



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-06

**The 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: Fidelma Donlon

Date: 13 July 2023

Language: English

Classification: Public

**Decision on 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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TRIAL PANEL II ("Panel"), pursuant to Articles 21 and 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 14 June 2023, the Panel issued the Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155 ("Impugned Decision").¹
2. On 26 June 2023, the Defence for Mr Thaçi, Mr Veseli and Mr Krasniqi (collectively, "Defence") filed a request for certification to appeal the Impugned Decision ("Request").²
3. On 6 July 2023, the Specialist Prosecutor's Office ("SPO") responded to the Request ("Response").³
4. The Defence did not reply.

II. SUBMISSIONS

5. The Defence requests certification to appeal the following four issues (collectively, "Issues"):

(1) Whether the Trial Panel erred by repeatedly grounding its assessment of prejudice on a future event which may or may not occur, being the future testimony of other SPO witnesses ("First Issue");

¹ F01603, Panel, *Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155*, 14 June 2023, confidential.

² F01628, Specialist Counsel, *Thaçi, Veseli & Krasniqi Defence Request for Certification to Appeal the 'Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155'*, 26 June 2023, confidential.

³ F01648, Specialist Prosecutor, *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"',* 6 July 2023, confidential.

- (2) Whether the Trial Panel erred in finding W01984 was unavailable, having ignored or failed to give sufficient reasoning as to the adequacy of the documents provided by the SPO to demonstrate unavailability (“Second Issue”);
- (3) Whether the Trial Panel erred in admitting the evidence of W01448 and W04733 concerning the acts and conduct of Mr Krasniqi and Mr Thaçi, having ignored or failed to give reasons in relation to the inconsistencies and retractions raised by the Defence (“Third Issue”); and
- (4) Whether the Trial Panel erred in refusing to consider documents relevant to its assessment of admissibility of Rule 155 material, on the grounds that these documents were not admitted in the record of the case (“Fourth Issue”).⁴

6. The Defence submits that the four Issues satisfy the requirements of Article 45(2) and Rule 77(2) insofar as: (i) they are appealable issues; (ii) they would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) their immediate resolution by the Court of Appeals Panel may materially advance the proceedings.⁵

7. The SPO responds that the Request should be rejected because it fails to meet the requirements for leave to appeal under Article 45(2) and Rule 77 in respect of each and all of the issues for which leave to appeal is sought.⁶ The SPO argues that the issues alleging errors in the Decision are based on misrepresentations and mere disagreements with the Panel. It submits that the Defence fails to comprehend the distinction between the admissibility and the final assessment of the evidence. Lastly, the SPO argues that the Defence fails to demonstrate any significant impact on, or that granting leave to appeal would materially advance, the proceedings.⁷

⁴ Request, para. 6.

⁵ Request, paras 7-17.

⁶ Response, para. 1.

⁷ Response, para. 3.

III. APPLICABLE LAW

8. Pursuant to Article 45(2) and Rule 77(2), a right to appeal only arises if the standard for certification set forth therein has been met. The standard for certification of appeal under Rule 77(2) has been outlined in past decisions and need not be reiterated in full here.⁸

IV. DISCUSSION

A. FIRST ISSUE

9. The Defence submits that the Panel erred in relying on future testimony to justify admission of incriminating material and that this error constitutes an appealable issue emanating directly from the Impugned Decision.⁹ It argues that the Panel conditions admissibility on the future testimony of SPO witnesses. The Defence also submits that Issue 1 relates to whether a proper assessment of prejudice includes consideration of whether the prejudice is purportedly mitigated by a future event that might not occur.¹⁰ Lastly, the Defence argues that this has direct relevance to the rights of the Accused to a fair and public hearing and to examine the witness against him,¹¹ and therefore immediate resolution by the Court of Appeals is necessary and will immediately advance the proceedings.¹²

⁸ F01237, Trial Panel, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; KSC-BC-2020-07, F00423, Trial Panel II, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect ("Gucati and Haradinaj Decision on Leave to Appeal")*, 8 November 2021, paras 13-21; KSC-BC-2020-07, F00372, Trial Panel II, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; KSC-BC-2020-07, F00484, Trial Panel II, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14. See also F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17.

⁹ Request, para. 8.

¹⁰ Request, para. 13.

¹¹ Request, para. 12.

¹² Request, paras 16-17.

