

In: KSC-SC-2024-03
The Specialist Prosecutor v. Mr. Salih Mustafa

Before: The President of the Kosovo Specialist Chamber
Judge Ekaterina Trendafilova

Registrar: Fidelma Donlon

Filing Participant: Defence of Salih Mustafa

Date: 9 December 2024

Language: English

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**Defence Request for Protection of Legality
pursuant to Article 48 (6) to (8) of the Law and Rule 193 of the Rules
with Public Annex 1**

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I. INTRODUCTION

1. Pursuant to Article 32 of the Constitution of the Republic of Kosovo (“Kosovo Constitution”), Articles 48(6) to 46(8) of the Law on Specialist Chambers and Specialist Prosecutor’s Office No 05/L-053 (“Law”) and Rule 193 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), the Defence for Mr. Salih Mustafa (“Accused”) files this Request for Protection of Legality following the Decision of the Panel of the Court of Appeals Chamber (“AP”) of 10 September 2024 (“Decision on New Determination of Salih Mustafa’s Sentence, hereinafter also referred to The New Determination of Sentence Decision.”)¹
2. Mustafa seeks a finding of the existence of violations of law in the New Determination of Sentence Decision for Count 4 (murder) and that the Supreme Court will modify the impugned decision, or alternatively, return the case for a new decision to the competent panel.
3. Mustafa submits that the Appeals Panel made an incorrect interpretations and application of the Law and a provision of the Constitution as enumerated in the Grounds hereinunder.
4. Mustafa’s present Request for Protection of Legality is limited. Mustafa seeks that the imposed punishment regrading count 4 (murder) be modified to a lower punishment for that crime.
5. Pursuant to Art.48 (6)-(8)-of the Law and Rule 193-and-194-of the Rules, Mustafa hereby requests:

¹ KSC-CA-2023-02/ F00045, Decision on New Determination of Salih Mustafa’s Sentence, 10 September 2024

- a)-protection of legality against the Appeals Panel's Decision on New Determination of Salih Mustafa's Sentence insofar that decision imposes a 15-year prison term for the crime of murder, and therefore,
- (b)-the modification of the impugned Decision, or the impugned Decision is annulled in whole or in part and the sentence for Count 4 is lowered.

II. PROCEDURAL BACKGROUND

6. On 16 December 2022, the Trial Panel delivered the Trial Judgment, convicting Mustafa of the war crimes of arbitrary detention to 10 years (Count 1), for torture to 22 years (Count 3) and for murder (Count 4) to 25 years, and imposed a single sentence of 26 years of imprisonment, with credit for time served.²
7. On 16 December 2023 the AP rendered an Appeal Judgment against Mustafa, affirming the Judgment of the First Instance Court and commuting the sentence from 26 years of imprisonment to: 8 years (count 1), 20 years (count 3) and 22 years (count 4) and an overall sentence of 22 years of imprisonment with credit for time served.³
8. On 29 July 2024, a Panel of KSC Supreme Court Chamber rendered its Decision on Salih Mustafa's Request for Protection of Legality.⁴ The Supreme Court Chamber returned the case to the Appeals Panel for a New Determination of Mr. Mustafa's sentence pursuant to Rule 194 (1) (b) of the Rules.⁵
9. On 10 September 2024, a Panel of the Court of Appeals Chamber rendered, following the Supreme Court guidance, its Decision on New Determination of Salih Mustafa's Sentence.⁶

² Trial Judgment, paras 828-831, KSC-BC-2020-05/F00494

³ Appeal Judgment. Paras 480 and 484, KSC-CA-2023-02/F00038

⁴ F00018/, Decision on Salih Mustafa's Request for Protection of Legality, 29 July 2024, KSC-SC-2024-02

⁵ Ibid, paragraph 112

⁶ F00045, Decision on New Determination of Salih Mustafa's Sentence, 10 September 2024, KSC-CA-

10. On 27 September 2024, Salih Mustafa filed his Referral to the Specialist Chamber of the Constitutional Court concerning the violations of Mr. Salih Mustafa's fundamental rights guaranteed under Articles 22, 31 and 33 of the Constitution of the Republic of Kosovo and Articles 6 and 7 of the European Convention on Human Rights.⁷
11. The Constitutional Court has to date not yet made any decision on Mustafa's Referral. Proceedings have been concluded on 29 November 2024 and Mustafa is thus awaiting a decision of the Specialist Chamber of Constitutional Court
12. The present Request for Protection of Legality Challenges a partial, but final, decision of the Appeals Panel Decision on New Determination of Salih Mustafa's Sentence.

