

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 Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr. Fidelma Donlon

Filing Participant: Defence Counsel for Hashim Thaçi
Defence Counsel for Rexhep Selimi
Defence Counsel for Jakup Krasniqi

Date: 15 February 2024

Language: English

Classification: Public

Public Redacted Version of Thaçi, Selimi and Krasniqi Defence Request

for Certification to Appeal the Decision on Prosecution Motion for Admission of

Evidence pursuant to Rule 153 (F02111)

Specialist Prosecutor

Kimberly P. West

Counsel for Victims

Simon Laws KC

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson KC

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. On 8 February 2024, Trial Panel II (“Panel”) issued its “Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153” (“Impugned Decision”).¹ The Impugned Decision admitted, *inter alia*, the statements of W04722 and W04816 without affording the Defence a chance to cross-examine these witnesses.

2. The Defence for Mssrs. Thaçi, Selimi and Krasniqi (“Defence”) seeks certification to appeal the following issues:

- (i) **First Issue:** *Whether the Trial Panel erred in law by applying an excessively low threshold for the admission of W04722 and W04816’s evidence pursuant to Rule 153, contrary to the militating factors set out in Rule 153(1)(b) and the requirement for an “exceptional” basis warranting the admission of evidence set out in Rule 153(3);*
- (ii) **Second Issue:** *Whether the Trial Panel erred in law and/or fact and/or abused its discretion by finding that the additional topics proposed by the Defence for cross-examination of W04722 and W04816 did not warrant their attendance in court;*
- (iii) **Third Issue:** *Whether the Trial Panel erred in law and/or fact by admitting [REDACTED] as an associated exhibit to W04816’s evidence.*

¹ KSC-BC-2020-06, F02111, Trial Panel II, *Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153*, 8 February 2024, confidential.

II. SUBMISSIONS

3. The Defence incorporates by reference its previous submissions on the legal standard for certification to appeal.²

4. The issues satisfy the test for certification. They originate from the Impugned Decision, are sufficiently specific and identifiable, do not amount to mere disagreements, affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their immediate resolution by the Court of Appeal's panel may materially advance the proceedings.

A. FIRST ISSUE

A. The First Issue is an appealable issue

5. The **First Issue** goes to the heart of the Decision, which concluded that W04722 and W04816's evidence could be admitted using Rule 153 and that neither witness' testimony necessitated cross-examination.³

6. The Impugned Decision found that W04722 and W04816's evidence is cumulative of other evidence, and met the requirements under Rule 153(2).⁴ In relation to W04722 in particular, the Decision failed to reflect that he is a key witness to incriminatory evidence central to the SPO's allegations of detentions in [REDACTED]. As the centrality of evidence constitutes a factor militating against the admission of a

² See e.g., KSC-BC-2020-06, F01624, Joint Defence, *Veseli and Krasniqi Defence Request for Certification to Appeal the "Second Decision on Specialist Prosecutor's Bar Table Motion"*, 23 June 2023, public, paras 11-14.

³ Impugned Decision, paras 59, 68.

⁴ Impugned Decision, para. 58.

written statement or transcript *in lieu* of oral testimony,⁵ the contents of the statements should have militated against their admission in writing.

7. Having established that the evidence provided by W04722 and W04816 was relevant, authentic and had probative value, the Impugned Decision did not properly address the factors militating against admission in writing or the exceptional nature of admitting statements without cross-examination.⁶ It proceeded on the basis that once the evidence was relevant, authentic and probative, it should be admitted unless the Defence substantiated an objection to the admission. This approach is too permissive with regard to the admission of untested testimonial evidence and warrants reconsideration by an Appeals Panel.

8. The **First Issue** is sufficiently specific, as it goes to the heart of crime-base evidence at locations where the witness is uniquely placed to speak to what occurred. Its resolution is critical to the Decision because, had Rule 153(1)(b) been correctly interpreted by the Panel, the statements of W04722 and W04816 would not have been admitted in writing and the Defence would have been afforded the opportunity to conduct cross-examinations.

B. The First Issue affects the fair and expeditious conduct of the proceedings or the outcome of the trial

9. The **First Issue** has repercussions on the fair and expeditious conduct of the proceedings. The right of the Defence to test the evidence being used against the Accused is a fundamental fair trial right under Article 21(4)(f). As noted in the Impugned Decision, the burden is on the SPO to meet the conditions of admission under Rule 153 by reference to the factors in Rule 153(1)(a), without those factors being

⁵ Rule 153(1)(b)(ii).

