

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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

Date: 15 February 2024

Language: English

Classification: Public

Public Redacted Version of Veseli Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153 (F02111)

Specialist Prosecutor’s Office

Kimberly P. West

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagenda

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 In accordance with Article 45(2) of the Law² and Rule 77(2) of the Rules,³ the Defence for Mr Kadri Veseli (“Defence”) hereby files this request for leave to appeal the Impugned Decision.
2. The Defence seeks certification to appeal the following issues:
 - a. First Issue: Whether the Trial Panel failed to apply the correct legal test for admission of evidence pursuant to Rule 153.
 - b. Second Issue: Whether the Trial Panel violated the defendant’s fundamental right to confront evidence by admitting this evidence via Rule 153.
3. The above two issues relate specifically to the decision to admit the evidence of W04722 and W04816.

II. APPLICABLE LAW

4. 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. Rule 77(2) states that:

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.

¹ F02111, *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 (“Impugned Decision”).

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (“Law”).

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

5. 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.⁴

III. SUBMISSIONS

6. The **Two Issues** satisfy the requirements for leave to appeal. They arise from the Impugned Decision, do not merely disagree with said Decision, are liable to significantly affect the fair and expeditious conduct of the proceedings and require immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

A. Both Issues are Appealable

- i. First Issue: Whether the Trial Panel failed to apply the correct legal test for admission of evidence of the evidence of W04722 and W04816 pursuant to Rule 153*

7. It is submitted that the Trial Panel applied the incorrect test for admission under this Rule when it chose to admit the evidence of W04722 and W04816.
8. Firstly, the Trial Panel erred in its apparent approach that if the SPO successfully showed that the evidence was relevant, *prima facie* authentic and a feature of 153(1)(a) was present, this was sufficient to render it admissible.⁵ The Panel considered in detail whether the evidence in question was relevant and *prima facie* authentic.⁶ Relevance, and authenticity are relevant criteria to the

⁴ See for instance, F02067, *Decision on Joint Defence Request for Certification to Appeal Decision F01963*, 19 January 2024, public, paras 10-11; 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.

⁵ Impugned Decision, para. 67.

⁶ Impugned Decision, paras 63-65.

admissibility of evidence *per se*; they are not the determinative of whether evidence can be admitted pursuant to Rule 153. Relevance and authenticity are not facts to be considered as militating in favour of admission under Rule 153. The evidence is not presumptively admissible once one or more factors in 153(1)(a) is present.

9. Further, for W04722, the Trial Panel expressly applied an incorrect test for admission. The Panel held that it was:

satisfied that W04722's Proposed Evidence is: (i) probative and its admission in lieu of oral testimony would not be unduly prejudicial within the meaning of Rule 138(1); and (ii) suitable for admission pursuant to Rule 153(1)(a).⁷

However, Rule 153 is not concerned with balancing prejudice versus probative value. Nor are the factors in Rule 153(1)(a) categories or gateways to admission. No regard was had by the Panel to provisions 153(1)(b) or 153(2) in the Impugned Decision. The Defence contends this was a fatal error.

10. Secondly, the Trial Panel erred by reversing the legal burden in Rule 153. The Panel held that it was "not persuaded that the further information which the Defence wishes to elicit from W04816 warrants his attendance for cross examination."⁸ In relation to W04722 it observed:

While the onus of establishing the conditions of admission under Rule 153 is with the SPO the Panel notes 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, [...] The Panel is therefore not persuaded that the further information which the Defence wishes to elicit from W04722 warrants his attendance for cross-examination.⁹

11. It is not for the Defence to show why attendance is warranted; attendance of any witness is presumptively warranted. It is for the SPO to show why,

⁷ Impugned Decision, para. 59.

⁸ Impugned Decision, para. 67.

⁹ Impugned Decision, para. 59.

considering all factors, the right to confront a witness can be infringed as the witness under consideration is an *exceptional* case; this is a very high bar to meet.

12. Thirdly, no interrogation or analysis of the competing arguments was conducted by the Panel, as such the Panel therefore failed to engage in the substance of the application. The Panel listed the key arguments by both parties as set out in their respective filings. However, at no point did it set out which, if any, of these submissions were accepted or rejected. No reasons were given as to how the Panel determined that SPO had shown these cases to be exceptional under Rule 153(2), had displaced the presumption of attendance or countered the Defence's concerns as enumerated in the Joint Response.¹⁰
13. By failing to give reasons – as required by Rule 153(2) – as to why the Panel was satisfied that the requirements of a fair and expeditious trial *exceptionally* warranted the admission of W04816 or W04722's statements, the Panel erred in law.
14. Fourthly, the fact that a witness does not provide evidence of the acts and conduct of the accused is a prerequisite for the proper application of Rule 153.¹¹ The Panel erred in consider this to be a factor militating in favour of admission.¹²
15. W04816 gives unique and important evidence in a number of key respects, as outlined in the Defence Response at paragraph 46,¹³ and W04722 is a key

¹⁰ Impugned Decision, paras 59 and 67.

¹¹ Rule 153(1) of the Rules.

¹² Impugned Decision, para 59 and 67.

¹³ F02063, *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)*, 15 January 2024, confidential ("Joint Defence Response"), para 46.

witness to incriminatory evidence central to the SPO's allegations of detentions in [REDACTED]. This fact militates strongly against admission under Rule 153.