III. APPLICABLE LAW

13. Mustafa requests Protection of Legality Pursuant to Article 48 (6) (8) of the Law and Rule 193 of the Rules.
14. The right to request Protection of Legality under Art. 48-Law ensures the protection of rights protected under the Constitution or European Convention on Human Rights and Fundamental Freedoms (ECHR).⁸
15. Article 48 (6) of the Law and Rule 193 (1) of the Rules provide that any request for protection of legality must be filed with the President of the KSC within ninety (90) days of the final decision or judgment against which protection of legality is sought.

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⁷ F00001, KSC-CC-2024-27, Referral to the Constitutional Court Panel concerning the violations of Mr. Salih Mustafa's fundamental rights guaranteed under Articles 22, 31 and 33 of the Constitution of the Republic of Kosovo and Articles 6 and 7 of the European Convention on Human Rights, 27 September 2024.

⁸ Article 48 of the Law and Article 32 of the Constitution of the Republic of Kosovo.

16. The Panel of Court of Appeals rendered its Decision on New Determination of Sentence on Salih Mustafa's on 10 September 2024. The Court of Appeals Decision is final. Mustafa's present request, based on Article 48 (6) (8) of the Law, is within three months of this final judgment.
17. A protection of legality request, under Article 48 (7), must allege, among others:
 - (a)-A violation of the criminal law contained within this Law; or
 - (b)-A substantial violation of the procedures set out in this Law and in the KSC Rules.
18. A procedural violation must be "substantial", i.e. one which materially affects the judicial finding.
19. Art.48 (7) (a)-Law does not require that a violation of the criminal law is substantial.
20. A substantial violation of procedure exists if the Court in its Judgment did not fully adjudicate the substance of the charge or the Judgment was not drawn up in accordance with the relevant procedural code.
21. Rule 159 (6) specifies that if the Panel finds the accused guilty of one or more crime(s), it shall determine the appropriate sentence to impose on the accused with the pronouncement of the trial judgment, unless, having heard the parties, the Panel decides to proceed in accordance with Rules 162 and 164.
22. Rule 173 provides the right to appeal a judgment and is, via Rule 186, applied *mutatis mutandis* to appellate proceedings before the Supreme Court Panel.

23. A request for protection of legality will be well-founded where the impugned judgment does not give sufficiently clear and consistent reasons or fails to address key evidence. It must be clear from the decision that the essential issues of the case have been addressed and the grounds for the decision indicated with sufficient clarity.
24. Rule 194 (1) provides that where the Supreme Court grants a request by the Accused, it shall, among others:
- (a)-Modify the impugned judgment;
 - (b)-Annul in whole or in part the judgment and return the case for a retrial to the competent Panel;
25. Mustafa seeks that, regarding Count 4 (murder), the imposed sentence of the impugned Decision on New Determination of Sentencing, be modified by the Supreme Court or be annulled in whole or in part.

IV. LEGAL GROUND

Ground I- Violation of Article 44 (2) (a) and (5) of the Law, and Article 33 (3) of the Constitution with regard to the imposed prison sentence for Count 4 (murder) as laid down in the Decision on New Determination of Sentencing

26. Mustafa seeks in the present Request for Protection of Legality a reversal or modification of the sentence of 15 years that was imposed upon him for the crime of murder for which he was found guilty. Mustafa submits that Article 44 (2) (a) of the Law was not applied correctly, or alternatively, the AP failed to apply the said article in accordance with Article 33 (3) of the Constitution and that the Article 33 (3) of the Constitution, as such, was not applied at all when the Appeals Panel anew determined the punishment for Mustafa of Count 4.