⁶ Impugned Decision, paras 55-58; 64-67.

outweighed by those in Rule 153(1)(b). The Defence does not bear any burden at this stage to strengthen the factors in Rule 153(1)(b). By reversing this burden, the Impugned Decision renders opaque the admissibility requirements under Rule 153, which has an impact on the Defence's case strategy and renders proceedings unfair.⁷

C. Immediate resolution of the First Issue may materially advance the proceedings

10. Resolution of the **First Issue** would materially advance the proceedings by providing legal certainty as to the interpretation of Rule 153. Further such applications are anticipated, and the preparation and response to such applications would be materially advanced by appellate guidance. If the evidence should not have been admitted pursuant to Rule 153, it will materially advance proceedings to correct the error now, whilst it can be remedied by calling the witnesses to give evidence.

B. SECOND ISSUE

A. The Second Issue is an appealable issue

11. The **Second Issue** concerns whether, by denying the Defence a chance to cross-examine W04722 and W04816 on identified topics relevant to their evidence, their credibility, and the Defence's own evidentiary case, the Impugned Decision disproportionately affected the Accused's fundamental right to examine or have examined the witnesses against them and to present evidence capable of rebutting the charges.⁸

⁷ Impugned Decision, para. 59.

⁸ Article 21 of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law"); Article 31(4) of the Constitution of the Republic of Kosovo.

12. In its response⁹ to the SPO's motion for admission of W04722 and W04816's evidence pursuant to Rule 153,¹⁰ the Defence objected to the admission of their evidence pursuant to Rule 153, and specified a series of discrete topics for cross-examination.

13. The Defence expressed its intention to cross-examine W04722 about topics arising from his evidence, including: (i) the [REDACTED] structure and reporting lines; (ii) meetings W04722 allegedly attended in [REDACTED], (ii) W04722's appointment in the unit; (iii) W04756's appointment; (iv) orders which W04722 personally received or overheard from [REDACTED]; (v) W04722's understanding of the term "collaborator"; and (vi) the alleged detentions in [REDACTED] and W04722's alleged role thereof.¹¹ Further, the Defence identified additional topics relevant to its case, including: (i) W04722's alleged role, responsibilities and reporting lines within [REDACTED]; (ii) W04722's role after 12 June 1999; (iii) the conduct of KLA soldiers in [REDACTED] and the local security situation in that period; and (iv) W04722's role in the release of detainees.¹² For several of these topics, W04722's evidence is unique: as the only KLA member on the SPO witness list who was present in [REDACTED] at the relevant time, and as the only SPO witness who was allegedly involved in the release of detainees,¹³ he is uniquely able to provide the Panel with relevant exculpatory evidence.

⁹ KSC-BC-2020-06, F02063, Joint Defence, *Joint Defence Response to Prosecution motion for the admission of the evidence of witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153 (F01994)* ("Response"), 15 January 2024, confidential.

¹⁰ KSC-BC-2020-06, F01994, Specialist Prosecutor, *Prosecution motion for the admission of the evidence of witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153 with confidential Annexes 1-10* ("Motion"), 8 December 2023, confidential.

¹¹ Response, paras 35-37.

¹² Response, para. 38.

¹³ Response, paras 35, 37-38.

14. The Impugned Decision dismissed these submissions, finding, without proper reasoning, that “the Defence has failed to establish that these issues are important to its case, that they cannot effectively be explored with other witnesses and that prejudice would arise from its inability to raise those issues with this particular witness.”¹⁴ It concluded that the information which the Defence wishes to elicit from W04722 does not warrant cross-examination.¹⁵

15. Regarding W04816, the Defence stressed that as the sole [REDACTED] on the SPO witness list available for cross examination, his evidence is also unique. The Defence proposed to cross-examine W04816 on his role as a [REDACTED], including: (i) the source of his purported knowledge of the KLA structure in areas in which he operated during 1998 and 1999; (ii) his knowledge of the KLA/VJ engagement in [REDACTED] and the organization and/or structure of the KLA operating there during the relevant period; and (iii) his knowledge of the closing stages of the conflict in June 1999, the cessation of hostilities and the withdrawal of VJ troops from Prizren and Kosovo generally.¹⁶

16. The Impugned Decision did not engage with these submissions in detail; finding in general terms that “the Panel is [...] not persuaded that the further information which the Defence wishes to elicit from W04816 warrants his attendance for cross-examination”.¹⁷

17. The **Second Issue** thus constitutes an identifiable topic arising from the Impugned Decision, as it seeks to appeal two specific findings underpinning the decision to admit the evidence of W04722 and W04816 without cross-examination.