10. The SPO responds that the First Issue fails to meet the certification test as: (i) it constitutes a mere disagreement with the Impugned Decision as it repeats the same argument already raised without identifying any error; and (ii) it mischaracterises the Impugned Decision as the Panel did not consider one factor in isolation but referred to several factors when assessing whether 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.¹³

11. The Panel considers that Issue 1 does not meet the criteria in Rule 77(2). First, the Panel observes that a statement offered under Rule 155 is not required to be substantiated by additional corroborating evidence.¹⁴ However, the existence of such corroboration and the ability of the Defence to cross-examine or otherwise challenge that corroborating evidence is relevant to the Accused's right to confront the evidence presented against him and therefore to the question of prejudice.¹⁵ Furthermore, the Panel observes that in its assessment, it carefully examined a range of factors, including the presence of corroborating evidence that could be tested by the Defence, when deciding the admission of this evidence.

12. Importantly, in assessing the overall prejudice to the Accused related to his or her ability to confront a witness, the Panel is not limited only to the other witnesses who have already testified and have given corroborating evidence on the same point. Evidence that the SPO has indicated it will present at trial could

¹³ Response, paras 4-5.

¹⁴ ICTY, *Prosecution v Stanisic & Zupljanin*, No. IT-08-91-T, Decision Granting in Part the Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quarter*, 14 April 2010, para. 23; ICTY, *Prosecutor v Karadzic*, IT-95-5/18-T, Decision on Prosecution Motion for Admission of the Evidence of KDZ172 (Milan Babic) Pursuant to Rule 92 *Quarter*, 13 April 2010, para. 30. See also ICTY, *Prosecutor v Prlic et al*, IT-04-74-T, Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92 *quarter* of the Rules (Hasan Rizvic), 14 January 2008, paras 21-23.

¹⁵ ICTY, *Prosecutor v Haradinaj et al*, IT-04-84-T, Decision on Prosecution's Motion for Admission on Evidence Pursuant to rule 92 *Quarter* and 13th Motion for Trial Related Protective Measures, 7 September 2007, para. 10; ICTY, *Prosecutor v Popovic et al*, IT-05-88-T, Decision on Gvero's Motion for the Admission of Evidence Pursuant to Rule 92 *Quarter*, 3 February 2009, para. 29.

also be relevant for that purpose. The Panel notes in that regard that when the SPO pointed to future witnesses as being relevant to the issue of prejudice, the Defence took no objection to the relevance of such prospective evidence to this evaluation.

13. The Panel also notes that the SPO submitted that witnesses who gave statements corroborating the evidence of W04733, W01143, W04783 and W04597 were also scheduled to testify and the Defence would therefore have an opportunity to examine them on the points in question here.¹⁶ The SPO is under an obligation to give notice of its intention to call or withdraw a witness,¹⁷ and there is no indication of the SPO's intention to withdraw any of the witnesses it referred to in its submissions. Thus, the Panel was justified in taking the view that the proposed evidence which the SPO intends to call was relevant to its evaluation of the ability of the Defence to confront the substance of evidence contained in the offered Rule 155 evidence.

14. The Panel accordingly finds that the Defence has failed to demonstrate that the First Issue is an appealable error which may significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.

15. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the First Issue is therefore rejected.

B. SECOND ISSUE

16. The Defence submits that the Panel failed to explain why it was satisfied of the witness' unavailability, in the face of the Defence objections. The Defence disputes the suggestion that a reasonable Panel could have concluded that a

¹⁶ See F01329, Specialist Prosecutor, *Prosecution First Motion for Admission of Evidence Pursuant to Rule 155*, 1 March 2023, confidential, paras 44, 56, 64.

¹⁷ F01266/A01, Trial Panel, *Annex 1 to Order on the Conduct of Proceedings*, 25 January 2003, para. 48.

document from nearly seven years ago could adequately reflect the contemporary health of the witness and accordingly inform a decision on his ability to testify.¹⁸ Lastly, the Defence submits that this issue concerns the alleged unavailability of a witness, which goes to the core of the Accused being deprived of a chance to test the evidence against him.¹⁹

17. The SPO submits that the Second Issue is not appealable as it constitutes a mere disagreement with and misrepresents the Impugned Decision. The SPO argues that contrary to the Defence's submission, the Panel did not ignore Defence arguments about the adequacy of the documents provided by the SPO. Lastly, the SPO submits that the Panel is not required to address all of the arguments raised by the Parties.²⁰

