

In: KSC-BC-2023-10
The Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Haxhi Shala

Date: 9 February 2024

Language: English

Classification: Public

Defence Preliminary Motions on Behalf of Haxhi Shala

Specialist Prosecutor

Kimberly P. West

Counsel for Sabit Januzi

Jonathan Elystan Rees KC

Huw Bowden

Counsel for Ismet Bahtijari

Dr. Felicity Gerry KC

James O'Keefe

Counsel for Haxhi Shala

Toby Cadman

John Cubbon

I. INTRODUCTION

1. The Defence for Mr. Haxhi Shala (“Defence”) hereby requests an order requiring the Specialist Prosecutor’s Office (“SPO”) to submit an amended Indictment in Mr Haxhi Shala’s (“Accused”) case addressing the defects below, or that the Indictment be dismissed.
2. On 8 February 2024 in the Decision on Request for Joinder and Amendment of the Indictment (“Joinder Decision”)¹, the Pre-Trial Judge granted the joinder of Special Prosecutor v. Sabit Januzi and Ismet Bahtijari (“Case 10”) and Special Prosecutor v. Haxhi Shala (“Case 11”) but determined that separate indictments should remain operative.²

II. PROCEDURAL BACKGROUND

3. On 20 November 2023, the Specialist Prosecutor’s Office (“SPO”) submitted a request for confirmation of an Indictment and the issuance of an arrest warrant and transfer order for the Accused.³

¹ KSC-BC-2023-10/F00041.

² Joinder Decision, paras. 55, 58a.

³ KSC-BC-2023-11/F00002, Submission of Indictment for confirmation and related requests with strictly confidential and ex parte Annexes 1-3, 20 November 2023, para. 25. A public redacted version was issued on 12 December 2023.

4. On 4 December 2023, the Pre-Trial Judge confirmed the indictment against the Accused (“Case 11 Confirmed Indictment”).⁴
5. On 6 December 2023, the SPO submitted a public redacted version of the indictment of the Accused, as confirmed by the Pre-Trial Judge.⁵
6. On 11 December 2023, the Accused was arrested in Kosovo. On 12 December 2023, he was transferred to the Specialist Chambers Detention Management Unit in The Hague, the Netherlands.⁶
7. On 13 December 2023, an initial appearance before the Pre-Trial Judge took place.⁷
8. At the first Status Conference held on 15 December 2023, the Accused entered pleas of not guilty to each charge in the Indictment.⁸
9. On 12 January 2024, the SPO filed a Submission of Joint Indictment with Confidential Annexes 1 and 2.⁹

⁴ KSC-BC-2023-11, F00005, Pre-Trial Judge, Decision on the Confirmation of the Indictment, 4 December 2023, confidential. A public redacted version was filed on 30 January 2024, F00005/RED.

⁵ KSC-BC-2023-11/F00007, Submission of Confirmed Indictment, 6 December 2023, strictly confidential and ex parte, with confidential Annex 1. A public redacted version was filed on 12 December 2023, F00013/A01.

⁶ KSC-BC-2023-11/F00014, Decision Setting the Date for the Initial Appearance of Haxhi Shala and Related Matters, 12 December 2023, paras. 4-5.

⁷ KSC-BC-2023-11, First Appearance, Transcript, 13 December 2023, pp. 1-15.

⁸ KSC-BC-2023-11, Status Conference, Transcript, 15 December 2023, p. 42.

⁹ KSC-BC-2023-11/F00031.

10. On 8 February 2024 the Pre-Trial Judge issued the Joinder Decision in which, *inter alia*, he rejected the amendments in the Joint Indictment that the SPO proposed¹⁰ and he determined that the joint case would proceed at this stage on the basis of the Case 10 Confirmed Indictment and Case 11 Confirmed Indictment.¹¹

III. APPLICABLE LAW

11. Pursuant to Article 39(1) of the Law on Specialist Chambers and Specialist Prosecutor's Office¹² ("Law"), the Pre-Trial Judge has, *inter alia*, the power to review an indictment and to rule on any preliminary motions, including challenges to the indictment and jurisdiction.
12. Article 21(4)(a) of the Law provides that, in the determination of any charge against the accused pursuant to the Law, an accused shall be entitled to certain minimum guarantees, including: "a. to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her."

¹⁰ Joinder Decision, paras 7, 58.c.

¹¹ Joinder Decision, para. 55.

¹² Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015.

13. Article 38(4) of the Law provides that, upon a determination that a well-grounded suspicion that a person is criminally liable for any offence within the jurisdiction of the Specialist Chambers, the Specialist Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the person is charged under the Law.
14. Rule 86(3) of the Rules of Procedure and Evidence of the Kosovo Specialist Chambers¹³ (“the Rules”) requires an indictment filed pursuant to Article 38(4) of the Law to set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime(s) with which the suspect is charged, in particular the alleged mode of liability in relation to the crimes charged pursuant to Article 16 of the Law.
15. Pursuant to Rule 97 of the Rules, the Accused may file preliminary motions before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which (a) challenge the jurisdiction of the Specialist Chambers; (b) allege defects in the form of the indictment; and (c) seek the severance of indictments pursuant to Rule 89(2).

IV. SUBMISSIONS

16. It is submitted that the requirements set forth in Articles 21(4)(a) and 38(4) of the Law as well as Rule 86(3) of the Rules have not been met in relation to the

¹³ KSC-BD-03/Rev3/2020.

information relevant to the Indictment that Witness 1 has given and the testimony that he might give.

