

In: KSC-CA-2024-03
The Specialist Prosecutor v. Pjetër Shala

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

Registrar: Fidelma Donlon

Date: 6 January 2025

Filing Party: Specialist Counsel for Pjetër Shala

Original language: English

Classification: Public

**Public Redacted Version of Defence Motion to Present Additional Evidence
Pursuant to Rule 181**

Specialist Prosecutor’s Office

Kimberly P. West

Counsel for Victims

Simon Laws

Maria Radziejowska

Specialist Defence Counsel

Jean-Louis Gilissen

Hédi Aouini

Leto Cariolou

I. INTRODUCTION

1. Pursuant to Rules 138 and 181 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), the Defence for Mr Pjetër Shala (“Defence”) seeks leave to call W04264, [REDACTED], as a Defence witness, to provide evidence before the Court of Appeals Panel and the transcripts and notes related to the witness’s testimony in other cases and interviews as additional evidence to be considered on appeal.

II. PROCEDURAL HISTORY

2. On 9 December 2024, the Prosecution disclosed Disclosure Package 2 under Rule 103 of the Rules. The disclosure package, which includes 20 items, contains the English and Albanian transcripts of the Prosecution’s interview of W04264, [REDACTED], in [REDACTED], and two Prosecution witness [REDACTED] notes relating to [REDACTED] dated [REDACTED].
3. On the same date, the Defence requested, *inter partes*, the Prosecution to immediately disclose: (i) the transcript of the [REDACTED] testimony of [REDACTED] in [REDACTED]; (ii) his interview with the [REDACTED] in [REDACTED], SITF00010487-SITF00010508, as referred to in the Prosecution witness [REDACTED] note 1;¹ and (iii) all other statements and testimonies of W04264 in the Prosecution’s possession, considering that Disclosure Package 2 was disclosed as exculpatory material under Rule 103 of the Rules and that in the Trial Judgment, [REDACTED] is named as member of the alleged joint criminal enterprise in which Mr Shala allegedly participated.²

¹ 123558-123568, para. 1.

² Email from the Defence to the Prosecution, 9 December 2024, 17:22. *See* KSC-BC-2020-04, F00847, Trial Judgment and Sentence with one confidential annex, 16 July 2024 (confidential) (“Trial Judgment”), paras [REDACTED].

4. On 10 December 2024, the Defence requested the Panel to: (i) find that the Prosecution failed to comply with its disclosure obligations and (ii) order the Prosecution to conduct a comprehensive review of the evidence in its possession and disclose without any delay all additional material relevant to the Defence case.³
5. On 13 December 2024, the Prosecution disclosed Disclosure Package 3 under Rule 102(3) of the Rules, which contains eight items further to the Defence *inter partes* request dated 9 December 2024.⁴
6. On 17 December 2024, the Defence requested, *inter partes*, the Prosecution whether it could contact [REDACTED] and request his authorisation for sharing his contact details with the Defence team.⁵
7. On 18 December 2024, the Prosecution responded to the Defence that it would be able assist the Defence; however, for reasons of confidential nature connected to [REDACTED], the Prosecution was unable to do this immediately at the time. The Prosecution anticipated that it would be in the position to contact the witness, at the latest, by mid-January and inform the Defence about the witness's position as soon as possible thereafter.⁶
8. On 19 December 2024, the Prosecution responded to the Defence request for an order to disclosure and related requests, requesting the Panel to dismiss the Request.⁷

³ KSC-CA-2024-03, F00030, Defence Request for Order to Prosecution to Disclose Rule 103 Material and Finding of Violation of Disclosure Obligations by the Prosecution, 10 December 2024 (confidential) ("Request").

⁴ Email from the Prosecution to the Defence, Victims' Counsel, and Court Management Unit of the Registry, 13 December 2024, 15:23. All further references to filings in this Motion concern Case No. KSC-CA-2024-03 unless otherwise indicated.

⁵ Email from the Defence to the Prosecution, 17 December 2024, 14:11.

⁶ Email from the Prosecution to the Defence, 18 December 2024, 20:12.

⁷ F00031, Prosecution Response to Defence Request for order to disclose and related requests, 19 December 2024 (confidential), paras 1, 17(a) and (b).

