



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-BC-2020-04  
**Specialist Prosecutor v. Pjetër Shala**

**Before:** **Trial Panel I**  
Judge Mappie Veldt-Foglia, Presiding  
Judge Roland Dekkers  
Judge Gilbert Bitti  
Judge Vladimir Mikula, Reserve

**Registrar:** Dr Fidelma Donlon

**Filing Party:** Specialist Prosecutor's Office

**Date:** 4 April 2024

**Language:** English

**Classification:** Confidential

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**Prosecution response to Defence request for certification or reconsideration of  
F00823**

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**Specialist Prosecutor's Office**

Kimberly P. West

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Jean-Louis Gilissen

**Counsel for Victims**

Simon Laws

## I. INTRODUCTION

1. Pursuant to Rules 77 and 79 of the Rules,<sup>1</sup> the Specialist Prosecutor's Office ('SPO') hereby responds to the Request,<sup>2</sup> which should be denied, as the Defence has failed to identify any appealable issue in the Decision.<sup>3</sup> In the Request, the Defence simply expresses its disagreement with the Decision, repeating submissions and seeking to re-litigate issues already dismissed by the Trial Panel ('Panel'), and misrepresenting the Panel's findings. Second, none of the proposed issues have 'significant repercussions' on the fair and expeditious conduct of the proceedings, or the outcome of the trial, and appellate resolution at this stage will unnecessarily prolong the proceedings, rather than materially advance them.<sup>4</sup> Finally, the Defence does not identify any reason why the Panel should reconsider the Decision, and indeed, no such reason exists.

## II. SUBMISSIONS

2. The Decision concerns discretionary matters of disclosure, trial management, and the presentation and admission of evidence, including in relation to witness credibility. Appellate intervention in such matters – even on appeals against final judgments – is warranted only in very limited circumstances.<sup>5</sup> For the same reasons,

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<sup>1</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

<sup>2</sup> Request for Leave to Appeal and/or Reconsideration of the Decision on the Defence Request for Leave to Reopen its Case, KSC-BC-2020-04/F00823, 26 March 2024, confidential ('Request').

<sup>3</sup> Decision on the Defence request for leave to reopen its case, KSC-BC-2020-04/F00813, 24 March 2019, confidential ('Decision'). An appealable issue amounts to an identifiable topic, the resolution of which is essential for determination of the matters arising in the judicial case under determination, and not merely a question over which there is disagreement. *See* Decision on Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala, KSC-BC-2020-04/F00401, 24 January 2023 ('Statements Certification Decision'), para.15.

<sup>4</sup> Statements Certification Decision, KSC-BC-2020-04/F00401, paras 16-19.

<sup>5</sup> *Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023, paras 34-35; *Specialist Prosecutor v. Mustafa*, Public Redacted Version of Appeal Judgment, KSC-CA-2023-02/F00038/RED, 14 December 2023 ('*Mustafa* Appeal Judgment'), paras 37-39.

certification to appeal must be the absolute exception.<sup>6</sup> The Request fails to meet this burden, instead making selective and repetitive submissions that do not demonstrate any discernible error, let alone one resulting in concrete prejudice.<sup>7</sup>

### **1. Issue 1<sup>8</sup> is not an appealable issue**

3. The first issue proposed by the Defence is based on a misrepresentation of and mere disagreement with the Decision. As such, it does not amount to an appealable issue.<sup>9</sup>

4. In denying the reopening of the Defence case, the Panel carefully considered multiple factors before determining that no prejudice was caused by the late disclosure and in turn, no remedy required. In this respect, Issue 1 and the Defence's supporting submissions in the Request do not concretely engage with or even challenge the Panel's findings, *inter alia*, that: (i) W02540's evidence is cumulative of other evidence on the record;<sup>10</sup> (ii) W02540's evidence largely corroborates TW4-01's account;<sup>11</sup> and (iii) W02540's evidence is of limited relevance, as it falls outside the geographical and temporal scope of the charges.<sup>12</sup> Instead, the Defence merely asserts that the late disclosure caused 'serious prejudice',<sup>13</sup> repeating arguments previously made and expressing disagreement. Further undercutting the Defence's claim that the Panel erred in not providing a remedy, the Panel specifically noted the cumulative

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<sup>6</sup> *Specialist Prosecutor v. Thaçi et al.*, Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960, KSC-2020-06/F02157, 29 February 2024, para.11.

