



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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

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Prosecution response to ‘Thaçi, Veseli & Krasniqi Defence Request for Certification to Appeal the “Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155”’

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I. INTRODUCTION

1. The Request¹ should be dismissed since none of the four Issues² meet the standard for leave to appeal³ under Article 45 of the Law⁴ and Rule 77 of the Rules.⁵

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 Accordingly, certification of admissibility decisions must be the absolute exception.⁸ The circumstances set out in the Request warrant no such exceptional relief.

¹ Thaçi, Veseli & Krasniqi Defence Request for Certification to Appeal the 'Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155', KSC-BC-2020-06/F01628, 26 June 2023, Confidential ('Request'). The THAÇI, VESELI and KRASNIQI Defence are collectively referred to herein as the Defence.

² The Request raises four issues ('Issues') which challenge the Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F01603, 14 June 2023, Confidential ('Decision').

³ 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.

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

⁵ 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.

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. See also ICTY, *Prosecutor v. Martić*, IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para.6; ICTY, *Prosecutor v. Mucić et al.*, IT-96-21-A, 20 February 2001, para.533.

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; ICTR, *Prosecutor v. Nshogoza*, ICTR-07-91-T, Decision on Defence Motion for Certification of the Trial Chamber's Decision on the Admission of Evidence Pursuant to Rule 92bis, 8 June 2009, para.5. See also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision Denying 'Sabra Request for Certification to Appeal Decision Admitting Statement of PRH024 under Rule 158', 15 September 2017, para.11.

II. SUBMISSIONS

3. The Request repeatedly mischaracterises and expresses mere disagreements with the Decision. The Defence fails to grasp the key distinction between the admissibility and the final assessment of the evidence. As emphasised in the Decision, the Panel will determine the weight of all admitted evidence at the end of the trial in light of the entire record, and assign it appropriate weight.⁹ This final assessment is ‘subject to the safeguard that un-confronted evidence shall not be relied upon to a sole or decisive extent’.¹⁰ Thus, in addition to failing to identify appealable issues arising from the Decision, the Defence fails to demonstrate any significant impact on, or that granting leave to appeal would materially advance, the proceedings.

A. NONE OF THE ISSUES ARE APPEALABLE

4. The First Issue¹¹ constitutes a mere disagreement with the Decision, as it repeats the same unpersuasive argument already raised¹² and addressed, without identifying any error. The Panel considered, on several occasions, whether the SPO intended to call other witnesses, who would be available to testify on the same matters concerned by the relevant proposed Rule 155 statement.¹³ As the First Issue merely asserts that the Panel was wrong to consider this factor – along with the multiple other facts taken into account – it is incapable of demonstrating an appealable error.

5. Further, insofar as the First Issue asserts that the Panel ‘ground[ed]’ its assessment on this factor, it mischaracterises the Decision.¹⁴ The Panel did not consider this factor in isolation. Rather, it referred to several factors when assessing whether

⁹ Decision, KSC-BC-2020-06/F01603, paras 18-19. *See also* ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Accused’s Application for Certification to Appeal Decision on Rule 92 *quarter* (Witness KDZ198), 31 August 2009, para.11.

¹⁰ Decision, KSC-BC-2020-06/F01603, para.18.

¹¹ Request, KSC-BC-2020-06/F01628, paras 6, 7-8.

¹² *See* Joint Defence Response to “Prosecution first motion for admission of evidence pursuant to Rule 155”, KSC-BC-2020-06/F01391, 22 March 2023, Confidential (‘Joint Response to Rule 155 Motion’), para.17.

¹³ Decision, KSC-BC-2020-06/F01603, paras 103, 106, 144, 172 and 203.

¹⁴ Request, KSC-BC-2020-06/F01628, paras 6-8.

the probative value of the evidence of witnesses W04733, W01143, W04783 and W04597 was not outweighed by its prejudicial effect, and correctly reached its conclusion by evaluating the combined effect of those factors.¹⁵ In this respect, the Panel emphasised that it will conduct its assessment of the evidence at the end of the trial, in light of the entire body of evidence.¹⁶ Thus, the realisation of the event challenged by the Defence under the First Issue – namely, which witnesses will ultimately appear and the scope of the evidence they will provide – will be taken into consideration to ultimately assess the weight of the evidence. The First Issue ignores this reasoning and in light of the shortcomings set out above, is not appealable.

6. The Second Issue also constitutes a mere disagreement with and misrepresents the Decision on W01984's availability.¹⁷ The Panel ruled that it was satisfied, based on the medical documentation submitted by the SPO, that his condition would prevent him from testifying effectively.¹⁸ Contrary to Defence submissions,¹⁹ the Panel did not ignore Defence arguments about the adequacy of the documents provided by the SPO. It referred to the Defence's submissions in the Decision,²⁰ and decided nevertheless that the documentation was sufficient.²¹ The Panel is not required to explicitly address all of the arguments raised by the Parties.²² The Second Issue is therefore not appealable.

7. The scope of the Third Issue²³ is vague and unclear. The Defence articulated an issue in relation to the evidence of both W01448 and W04733 regarding the identification of KRASNIQI and THAÇI,²⁴ but provides submissions only in relation

¹⁵ Decision, KSC-BC-2020-06/F01603, paras 103, 106, 144, 172 and 203.

¹⁶ Decision, KSC-BC-2020-06/F01603, paras 18-19, 106.

¹⁷ Request, KSC-BC-2020-06/F01628, paras 6, 9.

¹⁸ Decision, KSC-BC-2020-06/F01603, para.123.

¹⁹ Request, KSC-BC-2020-06/F01628, para.9.

