



In: KSC-BC-2020-04

The Specialist Prosecutor v. Pjetër Shala

Before: Trial Panel I

Judge Mappie Veldt-Foglia, Presiding Judge

Judge Roland Dekkers

Judge Gilbert Bitti

Judge Vladimir Mikula, Reserve Judge

Registrar: Fidelma Donlon

Date: 11 April 2024

Language: English

Classification: Public

**Decision on the Defence request for leave to appeal and/or reconsideration of the
"Decision on the Defence request for leave to reopen its case"**

To be notified to:

Specialist Prosecutor
Kimberly P. West

Counsel for the Accused
Jean-Louis Gilissen

Victims' Counsel
Simon Laws

TRIAL PANEL I (Panel) hereby renders this decision on the Defence request for leave to appeal and/or reconsideration of the “Decision on the Defence request for leave to reopen its case”.

I. PROCEDURAL BACKGROUND

1. On 19 March 2024, the Panel rendered the “Decision on the Defence request for leave to reopen its case” (Impugned Decision), rejecting the Defence request to reopen its case to call W02540 to testify live.¹
2. On 26 March 2024, the Defence for Pjetër Shala (Defence and Accused, respectively) filed a request seeking leave to appeal and/or reconsideration of the Impugned Decision (Request).²
3. On 4 April 2024, following a shortening of the time limits,³ the Specialist Prosecutor’s Office (SPO) responded to the Request (Response).⁴ Victims’ Counsel did not file a response. The Defence did not file a reply.

II. SUBMISSIONS

A. DEFENCE

4. The Defence presents two alternative requests. First, the Defence requests certification to appeal the Impugned Decision on the following two issues (collectively, Two Issues):

¹ KSC-BC-2020-04, F00813, Trial Panel I, *Decision on the Defence request for leave to reopen its case*, 19 March 2024, confidential. A public redacted version was issued on the same day, [F00813/RED](#).

² KSC-BC-2020-04, F00823, Defence, *Request for Leave to Appeal and/or Reconsideration of the “Decision on the Defence Request for Leave to Reopen its Case”*, 26 March 2024, confidential. A public redacted version was filed on 2 April 2024, F00823/RED.

³ The Panel shortened the time limits for responses and reply by email; KSC-BC-2020-04, CRSPD168, Email from the Registry to the Parties and Victims’ Counsel communicating the Panel’s directions, 27 March 2024, at 13:34.

⁴ KSC-BC-2020-04, F00826, Specialist Prosecutor, *Prosecution response to Defence request for certification or reconsideration of F00823*, 4 April 2024, confidential.

- (i) Whether the Panel erred in fact and in law by declining to provide a remedy to the Accused for the serious violation of the Prosecution's disclosure obligations (First Issue); and
- (ii) 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 (Second Issue).⁵

5. The Defence submits that: (i) the Two Issues are appealable issues as they are sufficiently concrete, precise and arise directly from the Impugned Decision;⁶ (ii) the Two Issues significantly affect the fair and expeditious conduct of the proceedings, as well as the potential outcome of the trial, as they directly affect the Accused's fair trial rights, by depriving him of an effective remedy and of the ability to present a fulsome defence in the case that he is prevented from examining W02540;⁷ and (iii) an immediate resolution by the Appeals Panel of the Two Issues would materially advance the proceedings, as it would ensure that the proceedings are continuing in compliance with the fundamental guarantees of fairness.⁸

6. As regards the First Issue, the Defence submits, more specifically, that the Panel failed to provide any effective remedy to the violation of the disclosure obligations of the SPO.⁹ It advances that this violation caused serious prejudice to the Defence and merits immediate redress to avoid a miscarriage of justice.¹⁰

⁵ Request, para. 4.

⁶ Request, para. 16 *et seq.*

⁷ Request, paras 21-23 (on p. 8). The Panel notes that, when referring to page numbers, it has followed the original page numbering used by the Defence in the Request.

⁸ Request, paras 24-25 (on p. 8).

⁹ Request, paras 19, 21 (on pp. 4-5).

¹⁰ Request, paras 17, 21-23 (on pp. 4-5).

7. As regards the Second Issue, the Defence submits, more specifically, that the Panel erred in its assessment of the probative value of W02540's evidence and in considering the inconsistencies between said evidence and TW4-01's testimony to be minor.¹¹ According to the Defence, said inconsistencies are major and W02540's evidence contradicts the testimony of TW4-01, who is the most important SPO witness.¹² For the same reasons, the Defence further submits that the Panel erred in assessing W02540's evidence to be of limited relevance to the case.¹³ Finally, the Defence avers that reopening the case for the testimony of an additional witness would not violate the Accused's right to be tried without undue delay, but not doing so and therefore not allowing him to present exculpatory evidence would violate his rights.¹⁴ The Defence advances that the above errors have caused prejudice to the Accused, whose Defence was not able to use W02540's exculpatory evidence in the presentation of its case, resulting in a violation of the Accused's rights.¹⁵

8. Second, in the alternative, the Defence requests reconsideration of the findings in the Impugned Decision to prevent injustice.¹⁶

B. SPO

9. The SPO submits, in response, that the Request should be rejected as: (i) neither of the Two Issues constitutes an appealable issue, rather the Defence merely disagrees with the Impugned Decision and seeks to re-litigate issues already dismissed by the Panel;¹⁷ (ii) the Two Issues have no prospect of significantly affecting the fair and

¹¹ Request, paras 29, 31.

¹² Request, paras 29, 31.

¹³ Request, para. 32.

¹⁴ Request, para. 34.

¹⁵ Request, paras 31, 34.

¹⁶ Request, paras 5, 26 (on p. 9).