18. The Panel is of the view that the Defence's arguments constitute mere disagreement with the Panel's findings. The Panel observes that the Defence asserts that the Panel failed to explain why it was satisfied of the witness' unavailability, in the face of detailed Defence objections. First, the Panel notes that the Defence did not and still does not dispute the correctness of the medical records offered by the SPO and the diagnosis made therein. It only presents an issue as to whether that diagnosis would still be valid 7 years after it was made. There is no indication on the record that the diagnosis relied upon ceased to be valid or that the condition diagnosed therein was one that would improve over time. The Panel further notes that the Impugned Decision specifically addressed the argument of the witness' unavailability and its finding that such a medical condition materially affects the witness' availability to testify is consistent with

¹⁸ Request, para. 9.

¹⁹ Request, para. 13.

²⁰ Response, para. 6.

existing case law of other international tribunals.²¹ The claim that it failed to do so or insufficiently addressed the Defence's arguments has no basis.

19. The Panel acknowledges that the moving party (the SPO in this case) carries the burden of demonstrating unavailability. However, this burden can be met by demonstrating the existence of the medical condition as discussed above and the absence of any indication that, given the nature of the illness and its long-term effects, the medical condition of the witness has significantly improved. Hence, the Defence has not demonstrated that the Panel made an error in its judgment when it considered the provided medical records as evidence of the witness's unavailability. The Defence merely disagrees with the Panel's conclusions without demonstrating an error.

20. The Second Issue therefore misrepresents the Panel's findings, amounts to mere disagreement with the Impugned Decision and fails to establish an appealable error.

21. The Panel accordingly finds that the Defence has failed to establish an appealable error, let alone one that would significantly affect the outcome of the trial or the fairness of the proceedings.

22. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Second Issue is therefore rejected.

C. THIRD ISSUE

23. The Defence submits that the Panel failed to refer to or to consider the impact of certain inconsistencies in the statements of W01448 and W04733 that amounts

²¹ ICTY, *Prosecutor v Hadzic*, IT-04-75-T, Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 9 May 2013, paras 41, 95; ICTY, *Prosecutor v Mladic*, IT-09-92-T, Decision on Prosecution Rule 92 *quater* Motion (Witness RM-012), 13 December 2013, para. 5.

to a failure by the Panel to take into account relevant factors, or to provide sufficient reasoning in respect of those.²² The Defence further argues that the Third Issue relates to the prejudice caused to the Accused by the inability to cross-examine two witnesses who make direct allegations as to their acts and conduct, and the Panel's balancing of such prejudice with the limited reliability and probative value of the evidence.²³

24. The SPO responds that the Third Issue does not qualify as an appealable issue as it merely expresses disagreement with and mischaracterises the Decision. It further argues that the Defence wrongly asserts that the Panel did not address the inconsistencies in W04733's evidence as raised by the Defence.²⁴

25. In the Panel's view, the Defence distorts the findings in the Impugned Decision and merely disagrees with the view taken regarding the relevance and importance of claimed discrepancies for the purpose of deciding admission. First, the Panel notes that the Impugned Decision expressly noted that inconsistencies as well as other factors were matters to be evaluated when considering the probative value and weight to be given to the witness's evidence.²⁵ In particular, with regard to W01448, the Panel observed, in relation to the identification of Mr Krasniqi in Kukës, that "an evaluation of the reliability of this witness's evidence in relation to this matter [...] will be conducted at the end of the case in light of all evidence relevant to this matter."²⁶ Moreover, the Panel notes that the Impugned Decision makes it clear that the Panel will approach evidence of identification with necessary caution.²⁷ Finally, the Panel notes that the evidence that is alleged to be marred by a purported inconsistency is, in any event, not

²² Request, para. 10.

²³ Request, para. 14.

²⁴ Response, para. 7.

²⁵ Impugned Decision, paras 37, 50, 137 and 168.

²⁶ Impugned Decision, para. 88.

²⁷ Impugned Decision, para. 88.

material to the SPO's case.²⁸ The Defence has failed to establish that the Panel erred when failing to consider any of the alleged discrepancies as such as to require non-admission, rather than being matters of potential relevance to weight and probative value.