<sup>7</sup> *Mustafa Appeal Judgment*, KSC-CA-2023-02/F00038/RED, para.39.

<sup>8</sup> Whether the Panel erred in fact and in law by declining to provide a remedy to the Accused for the serious violation of the disclosure obligations of the Prosecution.

<sup>9</sup> See Decision on Application for Leave to Appeal "Decision on Motion Challenging the Form of the Indictment", KSC-BC-2020-04/F00116, 29 November 2021, para.18.

<sup>10</sup> Decision, KSC-BC-2020-04/F00813, para.19.

<sup>11</sup> Decision, KSC-BC-2020-04/F00813, para.20.

<sup>12</sup> Decision, KSC-BC-2020-04/F00813, para.21.

<sup>13</sup> Request, KSC-BC-2020-04/F00823, paras 4(1), 17, 21-22.

nature of W02540's evidence, finding that the Defence can use other evidence on record, which the Panel specifically identified, to challenge TW4-01's credibility.<sup>14</sup>

5. This proposed issue is also based on submissions already dismissed by the Panel. Specifically, the Defence reiterates the existence of 'major inconsistencies' between the evidence of TW4-01 and W02540, and the existence of 'serious prejudice',<sup>15</sup> in spite of the Panel's specific findings to the contrary<sup>16</sup>

## 2. Issue 2<sup>17</sup> is not an appealable issue

6. In framing the second proposed issue, the Defence is simply seeking to re-litigate the Panel's findings on the probative value of W02540's evidence, and on the alleged prejudice suffered by the Defence.<sup>18</sup>

7. The Panel clearly found that 'contrary to the Defence's submissions[,] the inconsistencies between W02540's evidence and TW4-01's testimony are minor and that, in essence, W02540's evidence largely corroborates TW4-01's account'.<sup>19</sup> Rather than identifying an issue capable of affecting this determination, the Defence merely disagrees with it, arguing – again<sup>20</sup> – that W02540's evidence 'contradicts' the testimony of TW4-01, and that 'many discrepancies' exist between the evidence of the two witnesses.<sup>21</sup> Finally, as acknowledged in the Request,<sup>22</sup> the Panel considered a

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<sup>14</sup> Decision, KSC-BC-2020-04/F00813, para.21.

<sup>15</sup> Request, KSC-BC-2020-04/F00823, para.17.

<sup>16</sup> Decision, KSC-BC-2020-04/F00813, paras 20-21.

<sup>17</sup> Whether the Panel erred in fact and in law by refusing to allow the Defence to reopen its case to call one witness who could provide exculpatory evidence and whose evidence only became known to the Defence at the present stage because of the Prosecution's disclosure obligations.

<sup>18</sup> Request, KSC-BC-2020-04/F00823, paras 29-31.

<sup>19</sup> Decision, KSC-BC-2020-04/F00813, para.20.

<sup>20</sup> Defence Motion Requesting Leave to Reopen its Case to Present Exculpatory Evidence Recently Disclosed in Breach of the Prosecution's Disclosure Obligations, KSC-BC-2020-04/F00803, 29 February 2024, paras 25-28.

<sup>21</sup> Request, KSC-BC-2020-04/F00823, para.29.

<sup>22</sup> Request, KSC-BC-2020-04/F00823, para.26 *quoting* KSC-BC-2020-04/F00813, para.16.

number of other factors – beyond the alleged discrepancies – when issuing the Decision, which the Defence either addresses in passing or does not challenge.<sup>23</sup>

**3. None of the issues identified by the Defence has ‘significant repercussions’ on the fair and expeditious conduct of the proceedings, or the outcome of the trial**

8. In addition to failing to identify appealable issues, the Defence has not demonstrated that the proposed issues could have repercussions, let alone ‘significant’ ones,<sup>24</sup> on the fair and expeditious conduct of the proceedings, or the outcome of the trial.