¹⁷ Response, paras 1-7.

expeditious conduct of the proceedings or the outcome of the trial;¹⁸ and (iii) an immediate appellate resolution would not materially advance the proceedings at this stage, but would instead unnecessarily prolong them.¹⁹ As regards the Defence's request for reconsideration, the SPO submits that the Defence has failed to demonstrate that the Panel's findings warrant reconsideration.²⁰

III. APPLICABLE LAW

10. The Panel notes Articles 21 and 45 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rules 77 and 79 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (Rules).

IV. ANALYSIS

A. REQUEST FOR LEAVE TO APPEAL

11. At the outset, the Panel incorporates by reference the standard for certification to appeal set forth in Article 45(2) of the Law and Rule 77(2) of the Rules and outlined in past decisions.²¹

12. The Panel notes that the Two Issues put forward by the Defence overlap as they both relate to the remedy to be provided to the Defence, if any, as a result of the SPO's non-compliance with its disclosure obligations. Accordingly, the Panel has considered them together.

¹⁸ Response, paras 8-10.

¹⁹ Response, paras 11-13.

²⁰ Response, paras 1, 14.

²¹ KSC-BC-2020-04, F00587, Trial Panel I, [Decision on the Defence's Request for Leave to Appeal and/or Reconsideration of F00538](#), 13 July 2023, public, paras 8, 11-12; F00401, Trial Panel I, [Decision on Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala](#), 24 January 2023, public, paras 13-20; F00116, Pre-Trial Judge, [Decision on Application for Leave to Appeal "Decision on Motion Challenging the Form of the Indictment"](#), 29 November 2021, public, paras 11-13.

13. The Panel finds that the Defence has failed to identify an appealable issue. In relation to both issues, the Defence is merely repeating arguments already made, considered and dismissed by the Panel. In relation to the First Issue, the Defence repeats that the late disclosure of W02540's evidence "has caused serious prejudice to the Defence" and the Panel has erred by not addressing or providing any (alternate) effective remedy.²² The Panel has considered this argument in the Impugned Decision and has found that, although W02540's evidence was disclosed late, "no prejudice was caused to the Defence" and therefore no further remedy was required, as the evidence was cumulative in nature, of limited relevance, and any inconsistencies between W02540's evidence and TW4-01's testimony were minor.²³ The Defence is mischaracterising the Impugned Decision²⁴ and simply disagreeing with the Panel's determination in an attempt to re-litigate this matter.

14. Similarly, in relation to the Second Issue, the Defence repeats that W02540's evidence contradicts the testimony of TW4-01, that there are "many discrepancies" between the two witnesses and that the discrepancies are "major".²⁵ Once again, these arguments have been considered by the Panel in the Impugned Decision. The Panel has explicitly dismissed the arguments finding that "– contrary to the Defence's submissions – the inconsistencies between W02540's evidence and TW4-01's testimony are minor and [...], in essence, W02540's evidence largely corroborates TW4-01's account".²⁶ Once more, the Defence is simply disagreeing with the Panel's determination and seeks to re-litigate this matter.

²² Request, paras 17, 19, 21.

²³ Impugned Decision, paras 19-21.

²⁴ The Panel notes that this is not the first time that the Defence has not accurately reflected the Panel's findings; see KSC-BC-2020-04, F00401, Trial Panel I, [Decision on Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala](#), 24 January 2023, public, paras 27, 40, 68; F00592, Trial Panel I, [Decision on the Defence request for certification to appeal the "Decision on the Specialist Prosecutor's requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules"](#), 17 July 2023, public, paras 20, 24.

²⁵ Request, paras 29, 31, 32.

²⁶ Impugned Decision, para. 20.

15. For these reasons, the Panel finds that the Two Issues do not constitute appealable issues arising from the Impugned Decision. As the first prong of the test is not met, the Panel does not find it necessary to address the remaining requirements under Article 45(2) of the Law and Rule 77(2) of the Rules and rejects certification for the Two Issues.

B. REQUEST FOR RECONSIDERATION

16. At the outset, the Panel recalls that for an application for reconsideration pursuant to Rule 79 of the Rules to succeed, the moving party or participant must demonstrate either (i) the existence of a clear error of reasoning or (ii) that reconsideration is necessary to avoid injustice. New facts and arguments arising since the Impugned Decision was rendered may be relevant to this assessment. Given its exceptional character, reconsideration may not be invoked as an ordinary remedy (such as “a second appellate route”) to redress imperfections in a decision or to circumvent unfavourable consequences. Hence, mere disagreement with the outcome or with the reasoning of a decision is not sufficient for that decision to be reconsidered.²⁷

17. The Panel observes that the Defence does not provide any (further) reasoning for the requested reconsideration, other than its reasons in support of the request for leave to appeal. The Defence does not engage any further with the legal test under Rule 79 of the Rules, to demonstrate either a clear error of reasoning or a valid reason for the Panel to reconsider the Impugned Decision in order to avoid injustice, but rather simply expresses its disagreement with the findings of the Panel. Accordingly, the Panel finds that the Request also fails to meet the legal test under Rule 79 of the Rules for the same reasons as provided above with regard to the legal test under Article 45(2) of the Law and Rule 77(2) of the Rules concerning certification.

²⁷ KSC-BC-2020-04, F00587, Trial Panel I, [Decision on the Defence's Request for Leave to Appeal and/or Reconsideration of F00538](#), 13 July 2023, public, para. 23 and references therein.

18. For the foregoing reasons, the Panel also rejects this part of the Request.

V. DISPOSITION

19. For the above-mentioned reasons, the Panel hereby:

- a. **REJECTS** the Request; and
- b. **ORDERS** the Registry to reclassify the Response (filing F00826) as public.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Thursday, 11 April 2024

At The Hague, the Netherlands.