

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: Counsel for Kadri Veseli

Date: 27 November 2023

Language: English

Classification: Public

**Veseli Defence Request for Leave to Appeal the Decision on Prosecution Motion
for the Admission of the Accused's Statements**

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I. INTRODUCTION

1. In accordance with Article 45(2) of the Law,¹ and Rule 77(2) of the Rules,² the Defence for Mr Kadri Veseli (“Defence”) hereby files this request for leave to appeal the Decision on Prosecution Motion for the Admission of the Accused’s Statements (“Impugned Decision”).³
2. The Defence submits the following two issues for certification:
 - a. **First Issue:** Whether the Trial Panel erred in law in its application of Article 19(2) and Rule 4(1) by ignoring Article 123 of the Kosovo Code of Criminal Procedure (“KCPC”), after having found that the admissibility of statements of co-accused was not specifically addressed in the KSC legal framework;
 - b. **Second Issue:** Whether the Trial Panel erred in law by failing to adopt the most favourable interpretation to the Accused, pursuant to Rules 4(3) and 5 of the Rules.

II. PROCEDURAL BACKGROUND

3. On 8 March 2023, the SPO requested the admission into evidence of prior interviews and testimony of the four accused (“Motion”).⁴
4. On 24 April 2023, the Defence responded to the Request (“Response”).⁵

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (“Law”).

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

³ F01917, *Decision on Prosecution Motion for Admission of Accused’s Statements*, 9 November 2023, public (“Impugned Decision”).

⁴ F01351, *Prosecution motion for admission of Accused’s statements with public Annex 1*, 8 March 2023, public (“SPO Motion”).

⁵ F01476, *Veseli Defence Response to Prosecution Motion for Admission of Accused’s Statements*, 24 April 2023, confidential (“Veseli Response”). A Public Redacted Version was filed on 24 November 2023.

5. On 9 November 2023, the Trial Panel issued the Impugned Decision.⁶
6. On 13 November 2023, the Trial Panel granted the Defence a time extension to file this request for leave to appeal the Impugned Decision, setting the deadline for 27 November 2023.⁷

III. APPLICABLE LAW

7. 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.
8. 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.

9. The Defence recalls the legal test set for certification of appeal under Rule 77(2) has been developed in prior decisions issued by this Court, which are incorporated herein by reference.⁸

IV. SUBMISSIONS

10. The **Issues** satisfy the requirements for leave to appeal. They arise from the Impugned Decision, are liable to significantly affect the fair and expeditious

⁶ See generally, Impugned Decision.

⁷ Transcript, 13 November 2023, T.9881.11-12.

⁸ F01678, *Decision on Veseli and Krasniqi Defence Request for Certification to Appeal the Second Decision on Specialist Prosecutor's Bar Table Motion*, 17 July 2023, public, paras 9-11; F01237, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; F00172, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17. See also, KSC-BC-2020-07, F00423, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00372, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14.

conduct of the proceedings and require immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

A. The Issues Arise from the Impugned Decision

11. **Both Issues** arise from the Impugned Decision. Upon determining the admissibility of the proposed statements pursuant to Rule 138(1) of the Rules, the Panel considered the applicability of the KCPC (**First Issue**), as well as relevant general principles and human rights obligations (**Second Issue**), to conclude that the proposed statements were admissible.⁹

i. First Issue

12. At paragraph 215 of the Impugned Decision, the Trial Panel determined that because the KSC legal framework was silent on the admission of the accused's statements, the statements were subject to general rules of admissibility.¹⁰ It then proceeded to consider three provisions relevant to the admission of statements of a defendant whilst completely ignoring the principal provision on the use of such statements against a co-accused – namely, Article 123 of the KCPC. It then erroneously concluded that the core concern of the KCPC, as regards this issue, was that a conviction could not be based to a sole or decisive extent on such statements.¹¹ Although, as the Trial Panel notes, the KCPC does not have direct application before the KSC, Rule 4(1) and Article 19(2) explicitly reference the KCPC as a source of guidance and interpretation. Furthermore, where an issue arises that is not addressed by the KSC legal framework, the Trial Panel is not entitled to simply ignore relevant provisions of the KCPC, as the Defence submits it has done in the Impugned Decision.

⁹ Impugned Decision, paras 215-219.

¹⁰ Namely, Rule 138(1) of the Rules.

¹¹ Impugned Decision, para. 115.

ii. Second Issue

13. At paragraph 216 of the Impugned Decision, the Panel stated that “there is no general principle of law or human rights obligation that would render such evidence inadmissible or its admission unfair to an accused in a criminal case.”¹² Whereas the Panel cited three cases in support of this determination,¹³ there exists a significant amount of law and jurisprudence,¹⁴ both domestically and internationally, which renders the admissibility of an accused’s prior statement for use against the other co-accused highly unfair and prejudicial to the co-accused’s fair trial rights. This conclusion is supported by Article 38(1)(c) of the ICJ Statute, which recognises as a valid source of international law the “general principles of law” common to the domestic systems of many states.¹⁵
14. Even if the Trial Panel were correct – i.e., that there is no uniform general principle of law or human rights obligation – the international and comparative law that the Defence cited in its Response, which the Impugned Decision ignores, demonstrates, at the very least, the existence of a rule followed in many jurisdictions (including Kosovo) that reject the use of statements of an accused against his/her co-accused. Rule 4(3) and Rule 5 clearly provide that where the KSC legal framework is silent on an issue, and more than one interpretation is possible, the interpretation “most favorable” to the Accused shall be applied.¹⁶ In these circumstances, given the prejudice that would arise from the admission of these statements, the Trial Panel was required, as a matter of law, to apply the Rule disallowing the use of the accused’s statements against their co-accused.

