

In: KSC-CA-2023-02

The Specialist Prosecutor v. Mr. Salih Mustafa

Before: A Panel of the Court of Appeals Chamber
Judge Michèle Picard, Presiding Judge
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Filing Participant: Defence of Salih Mustafa

Date: 13 February 2023

Language: English

Classification: Confidential and *ex-parte*

**Motion regarding Victims' Counsel participating in the
Pre-Appeal Conference and further Appeal proceedings**

Counsel for Salih Mustafa:

Julius von Bóné
Jonathan Elystan Rees KC

Specialist Prosecutor's Office:

Alex Whiting

I. Introduction

1. On 16 December 2022 Trial Panel I rendered its judgment in the case of the Accused Salih Mustafa;¹ Salih Mustafa has appealed the decision and to that end filed a Notice of Appeal on 2 February 2023;²
2. The Victims' Counsel has not filed an appeal against the Judgment.
3. On 9 February 2023, the Presiding Judge of a Panel of the Court of Appeals Chamber issued an order scheduling a Pre-Appeal Conference (hereafter the scheduling order);³
4. The Pre-Appeal Conference is scheduled for 16 February 2023.
5. Where there is further mention of the "Law" and the "Rules" in this motion, it is meant the Law on the Specialist Chambers and Specialist Prosecutor's office and the Rules of Procedures and Evidence before the Kosovo Specialist Chambers.

II. The Scheduling Order

6. In paragraph 8 of the scheduling order, the Presiding Judge wrote: "During the hearing, the Presiding Judge will invite submissions from the Parties, Counsel for Victims and/or the Registry, as the case may be (...)". In paragraph 9 of the scheduling order, the Presiding Judge wrote: "The Presiding Judge instructs the Parties and Counsel for Victims to inform her and the other Parties and Counsel for Victims (...)"⁴

¹ Judgment KSC-BC-2020-05, 16 December 2022/F00494

² KSC-CA-2023-02, 2 February 2023/F00006

³ KSC-CA-2023-02, 2 February 2023/F00008

⁴ KSC-CA-2023-02, 2 February 2023/F00008 § 8 and 9

7. The Defence objects to the participation of Victims' Counsel in any form or manner in the Pre-Appeal Conference and the further Appeal proceedings.
8. As the Presiding Judge invites parties, including the Victims' Counsel, during the hearing on the issues of detention of the accused, translation into Albanian of the trial judgments and any other matter that the Presiding Judge may wish to raise, the Defence submits that the order lacks legal grounds for such submissions by the victims' counsel. It erroneously pre-supposes that the Victims' Counsel has standing in both the Pre-Trial Conference and the further Appeal proceedings.

III. The Law and the Rules

9. Neither the Law, nor the Rules provide any legal basis for the Victims' Counsel to participate in the Pre-Appeal Conference or the further Appeal proceedings in this case. Therefore, the Victims' Counsel has no standing in the Pre-Appeal Conference and has no standing in the further Appeal proceedings.
10. As stated above, the only party that has filed an appeal is the Accused (the "Appellant"). The Victims' Counsel did not file any appeal.
11. Rule 114 (1) defines the modalities of participation for victims (counsel) to participate in the proceedings. However, participation is limited to the circumstances identified in Articles 22(6) and 46 (9) of the Law. Neither one of these articles is applicable in the current case at hand.
12. Whereas Rule 67(1) of the Rules provides that at any stage of the proceedings, a Panel may invite or grant leave to a person to submit observations as *amicus curiae* on any issue that the Panel deems appropriate and which would assist in the proper

determination of the case, there is no such wide discretion in relation to Victims' Counsel. There is no equivalent provision in the Law or the Rules to either:

- (a) Article 68(3) of the Rome Statute of the International Criminal Court which provides that "where the personal interests of the victims are affected, the Court shall permit their views and concerns *to be presented and considered at stages of the proceedings determined to be appropriate by the Court...*"; or
- (b) Rule 87(D) of the Rules of Procedure and Evidence before the Special Tribunal for Lebanon which provides that at the appeal stage, subject to the authorisation of the Appeals Chamber, after hearing the Parties, a victim participating in proceedings may participate in a manner deemed appropriate by the Appeals Chamber.

- 13. Victim representation otherwise through Victims' Counsel in accordance with the Law and the Rules is not permitted – see Article 22(5) of the Law.
- 14. As the law and the Rules are clear on this issue, the Defence therefore objects to the participation of the Victims' Counsel in the Pre-Appeal Conference and the further Appeal proceedings.

IV. Conclusion

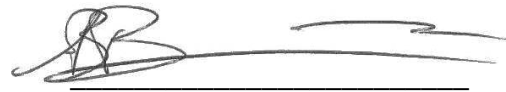
- 15. No application has been filed for participation of Victims' Counsel in these appeal proceedings. Moreover, the Law and the Rules do not permit participation of Victims' Counsel (or "Counsel for Victims") in these appeal proceedings.

16. As there is no legal basis for Victims' Counsel to either make submissions on anything -except where Victims' Counsel has appealed the Trial judgment itself-the defence therefore submits that Victims' Counsel cannot attend the Pre-Appeal Conference and cannot make submissions on any issues, neither during the Pre-Appeal Conference nor in any of the further Appeal proceedings.
17. Victims' Counsel therefore must be excluded from participating in the Pre-Appeal Conference and further Appeal proceedings.

Word count: 889

13 February 2023

At The Hague, the Netherlands



Julius von Bóné

Defence Counsel