision by claiming that Defence submissions were not addressed.¹⁸ While the Defence claims that, when addressing the appropriateness of recording 'collection of documents' in the inventory, the Panel failed to engage with the requirements of a 'detailed description of and information regarding each item seized';¹⁹ in reality, the Panel specifically addressed this issue.²⁰

10. The fact the Defence disagrees with the Panel's finding that if documents are found as a bundle or collection of documents, their description as such would meet the requirements of itemisation foreseen by Rule 39(4),²¹ is not an appropriate basis for certification.

¹⁶ Decision, KSC-BC-2020-06/F01596, paras 108-120.

¹⁷ Request, KSC-BC-2020-06/F01624, para.2(ii).

¹⁸ Request, KSC-BC-2020-06/F01624, para.18.

¹⁹ Request, KSC-BC-2020-06/F01624, para.18.

²⁰ Decision, KSC-BC-2020-06/F01596, para.113.

²¹ Decision, KSC-BC-2020-06/F01596, para.113.

11. The Defence fails to establish that the rights of the Accused or the integrity of the proceedings was in any way materially affected by the way in which the search and seizure operations were conducted in this case. Further, and as correctly pointed out by the Trial Panel, the Defence has not referred to a single rule or legal principle, applicable before this jurisdiction, that would support their submissions in this regard. The undeveloped assertion that procedural safeguards were not respected manifestly fails to meet the relevant burden which falls on the Defence in seeking leave to appeal.²² Consequently, like with the first issue, the Defence fails to demonstrate any, let alone significant, impact on the fairness and expeditiousness of the proceedings.

12. Lastly, immediate appellate resolution would not advance the proceedings. By speculating that the trial judgment will rely on evidence obtained from an unlawful search and seizure,²³ the Defence completely disregards the Panel's findings that the search and seizure operation was conducted in a manner consistent with the Law and the Rules, the Panel's broad discretionary power with regards to admissibility of evidence, and that admission is not the same as deciding what weight, if any, the Panel will give that evidence. The Defence arguments are based on abstract questions, hypotheticals, and speculations. They fail to explain why immediate appellate resolution is necessary and should therefore be dismissed.

III. CLASSIFICATION

13. This response is confidential pursuant to Rule 82(4). The SPO does not object to its reclassification as public.

IV. RELIEF REQUESTED

14. For the foregoing reasons, the SPO asks that the Trial Panel reject the Request.

²² Request, KSC-BC-2020-06/F01624, para.23.

²³ Request, KSC-BC-2020-06/F01624, para.26.

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Alex Whiting

Acting Specialist Prosecutor

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At The Hague, the Netherlands.