9. With regard to the fairness of the proceedings, as discussed above, the Panel found that there was no prejudice and noted the Accused’s ability to adequately challenge TW4-01’s credibility by using cumulative evidence already on the record.<sup>25</sup>

10. With regard to the outcome of the trial, as the trier of fact in this case – the Panel is uniquely placed to assess whether admission of W02540’s evidence is necessary for the determination of the truth.<sup>26</sup> The Panel has explained why it declined to reopen the Defence case, with specific references to the limited relevance and probative value of W02540’s evidence, which concerns events outside the Indictment period<sup>27</sup> and is cumulative with and largely corroborative of TW4-01’s account.<sup>28</sup> By merely arguing that the issues proposed for appeal affect the ‘potential outcome of the trial’, the Defence has failed to establish that this is actually the case.

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<sup>23</sup> See e.g. Request, KSC-BC-2020-04/F00823, paras 32-34.

<sup>24</sup> Statements Certification Decision, KSC-BC-2020-04/F00401, para.16.

<sup>25</sup> *Contra* Request, KSC-BC-2020-04/F00823, para.23.

<sup>26</sup> Decisions on the admission of evidence are discretionary, with appellate intervention on these matters being warranted only in very limited circumstances, see Decision on Shala’s Appeal Against Decision Concerning Prior Statements, KSC-BC-2020-04/IA006/F00007, para.8. See also para.2 above.

<sup>27</sup> Decision, KSC-BC-2020-04/F00813, para.21.

<sup>28</sup> Decision, KSC-BC-2020-04/F00813, paras 19-20.

#### **4. Immediate resolution by the Appeals Panel would not materially advance the proceedings**

11. The Panel need not examine whether an immediate resolution by the Appeals Panel may materially advance the proceedings, because the Defence has failed to satisfy the first prong of the certification test.<sup>29</sup> In any event, the Defence has failed to demonstrate that this requirement is met.

12. The Defence merely argues that ‘a prompt determination by an Appeals Panel would provide certainty on whether the proceedings are continuing in compliance with the fundamental guarantees of fairness’.<sup>30</sup> This submission is general and unspecific, and potentially applicable to any fair trial violation alleged by a party. Interlocutory appeals, however, are an exceptional remedy, and assertions that an interlocutory appeal would address ‘fundamental questions’ do not *per se* warrant certification.<sup>31</sup>

13. In the case at hand, granting certification in relation to evidence found by the Panel to be unnecessary for the determination of the truth<sup>32</sup> would not materially advance the proceedings. At any stage of the proceedings, but particularly here, where the trial is drawing to a close, it would unduly interrupt the course of the proceedings, and unnecessarily prolong the duration of this trial.

#### **5. Defence request for reconsideration**

14. The Defence has not demonstrated the existence of a clear error of reasoning, or that reconsideration of the Decision is necessary to avoid injustice. Nor has the Defence identified new facts or circumstances intervened since the issuance of the Decision, which would warrant its reconsideration.<sup>33</sup> As discussed above, the Defence

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<sup>29</sup> Statements Certification Decision, KSC-BC-2020-04/F00401, para.19.

<sup>30</sup> Request, KSC-BC-2020-04/F00823, para.24.

<sup>31</sup> Statements Certification Decision, KSC-BC-2020-04/F00401, para.13.

<sup>32</sup> Decision, KSC-BC-2020-04/F00813, para.21.

<sup>33</sup> Decision on the Defence’s Request for Leave to Appeal and/or Reconsideration of F00538, KSC-BC-2020-04/F00587, 13 July 2023, para.23.

merely disagrees with the Panel's findings, repeating submissions already rejected in the Decision. Under these circumstances, reconsideration should be denied.

### III. CLASSIFICATION

15. This filing is confidential pursuant to Rule 82(4). The SPO has no objections to its reclassification as public.

### IV. RELIEF REQUESTED

16. Based on the foregoing, the SPO requests that the Panel deny the Request.

**Word count: 1569**



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**Kimberly P. West**  
**Specialist Prosecutor**

Thursday, 4 April 2024

At The Hague, the Netherlands.