



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: 17 July 2023

Language: English

Classification: Confidential

**Decision on Veseli and Krasniqi Defence Request for Certification to Appeal the
Second Decision on Specialist Prosecutor's Bar Table Motion**

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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 9 June 2023, the Panel issued the Second Decision on the Specialist Prosecutor’s Bar Table Motion (“Impugned Decision”).¹
2. On 23 June 2023, following the granting of an extension of time by the Panel,² the Defence for Mr Kadri Veseli (“Mr Veseli” and “Veseli Defence”) and the Defence for Mr Jakup Krasniqi (“Mr Krasniqi” and “Krasniqi Defence”) (collectively “Defence”) filed a request for certification to appeal the Impugned Decision (“Defence Request”).³
3. On 4 July 2023, the Specialist Prosecutor’s Office (“SPO”) responded to the Defence Request (“Response”).⁴
4. On 10 July 2023, the Veseli Defence and the Krasniqi Defence replied to the Response (“Reply”).⁵

¹ F01596, Panel, *Second Decision on Specialist Prosecutor’s Bar Table Motion*, 9 June 2023, confidential.

² Transcript of Hearing, 19 June 2023, p. 4986, lines 7 to 13 (Second Oral Order).

³ F01624, Specialist Counsel, *Veseli and Krasniqi Defence Request for Certification to Appeal the “Second Decision on Specialist Prosecutor’s Bar Table Motion”*, 23 June 2023, confidential.

⁴ F01640, Specialist Prosecutor, *Prosecution Response to ‘Veseli and Krasniqi Defence Request for Certification to Appeal the “Second Decision on Specialist Prosecutor’s Bar Table Motion”’*, 4 July 2023, confidential.

⁵ F01661, Specialist Counsel, *Veseli and Krasniqi Defence Reply to the Prosecution Response to the ‘Request for Certification to Appeal the “Second Decision on Specialist Prosecutor’s Bar Table Motion”’*, 10 July 2023, confidential.

II. SUBMISSIONS

5. The Defence requests certification to appeal the following two issues (“Issues”):

- (1) Whether the Trial Panel erred in its 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” (“First Issue”); and
- (2) Whether the Trial Panel erred in finding that the inventory produced by the SPO on the day of the search and seizure operation fulfils the requirements of Rule 39(4) of the Rules (“Second Issue”).⁶

6. The Defence submits that the 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.⁷

7. The SPO responds that the Defence Request should be rejected because it fails to meet the requirements for leave to appeal under Article 45(2) and Rule 77.⁸

8. The Defence replies that the Panel should reject the SPO’s objections and grant certification to appeal the Issues as the SPO mischaracterises the Request, and ultimately misconstrues the applicable test for certification.⁹

⁶ Defence Request, para. 2.

⁷ Defence Request, paras 15-26.

⁸ Response, paras 1, 14.

⁹ Reply, paras 1, 8.

III. APPLICABLE LAW

9. Pursuant to Article 45(2) and Rule 77(2), a right to appeal only arises if the standard of certification set forth therein has been met.

10. Rule 77(2) provides:

The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

11. The standard for certification of appeal under Rule 77(2) has been outlined in past decisions and will not be reiterated in full here.¹⁰

IV. DISCUSSION

A. FIRST ISSUE

12. The Defence submits that the First Issue arises from the Impugned Decision as the Panel considered the lawfulness of the search and seizure as a preliminary matter before ruling on admissibility.¹¹ Specifically, the Defence avers that the Panel erred when it moved away from the literal meaning of the words “detailed description” and “each item” in Rule 39(4) without providing any reasons for its interpretation of this provision, and this error requires the scrutiny by the Court of Appeals Panel.¹² The Defence contends that the First Issue affects both the

¹⁰ F01237, Panel, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17; KSC-BC-2020-07, F00423, Trial Panel II, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00372, Trial Panel II, *Decision on Haradinaj Defence’s Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, Trial Panel II, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14.

¹¹ Defence Request, para. 16.