¹⁴ Impugned Decision, para. 59.

¹⁵ *Ibid.*

¹⁶ Response, para. 46.

¹⁷ Impugned Decision, para. 67.

18. Rather than constituting a mere disagreement with the Impugned Decision, the **Second Issue** concerns the requirement to render a reasoned decision and challenges the lawfulness of a Panel's decision which effectively curtails the Defence prerogative to elicit exculpatory evidence relevant to its case from Prosecution witnesses, as well as the scope of the discretion to deny the Defence a chance to cross-examine witnesses who can provide unique evidence on relevant topics. Indeed, a reasonable Trial Panel exercising its discretion correctly would have required the appearance of W04722 and W04816 for cross-examination.

B. The Second Issue affects the fair and expeditious conduct of the proceedings or the outcome of the trial

19. By admitting W04722 and W04816's evidence pursuant to Rule 153, the Panel restricted the Accused's right to an adversarial hearing, to confront witnesses against them, and to elicit exculpatory evidence which is favourable to their respective cases. These rights are fundamental fair trial safeguards,¹⁸ explicitly protected in Article 21(4)(f) of the Law, Article 31(4) of the Constitution and international human rights instruments.¹⁹

20. The **Second Issue** concerns whether the Panel unlawfully infringed on these rights in denying the Accused a chance to confront available witnesses against them, or abused its discretion in considering the additional topics proposed for cross-examination to be insufficient to justify cross-examination. As such, the **Second Issue**

¹⁸ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.2, Appeals Chamber, *Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross Examination by Defence and Association of Defence Counsel's Request for Leave to File an Amicus Curiae Brief*, 4 July 2006, p. 2.

¹⁹ European Convention on Human Rights, Article 6(3)(d); International Covenant on Civil and Political Rights, Article 14(3)(e).

affects the Accused's fair trial rights and thus the fair conduct of the proceedings. The Panel has already found that issues pertaining to the Accused's right to an adversarial hearing and to confront witnesses against them satisfy this limb of the test for certification.²⁰

21. Further, the admission of W04722 and W04816's evidence pursuant to Rule 153 prevents the Defence from testing the evidence of these witnesses in open court and from eliciting exculpatory evidence relevant to its case. This, in turn, necessarily affects the Panel's determination of the weight which can be afforded to their evidence and denies the Panel the chance to consider additional exculpatory evidence in its overall assessment of the charges. As such, the **Second Issue** significantly affects the outcome of the trial.

C. Immediate resolution of the Second Issue may materially advance the proceedings

22. Immediate resolution of the **Second Issue** by the Appeals Panel may materially advance the proceedings, by providing clarity on whether the admission of W04722 and W04816's evidence pursuant to Rule 153 effectively infringed on the Accused's fair trial rights, thus enabling the Defence and the SPO to prepare the presentation of their cases and final submissions on evidence that is validly before the Panel.²¹ Appellate intervention would also clarify the scope of the discretion to admit the statements of available witnesses without cross-examination, which would inform the determination of future motions pursuant to Rule 153.

²⁰ KSC-BC-2020-06, F02022, Trial Panel II, *Decision on Defence Requests for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements* ("16 December 2023 Decision on Certification"), 19 December 2023, public, paras 48, 52.

²¹ 16 December 2023 Decision on Certification, paras 21, 31, 53.

C. THIRD ISSUE

A. The Third Issue is an appealable issue

23. The **Third Issue** is concerned with whether the Impugned Decision erred in admitting the transcript of an [REDACTED],²² which was tendered as an associate exhibit to W04816's statement.²³ Notably, W04816 was not part of the [REDACTED], had never seen the document (or any other document of a similar nature) before his SPO interview or [REDACTED], and was not involved in any way in [REDACTED].²⁴ The [REDACTED] is not an indispensable or inseparable part of the interview, since W04816 in his SPO interview merely confirms that the content of the document appears to refer to the same incident he testified about,²⁵ but was not able to comment on its authenticity.²⁶

24. The Defence objected to admission arguing that, for several reasons contained in extensive previous submissions on [REDACTED],²⁷ the [REDACTED] does not possess the necessary *indicia* of authenticity required for admission.²⁸ The Impugned Decision failed to engage with the substance of the objection, consider the document in isolation, or assess its admissibility under Rule 138(1).²⁹ Rather, the Impugned Decision assessed all the exhibits associated to W04816 collectively,³⁰ considered sufficient for admission the fact that they had been discussed in the witness statement, and, without any explanation, concluded that "the Defence's objection to the

²² 092958-092966, pp. 092965-092966.