¹² Impugned Decision, para. 216.

¹³ Impugned Decision, fn. 611.

¹⁴ Veseli Response, para. 20.

¹⁵ See, Article 38(1)(c) of the [Statute of the International Court of Justice](#), 24 October 1945.

¹⁶ See, Rules 4(3) and 5 of the Rules.

15. Accordingly, the Defence submits that, in the alternative, the Trial Panel erred in law by failing to apply the interpretation most favourable to the Accused, as required by Rule 5 and Rule 4(3).

B. The Issues Significantly Affect the Fair and Expeditious Conduct of the Proceedings

16. The Defence submits that **both Issues** concern fundamental errors of law that will directly affect the fairness of the proceedings and, indeed, the outcome of this trial. In particular, Mr Veseli is now faced with a situation whereby (i) incriminating statements of a co-accused are in evidence; (ii) they will necessarily factor into the Panel's final deliberations, and (iii) he has no reasonable opportunity to confront the utterer of the statements because those persons cannot be compelled to testify. This cannot stand in Court that seeks protect and preserve the fair trial rights of the Accused.

17. With respect to the **First Issue**, the Defence observes that the Trial Panel overlooked the KCPC in rendering the Impugned Decision despite a prior ruling by the Appeals Chamber which noted that it is impermissible for the lower courts to *completely* ignore the KCPC. Rather, in accordance with the KSC legal framework, the KCPC serves as a *guide* to Judges.¹⁷ However, the extent of that guidance will naturally fluctuate in consonance with the extent to which the Law and the Rules specifically address certain issues. Given that the admissibility of an accused's statements, in a multi-accused trial, is *not* addressed anywhere in the Constitution, the Law or the Rules, the guidance provided by the KCPC – specifically, Article 123 – becomes inherently more commanding and persuasive.

¹⁷ See, KSC-BC-2018-01/IA001/F00005, [Decision on Appeal Against "Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi"](#), 1 October 2021, public, paras. 20-21.

18. This position is bolstered by Article 31(1) of the Vienna Convention on the Law of Treaties, according to which a treaty, including “any instrument” made by the Parties in connection with the conclusion of a treaty,¹⁸ must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁹
19. As regards the **Second Issue**, the Defence submits that the Impugned Decision has given rise to a situation whereby Mr Veseli has been wrongfully deprived of the benefit of a rule that is naturally more favourable to him. This deprivation is further exacerbated by the fact that it touches upon a fundamental cornerstone of the right to a fair trial – namely, the right to confrontation. Inasmuch as that right is subject to limitation in certain situations, the admission of incriminating statements made by an accused, for use against his fellow defendants, is, with respect, not a situation covered by the acceptable limitations. This is evidenced by Article 123 of the KCPC and the myriad of jurisprudence cited by the Defence in its Request.

C. An Immediate Resolution by the Appeals Chambers Will Materially Advance the Proceedings.

20. It follows that a positive resolution from the Appeals Chamber at this juncture would materially advance the proceedings by preserving Mr Veseli’s right to confront those who have provided evidence against him. Moreover, it would provide much-needed guidance on the correct approach to the Court’s interpretative regime as regards:
- a. Directly relevant (as opposed to directly applicable) provisions of Kosovo law; and

¹⁸ See, Article 31(2)(b) of the [Vienna Convention on the Law of Treaties](#), 23 May 1969.

¹⁹ See, Article 31(1) of the [Vienna Convention on the Law of Treaties](#), 23 May 1969.

- b. The methodology to be employed upon discovering a lacuna that is not resolved by application of Rule 4(1).

These issues are commonplace in litigation before the KSC and are likely to arise in future. This is all the more true given that the Impugned Decision creates an apparent conflict with previous Trial Panel interpretation of Rules 4(3) and 5, which ought to be clarified by the Appeals Chamber now.²⁰

V. CONCLUSION

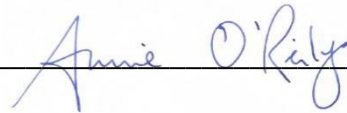
21. In light of the foregoing, the Defence respectfully seeks leave to appeal the two issues identified above.

Word Count: 1,933



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Monday, 27 November 2023,
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²⁰ F01448, [Decision on Victims' Counsel's Request for Reconsideration of Trial Panel II's "Order on the Disclosure of Application Forms Pertaining to Dual Status Witnesses"](#), 12 April 2023, public, para. 19 (h), where the Trial Panel noted that "[a]s the ambiguity is not clearly resolved by reference to the interpretive framework in Rule 4(1), the interpretation of the Rules that is most favourable to the Accused in the given circumstances is to order the transmission of relevant portions of the application forms of Dual Status Witnesses."

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