17. Witness 1 is described as “a person who has provided or is likely to provide information to the Special Investigative Task Force (‘SITF’), SPO, and/or to any KSC Panel about any crimes or offences falling under KSC jurisdiction.”¹⁴ He is described in the same way in paragraphs 18(i) and, more briefly, in paragraph 27.a. The scope of the relevant information that he is alleged to have here is very broad and requires greater specificity.
18. The SPO’s allegations in the Indictment refer on several occasions to the possibility of the withdrawal of the testimony of Witness 1.¹⁵ The content of this testimony which in paragraph 22(i) is referred to as “his testimony in KSC proceedings” is not directly described but the allegations in the section on Intimidation in criminal proceedings contain implications concerning its content which are in need of clarification.
19. The SPO alleges the following in support of Intimidation in criminal proceedings:

“Between at least 5 April 2023 and 12 April 2023, SHALA used and attempted to use serious threat, or any other means of compulsion, a

¹⁴ Case 11 Confirmed Indictment, para. 3.

¹⁵ Case 11 Confirmed Indictment, paras. 7, 13, 22(i), 22(ii).

promise of a gift or any other form of benefit to induce another person, Witness 1, to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings.”¹⁶

20. This paragraph reflects the wording of Article 387 of the Kosovo Criminal Code, which provides:

“Whoever uses force or serious threat, or any other means of compulsion, a promise of a gift or any other form of benefit to induce another person to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings shall be punished by a fine of up to one hundred and twenty-five thousand (125,000) EUR and by imprisonment of two (2) to ten (10) years.”

21. In the case of Special Prosecutor v. Hysni Gucati and Nasim Haradinaj the scope of the phrase “when such information relates to obstruction of criminal proceedings” in Article 387 was disputed. The matter is still subject to

¹⁶ Case 11 Confirmed Indictment, para. 21.

consideration before the Constitutional Court,¹⁷ but the Supreme Court accepted the position of the SPO that it *only* qualified “to otherwise fail to state true information” (third limb) and *not also* “to refrain from making a statement or to make a false statement”¹⁸ (first and second limbs). It should be noted that in the Indictment the SPO is not alleging that all three limbs were instantiated but that at least one of them was. The word “or” shows that they are alternatives.

22. If the SPO still adopts the interpretation it advocated in Gucati and Haradinaj, it is alleging in paragraph 21 that the Accused may have acted so as to induce Witness 1 to fail to state true information otherwise than by making a false statement or failing to state true information, *when such information related to obstruction of criminal proceedings*. The wording of paragraph 27 c. (“pressuring Witness 1 to recant his statement, provide false information or refrain from testifying”) reinforces the allegation in paragraph 21 that the Accused may have been inducing Witness 1 to “otherwise fail to state true information” in the terms of Article 387. It would follow that the *only* testimony which it is alleged that the Accused may have been acting so as to induce Witness 1 “to

¹⁷ KSC-CC-2023-22/F00001, Haradinaj Defence Referral to the Specialist Chamber of the Constitutional Court, 20 November 2023, confidential, paras. 41-44 (reclassified as Public); KSC-CC-2023-22/F00009, Prosecution Response to Haradinaj Defence Referral to the Specialist Chamber of the Constitutional Court with public annexes 1 and 2, 22 January 2024, paras. 24-25.

¹⁸ KSC-SC-2023-01/F00021, Decision on Requests for Protection of Legality, 18 September 2023, paras. 60-62; KSC-SC-2023-01/F00014, Prosecution consolidated response to requests for protection of legality, 3 July 2023, paras. 38-41.

otherwise fail to state” was true information related to obstruction of criminal proceedings. Confirmation of this point is required.

23. If the allegation of the SPO is indeed that the Accused may have been acting so as to induce Witness 1 “to otherwise fail to state” true information related to obstruction of criminal proceedings (third limb), there is an imbalance between this limb on the one hand and the first and second limbs on the other: whereas the true information in the third limb related to obstruction of criminal proceedings, there is no corresponding clarity about the statements in the first and second limbs. The Defence submit that if neither relate to obstruction of criminal proceedings, it is unclear to what they relate. The uncertainties here give rise to a defect in the Indictment.
24. The Defence makes these submissions regarding Intimidation in criminal proceedings under Article 387 of the Kosovo Criminal Code without prejudice to the interpretation that it will adopt of Article 387 in the remainder of the case.
25. The Defence reserves the right to make further preliminary motions pursuant to Rule 97 of the Rules if a joint indictment becomes operative or if amendments other than those requested above are made to the Case 11 Confirmed Indictment.

26. Equally the Defence further notes that there has been a joinder of Cases 10 and 11 but no order has been given for the filing of a joint indictment and the separate indictments for the two Cases remain operative. For as long as this remains the case the ability of the Accused to plan his defence is limited.

V. CONCLUSION

27. For the foregoing reasons, the Defence respectfully requests that:
- (i) The SPO submit an amended Indictment correcting the defects set forth above within 30 days from the date of decision on the preliminary motion (the right to thereafter raise objections to any amended indictment being reserved to the defence); and
 - (ii) The Case 11 Confirmed Indictment be dismissed if the defects are not corrected within the 30-day period.

Word Count: [1,841 words]



Toby Cadman

Specialist Counsel

09 February 2024

At London, United Kingdom