

In: KSC-BC-2023-10

The Prosecutor v. Sabit Januzi and Ismet Bahtijari

KSC-BC-2023-11

The Prosecutor v. Haxhi Shala

Before: Pre-Trial Judge

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Sabit Januzi

Date: 19 January 2024

Language: English

Classification: Public

**Public Redacted Version of Response to Prosecution Request for Joinder F00132
and Submission of Joint Indictment with confidential Annexes 1 and 2 F00146**

Specialist Prosecutor

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I. INTRODUCTION

1. On 13 December 2023, the Prosecution filed a request for joinder ('Request')¹, requesting that the accused in Case KSC-BC-2023-10 (BAHTIJARI and JANUZI) and the accused in Case KSC-BC-2023-11 (SHALA) be joined in a single indictment.
2. On 14 December 2023, the Pre-Trial Judge ordered the SPO to file a proposed joint indictment and Rule 86(3) outline for the same by 12 January 2024, and provided that the Defence had until 19 January 2024 thereafter to respond to the 'Request'².
3. On 12 January 2024, the Prosecution filed their proposed joint indictment and Rule 86(3) outline³.
4. The Accused (JANUZI) hereby objects to joinder as per the proposed joint indictment and responds as follows.

II. SUBMISSIONS

5. Contrary to the submission of the Prosecutor⁴, the proposed joint indictment seeks to include new charges.
6. The question whether a proposed amended indictment includes new charges is not confined to whether it contains new "counts"⁵.

¹ KSC-BC-2023-10/F00132, *Prosecution request for joinder*, Prosecution, 13 December 2023, Public

² KSC-BC-2023-10, *In Court – Oral Order*, 14 December 2023, Public

³ KSC-BC-2023-10/F00146, *Submission of Joint Indictment with confidential Annexes 1 and 2*, Prosecutor, 12 January 2024, Public

⁴ KSC-BC-2023-10/F00146, *Submission of Joint Indictment with confidential Annexes 1 and 2*, Prosecutor, 12 January 2024, Public at paragraph 1

⁵ Archbold on International Criminal Law § 6-202 referring to *Prosecutor v Kajelijeli*, Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File an

7. Instead, the key question is whether the proposed amendment “introduces a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment”⁶.
8. The proposed joint indictment seeks to introduce new charges in that:
 - a. It introduces an alternative legal and factual basis for conviction on count 3, namely use of a promise of a gift or any other form of benefit;
 - b. It introduces an alternative factual basis for conviction on count 2, namely common action to use a promise of a gift or any other form of benefit; and
 - c. It introduces an alternative factual basis for conviction on count 1, namely the use of a promise of a gift or any other form of benefit as a form of threat⁷.
9. One consequence of the Prosecution’s request to introduce these new charges is that the procedural steps in Article 39(8) of the Law⁸ and Rules 86(3)(a), 86(4), (5), (7) and 97 are engaged⁹.
10. Importantly, the new charges that the Prosecution seeks to introduce at this stage have previously been dismissed by the Pre-Trial Judge on 2 October 2023 at the confirmation stage¹⁰.

Amended Indictment: Warning to Prosecutor’s Counsels Pursuant to Rule 46(A), 25 January 2001, para.30

⁶ *Prosecutor v Halilović*, IT-01-48-PT, *Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment*, Trial Chamber, 17 December 2004 at para.30

⁷ KSC-BC-2023-10/F00146, *Submission of Joint Indictment with confidential Annexes 1 and 2*, Prosecutor, 12 January 2024, Public at footnote 4; KSC-BC-2023-10/F00146/A01, *Annex 1 to Submission of Joint Indictment*, Prosecutor, 12 January 2024, Confidential at paragraph 16, 22, 23, and 24(ii)

⁸ Law No.04/L-274

⁹ KSC-BD-03/Rev3/2020

¹⁰ KSC-BC-2023-10/F00008/CONF/RED, *Confidential Redacted Version of the Decision on the Confirmation of the Indictment*, Pre-Trial Judge, 2 October 2023, Confidential at paragraph 90, 149, and 155(b)

11. Whereas Rule 86(9) provides that the non-confirmation of any charge in an indictment shall not preclude the Specialist Prosecutor from including the same charge in a new or amended indictment, *where supported by new evidentiary material*¹¹, these charges are not supported by new evidentiary material.
12. Firstly, Rule 86(3)(a), which requires any evidentiary material supporting the material facts to be filed together with the indictment, has not been complied with at all.
13. Secondly, the only evidence referred to in the Rule 86(3)(b) outline¹² to support these charges is (i) the transcript of a recording dated 12 April 2023, and (ii) the transcript of the interview of Witness 1 dated 20 April 2023; both dated well before dismissal of these charges by the Pre-Trial Judge on 2 October 2024¹³. No evidentiary material has been referred to which might support a conclusion that, despite the date stated on each item, either item is *new*.
14. The Practice Direction on Files and Filings KSC-BD-15 at Article 40(a) and (c) requires the grounds in support of a request and all relevant legal and factual arguments, with specific reference to the applicable law relied upon to be articulated in the initial Request (to permit a meaningful response).
15. The Request itself makes no attempt to address Rule 86(9) and provides no grounds for the application of Rule 86(9) in the present case.
16. Accordingly, and for the reasons above, the Prosecutor is precluded from seeking to re-introduce these charges and the request for joinder should be refused.

¹¹ Not merely 'additional' (Article 39(2) of the Law) but 'new' (Rule 86(9) of the Rules) as in 'not available at the time of [the earlier ruling] and could not have been discovered with the exercise of due diligence' (per Rule 181(3) re 'additional material' on appeal).

¹² KSC-BC-2023-10/F00146/A01, *Annex 2 to Submission of Joint Indictment*, Prosecutor, 12 January 2024, Confidential at footnote 46, 50 and 76

¹³ Note: no evidentiary material has been referred to that explains the origin, authenticity or chain of custody in relation to the transcript of a recording dated 12 April 2023

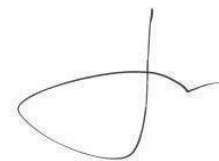
17. Finally, it is observed that there remains outstanding litigation in case KSC-BC-2023-10 in relation to [REDACTED]¹⁴. The outcome of that litigation will determine whether or not [REDACTED]¹⁵ ¹⁶. Despite the fact that a decision remains outstanding, [REDACTED] (the final submission in relation to which was filed on 15 December 2023) should be determined without delay and before the Request for Joinder.

III. CONCLUSION

18. The Request should be refused.

19. The [REDACTED] should be determined without delay and before the Request.

Word count: 1165 words



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¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁶ [REDACTED]

19 January 2024

Cardiff, UK