III. APPLICABLE LAW

9. Rule 181 of the Rules provides that:

- (1) [a] Party [...] may apply by motion to present additional evidence before the Court of Appeals Panel, identifying with precision the specific factual finding of the Trial Panel to which the additional evidence is directed. Such motions shall be filed within thirty (30) days of the Brief in Reply, unless a delay is justified on showing of good cause.
- (2) [...].
- (3) Where the Court of Appeals Panel finds that the additional evidence was not available at the time of trial and could not have been discovered with the exercise of due diligence, it shall determine whether it could have been a decisive factor in reaching a decision at trial and render a decision. Rule 138 shall apply *mutatis mutandis*.

10. Rule 138(1) of the Rules provides that:

[u]nless challenged or *proprio motu* excluded, evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect. In exceptional circumstances, when the Panel is satisfied that an issue was not known at the time when the evidence was submitted, it shall be raised immediately after it has become known.

IV. SUBMISSIONS

11. The Defence seeks leave to call W04264, [REDACTED], as a Defence witness, as well as the admission of the following material relating to [REDACTED], pursuant to Rule 181 of the Rules:

- a. 054739-TR-ET Parts 1-9 RED and 054739-TR-AT Parts 1-9 Revised RED: Redacted version of SPO Transcript of [REDACTED] dated, [REDACTED];
- b. 123558-123568: [REDACTED] Note 1;
- c. 123569-123574: [REDACTED] Note 2;
- d. 054664-054703 RED and 054664-054703-AT RED: Redacted version of [REDACTED], Record of Witness Hearing of [REDACTED] during Main

trial in the case against [REDACTED], dated [REDACTED], [REDACTED];

- e. 054704-054734 RED and 054704-054734-AT RED: Redacted version of [REDACTED], Record of the Witness hearing of W04264 in the main trial against [REDACTED], dated [REDACTED], re: [REDACTED], [REDACTED] ([REDACTED] case);
- f. SPOE00067205-SPOE00067208-ET RED and SPOE00067205-00067208 RED: Redacted version of [REDACTED], Record of Witness Interview of W04264, [REDACTED];
- g. SITF00010509-SITF00010563: Collection of documents including extract of KLA "Manual on Procedure Implementation towards the detainees", EULEX Photo Line-ups and other KLA Judgments and Ordinances, dated [REDACTED]; and
- h. SITF00010487-SITF00010508 RED: Redacted version of [REDACTED], Signed record of witness hearing of W04264 in case against [REDACTED] ([REDACTED]), dated [REDACTED].

- 12. The Proposed Evidence contains the English and Albanian versions of testimony, witness statements, and witness [REDACTED] notes relating to [REDACTED].
- 13. The Defence seeks leave to call W04264, [REDACTED], as a Defence witness, and have the Proposed Evidence admitted as it meets the requirements of Rules 181 and 138 of the Rules. The Proposed Evidence meets the relevant requirements, specifically it: (i) is relevant to the proceedings; (ii) is *prima facie* reliable and contains sufficient indicia of authenticity; and (iii) has probative value which is not outweighed by its prejudicial effect.

14. The Request is filed within thirty days of the anticipated Brief in Reply, as required by Rule 181(1) of the Rules. Due to the late disclosure of the Proposed Evidence by the Prosecution, it was not available at the time of trial and could not have been discovered by the Defence with the exercise of due diligence, as required by Rule 181(3) of the Rules.
15. In addition, the Proposed Evidence is relevant to the Defence case. It is important material relating to the alleged JCE in which Mr Shala allegedly participated in and it is also very relevant for assessing and effectively undermining the credibility of [REDACTED], who was a core Prosecution witness in this case.⁸ In the Trial Judgment, the Trial Panel found [REDACTED] to be a member of the Kosovo Liberation Army involved with the detainees at the Kukës Metal Factory on the basis of the evidence of [REDACTED].⁹ In particular, the Trial Panel relied on the evidence of [REDACTED] that [REDACTED], whom he had described as [REDACTED], had questioned him while he had been detained at the KMF.¹⁰ The Trial Panel held that [REDACTED] had participated in the interrogation of detainees at the KMF and in establishing and maintaining the conditions of detention at the KMF.¹¹
16. [REDACTED] is the only witness who mentioned [REDACTED] as having been involved with the detainees at the KMF. His highly incriminating evidence, which was decisive for a number of findings on which Mr Shala's convictions were based is inconsistent and substantially undermined by the Proposed Evidence. [REDACTED] mentioned having seen [REDACTED] on various occasions in Kukës; however, the evidence of [REDACTED] shows that from 5

⁸ See Request, paras 14-17.