27. Article 33 (3) of the Constitution reads: *“the degree of punishment cannot be disproportional to the criminal offence.”*⁹ Mustafa submits that his constitutional right was violated.
28. Mustafa submits that the imposed punishment of 15 years for Count 4 (murder) is disproportionate to the criminal offence of which he was found guilty. He submits that the Appeals Panel in its New Determination of the Sentence regarding Count 4 violates the provision of Article 33 (3) of the Constitution. Mustafa is constitutionally protected under this provision from a disproportionate sentence.
29. In the first Appeals Panel Decision,¹⁰ the Appeals Panel confirmed the Decision of the Trial Chamber regarding Count 4. For the sake of clarity some of the Trial Panel’s as well as Appeals Panel’s considerations are going to be cited hereunder.
30. The Trial Panel I considered in its judgment regarding the Count 4 (murder) the following:
- “In its factual findings on Count 4, the Panel found that the only reasonable conclusion as to the death of the Murder Victim is that he was killed between on or around 19 April 1999 and around the end of April 1999, as a result of the combination between: (i) the severe mistreatment inflicted by BIA members who detained him, causing serious bodily harm; (ii) the denial of medical aid by BIA members; and (iii) gunshot wounds caused by bullets, in respect of which the Panel has established that there exists a reasonable doubt as to their attribution to the BIA members or to the Serbian forces. The Panel also established in its factual findings that the causes of death mentioned under (i) and (ii) above constitute substantial causes of the Murder Victim’s death and are attributable to the Accused, in the context of his decisions to neither release nor evacuate the Murder Victim, and irrespective of whether the Murder Victim was hit by one or more Serbian bullets”¹¹.*

⁹ Article 33 (3) of the Constitution of the Republic of Kosovo

¹⁰ KSC-CA-2023-02/F00038, Appeal Judgment dated on 14 December 2023

¹¹ KSC-BC-2020-05/F00494, Trial Judgment, dated on 16 December 2022, Paragraph 689.

“In this respect, in its factual findings on Count 4, the Panel has found that the only reasonable conclusion, on the basis of the evidence taken as a whole, is that: (i) the decisions not to release or evacuate the Murder Victim could only have been made by the Accused, in his capacity as overall commander of the BIA at the ZDC; and (ii) the Accused’s decision not to release the victim, as executed by his BIA subordinates, jointly with the decision not to evacuate him, effectively equalled a decision to kill the Murder Victim, considering that the other detainees walked away from the ZDC while the Murder Victim remained in detention and was denied a last opportunity to be saved.”¹²

“All these circumstances taken together, lead the Panel to believe that the only reasonable conclusion, based on the evidence, is that through the acts and omissions attributable to the Accused and his BIA subordinates, they intended to kill the Murder Victim, thus establishing the requisite mental element for murder as a war crime”.¹³

31. Mustafa appealed the Judgment of the Trial Panel I. In Mustafa’s appeal he complained about Count 4. In his complaint the substantial cause of death was one of the issues. The substantial cause of death is not at issue in this Request for Protection of Legality. However, the considerations of the Appeals Panel at the time are relevant for the current Request, and are therefore for reasons of clarity cited hereunder.

The Appeals Panel considered the following:

“Turning to Mustafa’s argument that there can only be one cause of death, the Appeals Panel considers that Mustafa appears to confuse medical cause of death with legal causation. The Panel is of the view that, based on the principle of free evaluation of evidence, it is not necessary for a trial panel to be satisfied beyond reasonable doubt as to the medical cause of death (or even for the body of the victim to be recovered). As it concerns legal causation, there may be, and there often is, more than one cause leading to a harmful result and more than one person to whom the law may attribute that result. The Appeals Panel therefore dismisses this argument”¹⁴.