¹² Defence Request, paras 17, 19.

fairness of the proceedings and the outcome of the trial because evidence obtained in violation of the safeguards regulating a search and seizure affects the Accused's fair trial rights and has a direct bearing on the admission or exclusion of the seized items into evidence, with inevitable impact on the outcome of trial.¹³ Lastly, the Defence argues that the First Issue requires an immediate resolution by the Court of Appeals Panel as it goes to the heart of admission of evidence in this case and as any trial judgment which relies on evidence obtained from an unlawful search and seizure would inevitably be tainted with illegality and mar the outcome of proceedings.¹⁴

13. The SPO responds that the Defence assertion that the Panel provided no reasons for its interpretation of Rule 39(4) misrepresents the Impugned Decision as the Panel considered the merits of the challenges raised by Defence and correctly and adequately reasoned its interpretation of the Rules.¹⁵ In addition, the SPO contends that the Defence fails to demonstrate any impact on the fairness and expeditiousness of the proceedings as it relies on hypotheticals and ignores the safeguards considered by the Panel.¹⁶ The SPO submits that the Defence fails to explain why the First Issue requires the prompt resolution of the Court of Appeals Panel as no error has been identified, nor can it be when admissibility, not weight, is the subject of the Impugned Decision.¹⁷

14. The Defence replies that the SPO's position that the mere admission of evidence does not affect the fair and expeditious conduct of the proceedings or its outcome, since its weight will only be evaluated at the end of the proceedings, is fundamentally erroneous as no admissibility decision would ever be appealable.¹⁸ The Defence submits that: (i) the items allegedly obtained through the searches

¹³ Defence Request, paras 20-23.

¹⁴ Defence Request, paras 24-26.

¹⁵ Response, para. 5.

¹⁶ Response, para. 6.

¹⁷ Response, para. 7.

¹⁸ Reply, para. 3.

and seizures are referred to extensively by the SPO and go to issues at the centre of its case; (ii) once admitted, the Panel is unrestricted in referring to these items; and (iii) it is speculative to suggest that the Panel would decide to not assign any weight to any of the items allegedly seized during the searches and seizures and disregard them in their entirety and, for these reasons, the Issues should be resolved at this stage before evidence of a similar nature is admitted into evidence.¹⁹ In addition, the Defence contends that the SPO's reference to the Panel's "broad discretion" in justifying the admission of these items is unpersuasive as no "discretion" can overrun Rules 39(4) and 138 and justify the admission of evidence obtained through an unlawful investigative procedure.²⁰ Lastly, the Defence submits that, contrary to the SPO's submissions, it did not disregard the Panel's finding on the lawfulness of the search and seizure, but rather specifically challenged the Panel's broad interpretation of Rule 39(4) (First Issue) and finding that the SPO's inventory is compliant with the applicable requirements (Second Issue).²¹

15. The Panel is satisfied that the First Issue constitutes a discrete issue arising from the Impugned Decision.²²

16. With regards to the requirement of a significant effect on the fair and expeditious conduct of proceedings, or the outcome of the trial, the Panel considers that the interpretation of Rule 39(4) is relevant to determining whether the search and seizure operations conducted in this case complied with the Rules. While non-compliance with the terms of Rule 39(4) would not necessarily have led to the exclusion of the material seized during search operations, it would have required the Panel to determine whether, despite the claimed violation of Rule 39(4), the material could and should in the circumstances be admitted.

¹⁹ Reply, para. 4.

²⁰ Reply, para. 5.

²¹ Reply, para. 7.

²² Impugned Decision, paras 103-120.

Having found that no such violation occurred, the Panel did not need to make that determination. In those circumstances, the Panel is prepared to accept that the claimed error might raise an issue of fairness in the sense of Rule 77(2) and/or impact the outcome of proceedings.

17. This issue could be remedied after the close of the trial. However, the *appropriateness* of a remedy granted after the close of the trial is uncertain as it could come too late to help the Panel determine what evidence can be lawfully considered for the purpose of any trial judgment. In that sense, an immediate resolution by the Court of Appeals Panel would materially advance the proceedings insofar as it would provide necessary jurisprudential guidance in relation to this issue.

18. In light of the above, the Panel finds that the requirements of the certification test arising from Article 45(2) and Rule 77(2) have been met and accordingly grants certification to appeal the First Issue.

B. SECOND ISSUE

19. The Defence submits that the Second Issue arises from the Impugned Decision as the Panel considered the lawfulness of the search and seizure as a preliminary matter before ruling on admissibility.²³ Specifically, the Defence avers that the Panel erred when it: (i) concluded that the inventory produced by the SPO on 4 November 2020 fulfils the requirements of Rule 39(4) as such a conclusion is not supported by the facts; and (ii) did not provide reasoning for its conclusion that vague expressions such as “documents” or “binder” could be considered akin to, or satisfy the requirement of, a “detailed description of and information regarding each item seized”.²⁴ The Defence argues, based on the same arguments underlying

²³ Defence Request, para. 16.

