



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-98-34-A
Date: 18 November 2003
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Hans Holthuis

Date: 18 November 2003

PROSECUTOR

v.

**Mladen Naletilić, aka "TUTA"
Vinko Martinović, aka "ŠTELA"**

**DECISION ON THE REQUEST FOR PRESENTATION OF
ADDITIONAL EVIDENCE**

Counsel for the Prosecutor:

Mr. Norman Farrell

Counsel for the Accused:

Mr. Matthew Hennessy and Mr. Christopher Young Meek for Mladen Naletilić
Mr. Želimir Par and Mr. Kurt Kerns for Vinko Martinović

I. PROCEDURAL BACKGROUND

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (“International Tribunal”) is seized of a motion for the admission of additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”).

2. On 31 July 2003, Vinko Martinović (“Appellant”) filed confidentially the “Request for Presentation of Additional Evidence” (“Motion”) in which he seeks to admit additional evidence to his pending appeal from the Trial Chamber’s judgment in *Prosecutor v. Naletilić and Martinović*¹ rendered on 31 March 2003 (“Judgment”). The Prosecution filed the “Prosecution Response to Vinko Martinović’s Request for Presentation of Additional Evidence” (“Response”) on 11 August 2003 and the Appellant filed the “Response to Prosecution Response to Vinko Martinović’s Request for Presentation of Additional Evidence” (“Reply”) on 18 August 2003.

II. ARGUMENTS OF THE PARTIES

3. In the Motion, the Appellant proposes to tender an expert testimony of Dr. Ahmo Ćurić, neuro-psychiatrist from Mostar, on the health condition of Prosecution witness Ajanić. According to the Defence, this additional evidence disputes the findings of the Trial Chamber set out in paragraphs 476 to 511 of the Judgment.² The additional evidence allegedly pertains to the credibility of witness Ajanić.

4. The Appellant was indirectly approached by Dr. Ćurić who treated and examined the witness when he was at the “Dr. Safet Mujić” hospital in Mostar in 1996. The witness has consented to testify before the Appeals Chamber but only upon receiving an order. The Appellant submits that “in the course of the procedure it was objectively not possible for the Defence to obtain this kind of evidence”.³ Continuing, the Appellant states that “the contacts of the Defence with the Prosecution witnesses were prohibited and the Defence had objectively no possibility to request from witness Ajanić the medical documentation in relation to his health condition, nor to summon him to undergo examination by a psychiatrist engaged by the Defence”.⁴

¹ *Prosecutor v. Naletilić and Martinović*, Judgment, Case No.: IT-98-34-T, 31 March 2003.

² Motion, p. 2; *Prosecutor v. Naletilić and Martinović*, Second Amended Indictment, 28 September 2001.

³ Motion, pp. 3-4. The Appellant is referring to the lack of cooperation by the medical institutions and doctors in the Eastern part of Mostar, mainly populated by Muslims who have a negative perception of the Appellant.

⁴ Motion, p. 3.

5. In its Response, the Prosecution argues that the Appellant must file the additional evidence with the Motion and since the Appellant failed to do so, the Motion must be dismissed on that basis alone.⁵ Furthermore, it submits that Rule 115 is not a mechanism for summoning a witness.⁶ According to the Prosecution, the Appellant has not satisfied the criterion of non-availability as he failed to exercise due diligence during the trial; he did not attempt to speak to witness Ajanić nor did he seek the assistance of the Trial Chamber to obtain a psychiatric evaluation of the witness.⁷

6. In its Reply, the Appellant stresses the importance of allowing the testimony of Dr. Ćurić who personally examined witness Ajanić. He repeats that Dr. Ćurić will only testify if he is summoned, and that the “defence has just conducted an interview with dr. Ahmo Ćurić, without taking any deposition or expert finding” as it could put the witness in a situation which is harmful to him.⁸

III. DISCUSSION

7. The admission of additional evidence is regulated in Rule 115 of the Rules, which reads as follows:

Rule 115
Additional Evidence

(A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than seventy-five days from the date of the judgment, unless good cause is shown for further delay. Rebuttal material may be presented by any party affected by the motion.

(B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117.

(C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.

(D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.

In order to admit additional evidence, the moving party must demonstrate that the additional evidence was unavailable at trial and that it is relevant, and credible - that is, reasonably capable of

⁵ Response, paras 10–13.

⁶ Response, paras 14–16.