26. In relation to W04733, the Panel considers that the Defence's submissions are in fact misleading and show no real inconsistency. That is, the witness did not deny or recant that Mr Kransiqi was in Kukës but, rather, appears to have had an unclear memory about Mr Krasniqi's presence in a specific location on the second day of his investigative interview. In any event, like W01448, the alleged contradictions or uncertainties are inconsequential as this is not the part of the witness' transcript that the SPO is relying upon to establish Mr Krasniqi's (and Mr Thaçi's) presence in Kukës. Again, the Defence failed to establish that the Panel erred in finding none of the alleged discrepancies to be such as to require non-admission, rather than being matters of potential relevance to weight and probative value.

27. Therefore, the Panel considers that the Defence failed to establish that the Impugned Decision failed to properly address the Defence's submissions concerning W01448 and W04733 and claimed discrepancies in their accounts.

28. The Panel accordingly finds that the Defence has failed to demonstrate that the Third Issue constitutes an appealable issue, which might significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.

29. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Third Issue is therefore rejected.

²⁸ See F01329, Specialist Prosecutor, *Prosecution First Motion for Admission of Evidence Pursuant to Rule 155*, 1 March 2023, confidential, para. 37.

D. FOURTH ISSUE

30. The Defence submits that the Panel failed to consider material directly relevant to admissibility, on the basis that this material was not itself admitted. The Defence argues that this will lead to an uncontrollable trial record.²⁹ Lastly, the Defence submits that refusal of the Panel to consider materials relevant to the admissibility of Rule 155 material, before then making adverse decisions over Defence objections has a significant impact on the rights of the Accused.³⁰

31. The SPO responds that the Fourth Issue is not appealable because it constitutes a hypothetical and abstract issue. It argues that the Defence fails to acknowledge that the recantation is in fact addressed and explained in the Rule 155 statements offered by the SPO and thus the Fourth Issue is a misrepresentation, and in any event, is based on hypotheticals and speculation.³¹

32. The Panel first notes that the Impugned Decision clearly underlines that the Panel will fulfil its responsibilities under Rule 139(4) based exclusively on the evidence that has been admitted on the record of these proceedings.³² In this regard, the Panel emphasises that only the inconsistencies within the offered statements or between those statements and the already admitted evidence hold relevance for the purpose of admission.³³ As noted above, non-admitted material would only be relevant to admission for the purpose of evaluating potential prejudice to the Accused where the not-yet admitted material is to be offered by the SPO at trial. There is no basis in the Rules or in practice identified by the

²⁹ Request, para. 11.

³⁰ Response, para. 14.

³¹ Response, para. 8.

³² Impugned Decision, para. 19.

³³ ICTY, *Prosecutor v Haradinaj et al.* IT-04-84-T, Decision on Prosecution's Motion for Admission on Evidence Pursuant to rule 92 *Quarter* and 13th Motion for Trial Related Protective Measures, 7 September 2007, para. 10; ICTY, *Prosecutor v Popovic et al.* IT-05-88-T, Decision on Gvero's Motion for the Admission of Evidence Pursuant to Rule 92 *Quarter*, 3 February 2009, para. 29; ICTY, *Prosecutor v Milutinovic et al.* IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *Quarter*, 16 February 2007, para. 7.

Defence that would authorise or require the Panel to decide admission of proposed evidence based on items which neither Party proposes to tender on the record. Moreover, the Panel notes that the Defence based its argument on the assumption that this “will lead to an uncontrollable trial record”. The Panel is of the view that the argument raised by the Defence is entirely speculative and without merit. No error has therefore been shown.

33. The Panel accordingly finds that the Fourth Issue is not capable of meeting the threshold of Rule 77(2) in that it does not present an appealable issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

34. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Additional Issue is therefore rejected.

V. CLASSIFICATION

35. The Panel notes that the Defence Request and the SPO Response have been filed confidentially. The Panel therefore, orders the Parties to file a public redacted version of their submissions by no later than Monday, 24 July 2023.

VI. DISPOSITION

36. For these reasons, the Panel hereby:

- a) **DENIES** the Request; and
- b) **ORDERS** the Parties to file a public redacted version of the Defence Request, and the SPO Response, by no later than Monday, 24 July 2023.



Judge Charles L. Smith, III
Presiding Judge

Dated this Thursday, 13 July 2023

At The Hague, the Netherlands.