¹² Ibid, paragraph 692

¹³ Ibid, paragraph 695

¹⁴ KSC-CA-2023-02/F00038, Appeal Judgment dated on 14 December 2023, Paragraph 350

“Concerning Mustafa’s argument that death due to ill-treatment or denial of medical care does not amount to the “criminal offence of murder”, the Appeals Panel notes that it is well-established in the jurisprudence of international courts and tribunals that both acts and omissions resulting in the death of a person may qualify as murder. Ill-treatment and denial of medical care are no different than any other act or omission. What is required is that the perpetrator’s conduct substantially contributes to the victim’s death, without having a supervening event superseding this substantial causal contribution. The Appeals Panel therefore dismisses this argument.”¹⁵

“In this regard, the Appeals Panel observes that Mustafa’s conviction for the war crime of murder was not based on attribution of the bullet hole to him or to his BIA subordinates, as the Trial Panel found reasonable doubt as to its attribution. Instead, it was based on the attribution of the severe mistreatment inflicted on the Murder Victim and the denial of medical aid. The Panel therefore dismisses Mustafa’s arguments in this regard”.¹⁶

“In this regard, the Panel notes that the approximate time of death was a material fact pleaded in the Indictment, namely the SPO alleged that Mustafa was individually criminally responsible for the death of the Murder Victim between approximately 19 April 1999 and around the end of April 1999. The Trial Panel found that: (i) the Murder Victim was last seen alive by his co-detainees at the ZDC, in a near-to-death state, on or around 19 April 1999, having been denied medical care after suffering an extreme level of mistreatment by BIA members for about 19 days in detention, including with a potentially lethal object; (ii) the Murder Victim was not released from the ZDC on or around 19 April 1999 when other detainees were released; (iii) at some subsequent point in time, prior to when some BIA members returned to Zllash/Zlaš, on or around 20 to 21 April 1999, 954 Serbian forces shelled and fired at the ZDC, at least from a distance, causing damage to its infrastructure; and (iv) the Murder Victim was found dead between approximately 3 and 6 July 1999, buried between 100 and 300 meters away from the ZDC. On the basis of these findings, the Trial Panel concluded that the Murder Victim died between on or around 19 April 1999 and around

¹⁵ Ibid, paragraph 352

¹⁶ Ibid, paragraph 353

the end of April 1999. The Appeals Panel considers that, depending on the facts of a case, a precise determination of the time of death may be necessary in order to attribute responsibility to an accused. Yet, in this case, a more precise determination of the time of death than the one given was not necessary for the purpose of attribution. Mustafa fails to show why it should have been necessary and that no reasonable trial panel could have found that Mustafa's conduct satisfied the actus reus of murder in the absence of such a finding. The Panel therefore dismisses this argument".¹⁷

32. As can be clearly seen from consideration of both the Trial Panel and Appeals Panel, the following can be concluded:
- a) Mustafa was not a direct perpetrator in the sense that it was he himself who took the life of the murder victim.
 - b) The killing of the murder victim was attributed to Mustafa.
 - c) The attribution to the Accused, was in the context of his decisions to neither release nor evacuate the Murder Victim.¹⁸
 - d) The victim's death was determined through several indirect causes of death.
 - e) Even though the date of death was not established, the eventual death was nevertheless attributed to Mustafa, even as he was not present anymore at the time of the victim's death.
 - f) Even though it was established that the victim was severely mistreated and was denied medical aid, this nevertheless must be distinguished from a situation in which a perpetrator is personally involved in the taking of one's life and does so knowingly and purposely.
 - g) The gravity of an act of personally taking one's life on the one hand, while on the other hand denying medical aid or not to release someone, is entirely different.

¹⁷ Ibid 354

¹⁸ KSC-BC-2020-05/F00494, Trial Judgment, dated on 16 December 2022, Paragraph 689

Therefore, this must be weighed differently when considering the punishment to be imposed on the accused.

- h) The difference as indicated above regarding the actions of the perpetrator must result in a differentiation concerning the proportionality of the eventual punishment that would be imposed upon the perpetrator. To the least, the perpetrators *modus operandi* must have an impact with regard as to manner in which the crime was committed and, as a result of it, the degree of the punishment in relation to the crime. Such punishment cannot be disproportionate.
- i) When considering the issue of proportionality of a punishment, the number of murdered victims must also be taken into account.