⁷ Response, paras 20–24.

belief or reliance - and such that it could have had an impact on the verdict, *i.e.*, could have shown, in the case of a request by a defendant, that a conviction was unsafe.⁹ If the additional evidence was available at trial or could have been discovered through the exercise of due diligence, the moving party will be required to undertake the additional burden of establishing that the exclusion of the additional evidence *would* lead to a miscarriage of justice - that is, it *would* have affected the verdict.¹⁰

(i) Unavailable at trial

8. The applicant must demonstrate that the additional evidence tendered on appeal was not available to him at trial and that it could not have been discovered through the exercise of due diligence.¹¹ The duty placed upon the applicant to act with reasonable diligence includes making “appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber”.¹² The requirement of due diligence obliges counsel to bring any difficulties in relation to obtaining evidence, including those arising from intimidation or the inability to locate witnesses, to the attention of the Trial Chamber.¹³

9. The trial record does not suggest that the Appellant brought to the attention of the Trial Chamber any difficulties in relation to obstacles in contacting an expert witness who would examine witness Ajanić personally. Further, the Appellant failed to show any difficulties in making contact with Dr. Omanović who, according to the Appellant, was the doctor treating witness Ajanić in 1996; the Appellant also failed to make inquiries at the “Dr. Safet Mujić Hospital” in Mostar where witness Ajanić was admitted.

10. Further, the Appellant could have requested that the expert witness Dr. Begić, who testified about the credibility of witness Ajanić for the Defense, or another qualified psychiatrist, undertake a personal examination of witness Ajanić. When Dr. Begić was asked by Judge Diarra

⁸ Reply, Registry page 693.

⁹ *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 Aug. 2003, p. 3 (“Krstić Decision”). See also *Prosecutor v. Kupreškić et al*, Case No. IT-95-16-A, Appeal Judgment, 23 Oct. 2001, (“Kupreškić Appeals Judgement”), para. 68, *Prosecution v. Blaškić*, Case No.: IT-95-14-A, Decision on Evidence, 31 October 2003, p. 3.

¹⁰ *Krstić Decision*, p. 4.

¹¹ *Prosecutor v Tadić*, Case No.: IT-94-1, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, (“Tadić Rule 115 Decision”), para. 35-45; *Kupreškić Appeals Judgement*, para. 50.

¹² *Tadić Rule 115 Decision*, para. 47.

what had prevented him from communicating with witness Ajanić directly, Dr. Begić answered: “Nothing prevented me from communicating with that patient, but my task was to consider, to analyze documents. Had they [the Defence] asked me to do something else, then as a witness, I would have acted accordingly”.¹⁴

11. In this case counsel neither requested to have witness Ajanić examined personally by a qualified psychiatrist nor reported any difficulties in obtaining evidence. The Appeals Chamber therefore finds that the proposed evidence was available at trial.

(ii) Miscarriage of Justice

12. Even if the proposed additional evidence was available at trial, it can be admitted if the appellant can establish that its exclusion would lead to a miscarriage of justice.¹⁵

13. The Appellant has not attached the proposed additional evidence to the Motion and it is therefore impossible for the Appeals Chamber to determine whether it would have affected the verdict. The Appeals Chamber does not accept the Appellant's claim that he has not attached any statement from Dr. Ćurić because it could be harmful to him. If Dr. Ćurić needs protection the Appellant could have requested protective measures to be imposed by the Chamber and should not have revealed his name in the Reply which is a public filing. The Motion could be dismissed on this basis alone. The Appeals Chamber notes that in any event the challenged paragraphs of the Judgement are based upon a number of witnesses and that witness Ajanić is only one of them. The Appeals Chamber considers that even if the proposed evidence had been proffered by the Appellant, it is not such that its exclusion would lead to a miscarriage of justice.

¹³ *Tadić* Rule 115 Decision, para. 40; *Kupreškić* Appeal Judgment, para. 50; *Prosecutor v Krstić*, Case No.: IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (“*Krstić* Subpoenas Decision”), para. 5.


¹⁴ Trial Transcript, p. 15485.

¹⁵ *Prosecutor v Delić*, Case No.: IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002 (“*Delić* Decision”) para. 15.

IV. DISPOSITION

19. For the foregoing reasons, the Appeals Chamber dismisses the Motion.

Done in both English and French, the English text being authoritative.



Judge Fausto Pocar
Presiding

Dated this 18th day of November 2003,
At The Hague,
The Netherlands.

[Seal of the Tribunal]