²⁰ Decision, KSC-BC-2020-06/F01603, para.122, footnote 120.

²¹ Decision, KSC-BC-2020-06/F01603, para.123.

²² Decision on Joint Defence Request for Certification to Appeal Decisions F01534 and F01536, KSC-BC-2020-06/F01614, 16 June 2023, paras 45, 48.

²³ Request, KSC-BC-2020-06/F01628, paras 6, 10.

²⁴ Request, KSC-BC-2020-06/F01628, para.6.

to the identification of THAÇI by W04733.²⁵ Further, the Third Issue does not qualify as an appealable issue because, once again, it merely expresses disagreement with and mischaracterises the Decision.²⁶ The Defence wrongly asserts that the Trial Panel did not refer to or adequately address the inconsistencies in W04733's evidence, as raised by the Defence.²⁷ To the contrary, the Panel referred to the Defence submissions in the Decision and indicated that they were matters of weight, not admissibility.²⁸

8. Lastly, the Fourth Issue²⁹ is not appealable because it constitutes a hypothetical and abstract issue as its resolution is not essential for the determination of the matters arising, for example, from the admission of the evidence of W04418.³⁰ The Defence challenged the *prima facie* reliability of W04418's evidence based on the witness's recantation relating to crimes committed in Llapashticë/Lapaštica.³¹ However, the Defence fails to acknowledge that the recantation is in fact addressed and explained in the Rule 155 statements offered by the SPO. Thus, contrary to the Defence's arguments, the Trial Panel did consider the issue of inconsistencies and recantation before concluding that the evidence was admissible.³² Thus, the Fourth Issue is a misrepresentation, and in any event, is based on hypotheticals and speculation. At the end of the proceedings, the Panel will consider the entire record, including any admitted evidence tendered by the Defence concerning the credibility or reliability of the SPO's evidence.

²⁵ Request, KSC-BC-2020-06/F01628, para.10.

²⁶ Request, KSC-BC-2020-06/F01628, paras 6, 10.

²⁷ Request, KSC-BC-2020-06/F01628, para.10.

²⁸ Decision, KSC-BC-2020-06/F01603, paras 97 and 101.

²⁹ Request, KSC-BC-2020-06/F01628, paras 6, 11.

³⁰ Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.11.

³¹ Request, KSC-BC-2020-06/F01628, para.11. *See also* Joint Response to Rule 155 Motion, KSC-BC-2020-06/F01391, paras 45-53.

³² Decision, KSC-BC-2020-06/F01603, paras 50, 52.

B. THE ISSUES HAVE NO SIGNIFICANT IMPACT AND GRANTING LEAVE TO APPEAL WOULD NOT MATERIALLY ADVANCE THE PROCEEDINGS

9. Even if the Issues were appealable, they do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Defence's mere contention that the Issues satisfy the second prong of the certification test because they are, *inter alia*, related to the right of the Accused to a fair and public hearing and to the right to confront witnesses, is manifestly below the threshold required.³³ The Defence erroneously asserts the 'exceptional' nature of Rule 155 without any valid basis.³⁴ Rule 155 is not an exception under the court's legal framework, which provides robust safeguards.³⁵ Further, contrary to Defence submissions,³⁶ remedies could effectively be granted after the close of the trial.³⁷ As underlined by the Trial Panel and as noted above, the ultimate probative value and weight (if any) to be given to individual pieces of admitted evidence will be determined in light of the record as a whole.³⁸ In this respect, a conviction may not be based solely or to a decisive extent on the statement of a witness that the Defence did not have the opportunity to examine.³⁹ Thus, the Issues do not significantly impact on the fair and expeditious conduct of the proceedings or the outcome of the trial.

10. Finally, for the same reasons given above, the Defence also fails to demonstrate how granting leave to appeal any of the four Issues would materially advance the proceedings. Contrary to Defence submissions,⁴⁰ none of the general, unsubstantiated

³³ Request, KSC-BC-2020-06/F01628, para.12.

³⁴ Request, KSC-BC-2020-06/F01628, para.13.

³⁵ Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, 16 March 2023, Confidential, para.18.

³⁶ Request, KSC-BC-2020-06/F01628, paras 14-15.

³⁷ Decision on Requests for Certification to Appeal F01057 and F01058, KSC-BC-2020-06/F01118, 23 November 2022, para.18.

³⁸ Decision, KSC-BC-2020-06/F01603, para.18

³⁹ Decision, KSC-BC-2020-06/F01603, para.18; Rule 140(4). *See also* ICTY, *Prosecutor v. Prlić*, IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, para.53; ICTY, *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, Judgement, 23 July 2009, para.61.

⁴⁰ Request, KSC-BC-2020-06/F01628, paras 16-17.

claims concretely shows that granting an appeal is necessary to move proceedings forward along the right course.⁴¹ Rather, it would trigger unnecessary appellate litigation concerning admissibility of evidence and related discretionary assessments, which were made within the confines of the provisions of the Rules and factors firmly established in the jurisprudence of international criminal courts. Ultimately, weight is only assigned at the end of the trial, and, absent exceptional circumstances, appellate intervention in interlocutory admissibility decisions would not materially advance the proceedings.⁴²

11. Accordingly, none of the Issues satisfy any of the cumulative criteria required for certification.

III. CLASSIFICATION

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

IV. CONCLUSION

13. For the foregoing reasons, the Trial Panel should reject the Request.

Word count: 1863



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Thursday, 6 July 2023

At The Hague, the Netherlands.

⁴¹ *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.17.

⁴² See paras 2-3 above.