33. In the case for which Mustafa was found guilty, the murder under Count 4 involved as single human being.

34. After a Supreme Court Decision on unrelated matters the case was sent back to the Appeals Panel and a new decision regarding the punishment of Mustafa was rendered.

35. The Appeals Panel, in its new determination of the sentence on Mustafa did not weigh any of the above-mentioned factors when it imposed a 15 years sentence on Mustafa for count 4. As Article 3 (2) (a) of the Law stipulates that the Specialist Chambers shall adjudicate and function in accordance with Constitution of the Republic of Kosovo, the Appeals Chamber Decision regarding Count 4 is not in accordance with Article 33 (3) of the Constitution. Mustafa is protected by that Article of the Constitution and the Appeals Chamber did not apply the article for the purpose on the New Determination of Mustafa's Sentence.

36. As noted earlier in the present document, the vast majority of jurisprudence in Kosovo, regarding the same crime, is far more lenient. Where a punishment as high as 14 years of imprisonment was ever imposed, it involved multiple murdered victims with a perpetrator directly committing the taking of human lives. In cases where it involved a single murder victim, the imposed punishment was much lower. In case Mustafa would have been prosecuted in regular Kosovo courts for the same crime he most probably would have received a lower sentence. This discriminates Mustafa *vis-a-vis* other people who committed the same crime in the same period within the same armed conflict.¹⁹
37. In sum, Mustafa would have been better off when he would have been tried for the same crimes in Kosovo. Instead, he was prosecuted more than 20 years after the events took place while other accused persons were prosecuted and punished earlier on. The delay of this late prosecution was not discounted in any manner but should have resulted in a less disproportionate punishment.
38. Mustafa submits that the punishment of 15 years for a single murder in which he has not been found guilty as a direct perpetrator, is disproportionate.
39. The Appeals Panel imposed a punishment that violates the constitutional right of Mustafa under Article 33 (3) of the Constitution. Thus, the Appeals Panel in its New Determination of Mustafa's Sentence ventured outside the boundaries of imposing a punishment that is considered proportionate in relation to the criminal offence.

¹⁹ See the Kosovo case-law on war crimes added as Annex 1 to the present document: **Prosecutor v. Goran Stanisić** (Pml.nr.26/2023); **Prosecutor vs. Zoran Djokic** (PS.nr. 15/19); **Prosecutor v. Zlatan Krstić and Destan Shabanaj** (PS.nr.76/2019); **Prosecutor vs. Zoran Kolić** (P 408/11); **Prosecutor v. Fahredin Gashi and Hysri Rama** (Pml.Kzz 157/2014); **Prosecutor vs. Remzi Shala** (P.nr.181/2016); **Prosecutor v. Idriz Gashi-Galani** (Ap-Kz-108/2010); **Sabit Tafil Geci et al** (PAKR 55/14).

40. Therefore, the sentence that it is to be imposed with regard to Count 4 (murder) is to be modified. The modification must entail a lower sentence to be imposed for this count.
41. As a result of the modification mentioned above, the overall sentence imposed upon Mustafa is to be modified to a lower overall sentence as well. This is because the overall sentence apparently connects to imposed sentence for the murder.
42. Mustafa requests that the Supreme Court will suspend any decision in this matter until the constitutional court has rendered its decision in Mustafa's Referral to the Constitutional Court of 27 September 2024.

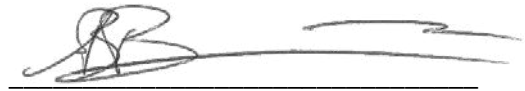
V. CONCLUSION

43. In light of the above, it is submitted that the Supreme Court should modify the Decision of the Appeals Panel so as to:
- (i) Grant Ground 1 of the present Request;
 - (ii) Reduce the sentence imposed for Count 4 to a lower sentence (with credit for time served);
 - (iii) Reduce the overall sentence that was imposed.

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At The Hague, the Netherlands



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