⁹ Trial Judgment, para. [REDACTED]. See also Request, para. 14.

¹⁰ Trial Judgment, paras [REDACTED]. See also Request, para. 14.

¹¹ Trial Judgment, paras [REDACTED]. See also Request, para. 14.

April 1999 onwards, he was based in [REDACTED].¹² He never even mentioned Kukës in any of the statements. In his statements, [REDACTED] provided clear and forthcoming evidence, including potentially incriminating information such as having seen two Serbian prisoners in [REDACTED] where one of the soldiers was deceased and the other had been beaten.¹³ Furthermore, [REDACTED] admitted regularly having visited the [REDACTED] prison.¹⁴ There is no reason for [REDACTED] to have been open and honest about the prison in [REDACTED] and his role there while, at the same time, hide information regarding his presence and involvement with detainees at the KMF. In fact, [REDACTED] voluntarily disclosed that there was a point at the border of Albania, on the Albanian side, which examined the incoming and exiting soldiers, stating however that he did not know whether it was a prison.¹⁵ [REDACTED] explained that he had not physically been there; however, he had intervened and secured the release of FARK soldiers detained at the location via telephone.¹⁶ Furthermore, while [REDACTED] was accused of being a [REDACTED],¹⁷ the Proposed Evidence indicates that [REDACTED] never “adjudicated” “any cases of collaboration” which further undermines [REDACTED] decisive evidence on this point.¹⁸

17. Moreover, the evidence of [REDACTED] is relevant to assessing Mr Shala’s alleged presence and participation in alleged crimes at the KMF.¹⁹ The Trial Panel found that, “[REDACTED], and that “[REDACTED]”.²⁰ This is directly contradicted by [REDACTED]’s statement to the Prosecution in which he stated

¹² 054664-054703 RED, pp. 7, 35.

¹³ SITF00010487-SITF00010508 RED, p. 5; 054664-054703 RED, p. 17.

¹⁴ SITF00010487-SITF00010508 RED, p. 3.

¹⁵ 054739-TR-ET Part 3 RED, p. 10; 054739-TR-ET Part 6 RED p. 8.

¹⁶ 054739-TR-ET Part 3 RED, p. 10; 054739-TR-ET Part 6 RED, pp. 7-10.

¹⁷ Trial Judgment, para. [REDACTED].

¹⁸ 054739-TR-ET Part 9 RED, p. 11.

¹⁹ See Request, para. 15.

²⁰ Trial Judgment, para. [REDACTED]. See also Request, para. 15.

that he never interviewed a suspect together with a commander or a member of the Headquarters.²¹ The Proposed Evidence directly contradicts the evidence of [REDACTED] and further raises doubts as to the credibility of the witness whose evidence, as Defence raised in its Final Trial Brief, shows a clear pattern of fabrications and is unreliable.²²

18. The Proposed Evidence is also relevant to the findings on and conviction of arbitrary detention in the Trial Judgment. The Trial Panel found that while held at the KMF, detainees were not brought promptly before a judge or other competent authority and were not provided with an opportunity to challenge the lawfulness of their detention.²³ Neither [REDACTED] nor any other KLA member exercised the function of a “judge” or “competent” authority for the purposes of meeting this procedural guarantee.²⁴ However, in his statement to the Prosecution, [REDACTED] explained that with the establishment of the Directorates, the KLA started to operate consistently with the laws of war.²⁵ [REDACTED] stated that as [REDACTED].²⁶ Furthermore, [REDACTED] confirmed that “commanders on any level, they had no authority to deal with cases of collaboration” and that he had never adjudicated such a case.²⁷ [REDACTED] additionally stated that [REDACTED].²⁸ The Proposed Evidence shows that KLA members did in fact made efforts to ensure adequate adherence to the laws of war and respect procedural rights of detainees.

²¹ 054739-TR-ET Part 5 RED, p. 25.

²² KSC-BC-2020-04, F00821, Defence Final Trial Brief, 25 March 2024 (confidential), paras. [REDACTED].

²³ Trial Judgment, para. 948.

²⁴ Trial Judgment, para. 948.

²⁵ 054739-TR-ET Part 2 RED, p. 6.