16. Fundamentally, Rule 153(1)(a) is designed for the admission of evidence concerning background, victim impact and character evidence. The evidence of W04722 and W04816 is not the peripheral, uncontroversial, type clearly envisaged by the drafters of Rule 153.
17. Finally, while inconsistencies may not be a bar to admission under Rule 153 *per se*, they are a factor which militate heavily against admission under Rule 153.¹⁴ The Panel erred in failing to consider them as such.¹⁵ An inconsistent witness is often an unreliable witness. A potentially unreliable witness clearly warrants challenge. Inconsistencies are not a question of weight to be determined later, but a factor militating against admission of evidence absent cross examination. It is difficult to envisage how the Panel could assess the weight of any inconsistency without its proper exploration in cross examination or the ability to assess the credibility, reliability and demeanour of the witness for themselves during live evidence.
18. For the reasons outlined above, the Panel erred in significant ways in its interpretation and application of Rule 153. If the Rule had been applied correctly, the Panel would not have admitted the statements of W04722 and W04816 under this provision and the Accused would be entitled to cross examine these important witnesses.

¹⁴ Rule 153(1)(b)(i) of the Rules.

¹⁵ Impugned Decision, para 59.

- ii. *Second Issue: Whether the Trial Panel violated the defendant's fundamental right to confront evidence by admitting the evidence of W04722 and W04816 evidence pursuant to Rule 153.*
19. One of the fundamental rights of the Accused is the right to confront the evidence against them, as protected by Article 31(4) of the Constitution, international human rights instruments,¹⁶ and Article 21(4)(f) of the Law, which states that:
4. In the determination of any charge against the accused pursuant to this Law, the accused shall be entitled to the following minimum guarantees, in full equality: [...]
- f. to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.
20. Rule 153 does not, and cannot, detract from this right. As such, in order for any violation or encroachment upon this right to be justified or indeed lawful, there must be a significant competing right or interest at play justifying such a violation. Significantly, in their Rule 153 application the SPO have not identified any competing right or interest which could justify the encroachment of the Accused's rights. The SPO have not sought at any point to justify or explain the reason behind these applications, why these witnesses are exceptional or why such a violation of the Accused's fundamental rights is warranted. Any balancing act is bound to fail.
21. While expediency is an important goal in a criminal trial, it cannot trump the fundamental fair trial rights enumerated in Article 21.
22. There is presumption in favour of the ability to cross examine, unless successfully rebutted by the SPO. While the Defence bears no legal burden in this respect it nonetheless made detailed submissions in its Response on the

¹⁶ Article 6(3)(d) of the European Convention on Human Rights; Article 14(3)(e) International Covenant on Civil and Political Rights.

centrality of the evidence in question and the relevant cross examination topics for each witness going to issues at the heart of the case.¹⁷ There has been no suggestion by either the SPO or the Panel that these areas identified for cross-examination are (a) irrelevant or (b) inadmissible. It is clear these are, in fact, issues of prime importance.

23. Broad deference should be afforded to the Defence when it is said that a witness is required for cross examination. It is the right of an Accused to conduct their case as they wish, subject to overarching principles of fairness, relevance and admissibility. The Accused are represented by experienced trial counsel who are best placed to identify the need to cross examine witnesses in the Accused's defence.
24. The Panel failed to provide reasons as to why the evidence of either W04722 and W04816 was so exceptional as to deprive the Accused of their right of confrontation, in the face of such detailed and clear submissions of the Defence to the contrary. As such, the Impugned Decision constitutes an unjustifiable infringement upon the rights of the Accused.

B. Both Issues Affect the Fair and Expeditious Conduct of the Proceedings or the Outcome of the Trial

25. Both issues significant repercussions on the fair and expeditious conduct of the proceedings. Two of the most fundamental rights afforded to a defendant in a criminal trial are (a) the right of an Accused to confront the evidence against them, and (b) the burden of proof. The Impugned Decision infringes both rights and therefore and the issues arising go to the heart of fairness of the trial process.

¹⁷ Joint Defence Response, paras 38 and 46.

C. Immediate Resolution of Both Issues Would Materially Advance the Proceedings

26. Resolution of both issues would materially advance the proceedings as a positive resolution from the Appeals Chamber at this juncture would prevent the fundamental rights of the Accused being violated at this juncture. An authoritative determination by the Appeals Panel would also rectify the abovementioned errors of reasoning in the Impugned Decision and clarify the correct legal test and reasoning to be applied to Rule 153 decisions in the future.

IV. CLASSIFICATION

27. This request is filed confidentially pursuant to Rule 82(3) of the Rules, as reference is made to confidential information.

V. CONCLUSION

28. In light of the foregoing, the Defence respectfully seeks leave to appeal the **Two Issues** identified above.

Word Count: 2,249



Ben Emmerson, CBE KC

Counsel for Kadri Veseli

Thursday, 15 February 2024,

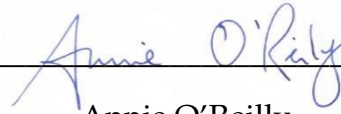
The Hague, The Netherlands



Kerrie Ann Rowan

Co-Counsel for Kadri Veseli

Thursday, 15 February 2024,
The Hague, The Netherlands



Annie O'Reilly

Co-Counsel for Kadri Veseli

Thursday, 15 February 2024,
The Hague, The Netherlands