²³ Annex 7 to the Motion, p. 5.

²⁴ Response, para. 45, referring to 092967-TR-ET Part 2 RED, pp. 15-16; 092967-TR-ET Part 3 RED, p. 2.

²⁵ 092967-TR-ET Part 3 RED, p. 2, lines 8-11.

²⁶ 092967-TR-ET Part 2 RED, p. 15, lines 22-23 ; 092967-TR-ET Part 3 RED, p. 2, lines 4-7.

²⁷ Response, fn. 116, citing [REDACTED].

²⁸ Response, para. 45.

²⁹ Rules of Procedure and Evidence ("Rules").

³⁰ Impugned Decision, para, 66.

admission of the [REDACTED] discussed by W04816 pursuant to Rule 153 is dismissed".³¹

25. The **Third Issue** is thus a discernible issue which arises from the Impugned Decision. Rather than being a mere disagreement, the **Third Issue** goes to the correct application of the admissibility criteria, as well as to the requirement to render a reasoned decision.

B. The Third Issue affects the fair and expeditious conduct of the proceedings or the outcome of the trial

26. The admission of evidence which does not meet the required standard of authenticity impacts the fair and expeditious conduct of the proceedings or the outcome of the trial. As prescribed by Rule 138(1), only evidence which is relevant, authentic, has probative value, and is not outweighed by its prejudicial effect can be admitted. The Panel previously noted that these four cumulative requirements serve to ensure that the Panel is not burdened by evidence that is irrelevant, lacks indicia of authenticity or probative value, or is overly prejudicial.³² Assessing each piece of evidence individually is thus a fundamental step to ensure a minimum standard for the evidence which the Parties can ultimately rely upon in their submissions, and that the Panel will assess in its deliberations.

27. The **Third Issue** contends that by failing to engage with objections raised by the Defence, and omitting to consider whether the [REDACTED] fulfilled the requirements of Rule 138(1), the Impugned Decision effectively misapplied the Rules

³¹ *Ibid.*

³² KSC-BC-2020-06, F01409, Trial Panel II, *Decision on Specialist Prosecutor's Bar Table Motion*, 31 March 2023, confidential, para. 11 citing KSC-BC-2020-07, F00334, Trial Panel II, *Decision on the Prosecution Request for Admission of Items Through the Bar Table*, 29 September 2021, public, para. 12.

and admitted a document which lacks the required *indicia* of authenticity, thus impacting the fair conduct of the proceedings as a whole. Further, once admitted, the Panel may rely on this document against the Accused; as such, the **Third Issue** is liable to significantly impact the outcome of the trial.

C. Immediate resolution of the Third Issue may materially advance the proceedings

28. The Panel has previously found that issues concerning the admissibility of evidence satisfy the third limb of Rule 77(2), since their immediate resolution enables the Parties to prepare the presentation of their case and final submission on evidence that is validly before the Panel.³³ It also considered that their resolution at a later stage would be inappropriate as it would come too late to help the Panel determine what evidence can be lawfully considered in any trial judgment.³⁴

29. The same applies to the **Third Issue**. Immediate appellate intervention would clarify what evidence is validly before the Panel, and provide useful guidance on the applicable criteria for admissibility of documentary evidence, as well as on the necessary analysis which is required of the Panel before ruling on the admissibility of exhibits associated to a witness statement.

³³ 16 December 2023 Decision on Certification, paras 21, 31, 53.

³⁴ KSC-BC-2020-06, F01678, Trial Panel II, *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, para. 16.

III. CONCLUSION

30. The Defence respectfully seeks leave to appeal the stated issues.

Word count: 2,999

Respectfully submitted on 15 February 2024



Luka Misetic

Co-Counsel for Hashim Thaçi



Geoffrey Roberts

Lead Counsel for Rexhep Selimi



Eric Tully

Co-Counsel for Rexhep Selimi



Rudina Jasini

Co-Counsel for Rexhep Selimi



Venkateswari Alagenda

Lead Counsel for Jakup Krasniqi



Aidan Ellis

Co-Counsel for Jakup Krasniqi



Victor Băieșu

Co-Counsel for Jakup Krasniqi