²⁶ 054739-TR-ET Part 2 RED, p. 10; 054739-TR-ET Part 5 RED, p. 9.

²⁷ 054739-TR-ET Part 5 RED, p. 9; 054739-TR-ET Part 9 RED, p. 11.

²⁸ 054664-054703 RED, p. 9; SITF00010509-SITF00010563, p. 2: Article 1.

19. Third, the Proposed Evidence meets the threshold for *prima facie* reliability and is sufficiently authentic. With regard to 054739-TR-ET Parts 1-9 RED and 054739-TR-AT Parts 1-9 Revised RED, the transcripts were provided to the Defence by the Prosecution and are *verbatim* transcripts from an interview the Prosecution conducted with [REDACTED] in [REDACTED]. The transcript records the date and place where the interview took place and the persons present during the questioning.²⁹ The transcripts are not signed by the witness. However, the Defence understands that the Prosecution generates transcripts from audio-video recordings of witness interviews, and that these recordings are signed by the Prosecution and the witness at the end of the interviews.³⁰
20. Documents 123558-123568 and 123569-123574 are the Prosecution's witness [REDACTED] notes with [REDACTED] in [REDACTED]. The notes are dated, contain the official SPO heading, include attestation that the information in the notes was read to [REDACTED], who confirmed it reflected his account fully and accurately and is signed by a representative of the Prosecution.
21. Documents 054664-054703 RED, 054664-054703-AT RED, 054704-054734 RED, 054704-054734-AT RED, and SITF00010487-SITF00010508 RED are transcripts of the statements and testimony of [REDACTED] before the [REDACTED] in [REDACTED] and [REDACTED]. The Trial Panel has previously held that transcripts of witness statements or testimony before the [REDACTED] satisfy the standard for *prima facie* reliability and sufficient authenticity.³¹ There is nothing in this evidence suggesting that a departure from this standard is warranted as the statements and testimony were taken before a [REDACTED].

²⁹ 054739-TR-ET Part 1 RED, p. 1.

³⁰ See KSC-BC-2020-04, F00546, Prosecution application for the admission of TW4-01's evidence pursuant to Rule 153 with confidential Annex 1, 14 June 2023 (confidential), para. 22.

³¹ KSC-BC-2020-04, F00562, Decision on the Specialist Prosecutor's motion for admission of evidence pursuant to Rule 155 of the Rules, 4 July 2023 (confidential), para. 47.

22. Document SITF00010509-SITF00010563 is an associated exhibit of SITF00010487-SITF00010508 RED and contains handwritten notes indicating that the document is an attachment of the record of witness interview of [REDACTED] in [REDACTED], with each page containing the signature of the interviewing prosecutor in question.
23. Documents SPOE00067205-SPOE00067208-ET RED and SPOE00067205-00067208 are records of the witness statement given by [REDACTED] to the [REDACTED]. The document contains the date and place of the statement, an official stamp of the [REDACTED], and signatures of the persons present during the questioning.
24. Finally, the Defence submits that the probative value of the evidence is not outweighed by any prejudicial effect. The Proposed Evidence contradicts evidence provided by [REDACTED] and is relevant to Grounds 6, 9 and 12 in the Defence Appeal Brief.³² Any prejudice caused to the Prosecution is negligible and is outweighed by the probative value of the evidence.

V. CLASSIFICATION

25. Pursuant to Rules 82(3) of the Rules, the Motion is filed as confidential as it contains confidential information. The Defence will file a public redacted version of the Motion in due course.

VI. RELIEF REQUESTED

26. The Defence respectfully requests the Appeals Panel to grant leave for the Defence to call W04264, [REDACTED], as a Defence witness as well as have the Proposed Evidence identified in paragraph 9 of the Motion admitted as additional evidence on appeal, and to be permitted to present additional

³² See Request, para. 17.

written and oral submissions on the Proposed Evidence and its impact on the case on appeal at the appropriate time after the admission of the evidence.

Word count: 2761

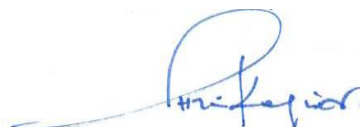
Respectfully submitted,



Jean-Louis Gilissen
Specialist Defence Counsel



Hédi Aouini
Defence Co-Counsel



Leto Cariolou
Defence Co-Counsel

Monday, 6 January 2025

The Hague, the Netherlands