²⁴ Defence Request, para. 18.

the First Issue, that the Second Issue affects both the fairness of the proceedings and the outcome of the trial and requires the immediate resolution of the Court of Appeals Panel.²⁵

20. The SPO responds that the Second Issue repeats prior Defence submissions and expresses mere disagreement with the Panel's findings in relation to the admissibility of the seized items.²⁶ The SPO argues that 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.²⁷ The SPO submits that immediate resolution of this matter by the Court of Appeals Panel would not advance the proceedings as the Defence's submissions are mere speculation that the trial judgment will rely on evidence obtained from an unlawful search and seizure.²⁸ The SPO contends that this argument disregards: (i) the Panel's finding that search and seizure was lawful; (ii) the Panel's broad discretionary powers as regards admissibility of evidence; and (iii) the fact that admission is not the same as deciding the weight, if any, the Panel will give to that evidence.²⁹

21. The Defence replies raising, in essence, similar arguments for the Second Issue as put forward in respect of the First Issue.³⁰

22. As a preliminary matter, the Panel notes that the Impugned Decision does not contain the finding which, the Defence claims, underlies the Second Issue. The finding of the Panel, at paragraph 110 of the Impugned Decision, is that it was "satisfied that the records of the searches fulfil the requirement of Rule 39(4) for an itemized and detailed inventory". The Impugned Decision does not contain a

²⁵ See *supra*, para. 12; See also Defence Request, paras 21-26.

²⁶ Response, paras 9-10.

²⁷ Response, para. 11.

²⁸ Response, para. 12.

²⁹ Response, para. 12.

³⁰ See *supra*, para. 14; See also Reply, paras 3-7.

finding that that “the inventory *produced by the SPO on the day of the search and seizure operation*” fulfils the requirements of Rule 39(4) of the Rules. The Second Issue could be rejected for misrepresenting the finding of the Panel.

23. If the Second Issue were to be re-phrased to reflect the finding of the Panel, it would constitute a discrete issue arising from the Impugned Decision insofar as the Panel did indeed verify whether the records of the searches and seizures met the requirements of Rule 39(4).³¹

24. With regards to the requirement of a significant effect on the fair and expeditious conduct of proceedings, or the outcome of the trial, the Panel considers that the Defence has failed to establish how the Second Issue would affect either of the two branches of the first prong of the test. The Panel notes in this regard that the Defence does not dispute the fact that the documents which the SPO has identified and tendered in evidence come from the search and seizure at Mr Krasniqi’s residence. In that sense, it is not being suggested that the claimed defects in the inventory affected the “chain of custody” (as supplemented by the “Decision on the Request of the Veseli Defence Regarding Documents Seized During the Search” of the Pre-Trial Judge)³² and affected the ability of the Parties and of the Panel to establish the origin of the material in question. Nor is it suggested by the Defence that the search went beyond the scope of what had been authorised by the Pre-Trial Judge. Therefore, unless one assumes that the Panel adopted an incorrect legal standard (First Issue), the Defence has failed to establish that the Panel committed an error when assessing the compatibility of the inventory of the searches and seizures with Rule 39(4) of the Rules that could have had a significant impact on the fairness, expeditiousness or outcome of the proceedings.

³¹ Impugned Decision, para. 110.

³² F00251, Pre-Trial Judge, *Decision on the Request of the Veseli Defence Regarding Documents Seized During the Search*, 16 April 2021, confidential.

25. The Panel accordingly finds that the Second Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

26. 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.

V. CLASSIFICATION

27. The Panel notes that the Defence Request and the Reply were filed confidentially as the Impugned Decision is confidential. The Panel orders, nonetheless, the Defence to reclassify, or file public redacted versions, of these filings by no later than **Monday, 24 July 2023**.

VI. DISPOSITION

28. For all the reasons stated above, the Panel hereby:

- (a) **GRANTS** the Defence Request in relation to the First Issue;
- (b) **REJECTS** the Defence Request in relation to the Second Issue; and
- (c) **ORDERS** the Defence to reclassify, or file public redacted versions, of the Defence Request and the Reply.



Judge Charles L. Smith, III

Presiding Judge

Dated this Monday, 17 July 2023

At The Hague, the Netherlands.