



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-05
The Prosecutor v. Salih Mustafa

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 19 October 2020

Language: English

Classification: Public

Order Setting the Date for the Plea Hearing and a Second Status Conference

Specialist Prosecutor
Jack Smith

Counsel for the Accused
Julius von Bóné

THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(1), (5) and (13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 92(2)(c) and 96(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this order.

I. PROCEDURAL BACKGROUND

1. On 12 June 2020, the Pre-Trial Judge issued the "Decision on the Confirmation of the Indictment Against Salih Mustafa",² the "Arrest Warrant for Mr Salih Mustafa"³ and the "Order for Transfer to Detention Facilities of the Specialist Chambers".⁴
2. On 19 June 2020, the Specialist Prosecutor's Office ("SPO") submitted the Confirmed Indictment.⁵
3. On 24 September 2020, Salih Mustafa ("Mr Mustafa" or "Accused") was arrested⁶ and transferred to the detention facilities of the Specialist Chambers in The Hague, the Netherlands.⁷
4. On 28 September 2020, the Pre-Trial Judge issued the "Order for Submissions on the Redaction System".⁸

¹ KSC-BC-2020-05, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-05, F00008, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Salih Mustafa*, 12 June 2020, strictly confidential and *ex parte*. A confidential redacted version and a public redacted version of this decision were filed on 5 October 2020.

³ KSC-BC-2020-05, F00009/A01/RED, Pre-Trial Judge, *Public Redacted Version of Arrest Warrant for Mr Salih Mustafa*, 12 June 2020, public.

⁴ KSC-BC-2020-05, F00009/A02/RED, Pre-Trial Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 12 June 2020, public.

⁵ KSC-BC-2020-05, F00011/A02, Specialist Prosecutor, *Annex 2 to Submission of Confirmed Indictment*, 19 June 2020, confidential. A further redacted public version of the Confirmed Indictment was filed on 28 September 2020 (KSC-BC-2020-05, F00019/A01, Specialist Prosecutor, *Annex 1 to Submission of Further Redacted Version of Confirmed Indictment*, 28 September 2020, public).

⁶ KSC-BC-2020-05, F00013, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 24 September 2020, strictly confidential and *ex parte*.

⁷ KSC-BC-2020-05, F00014, Registrar, *Notification of Reception in the Detention Facilities of the Specialist Chambers*, 24 September 2020, strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*.

⁸ KSC-BC-2020-05, F00022, Pre-Trial Judge, *Order for Submissions on the Redactions System*, 28 September 2020, public.

5. On the same day, Mr Mustafa made his initial appearance and, *inter alia*, declined to enter a plea at that time.⁹
6. On 30 September 2020, the Pre-Trial Judge issued an order convening the first status conference on disclosure and related issues and, for this purpose, annexed a list of issues to be discussed.¹⁰
7. On 1 October 2020, the SPO filed its observations on a redactions regime.¹¹
8. On 5 October 2020, both Parties filed written submissions in advance of the first status conference.¹² The same day, the first status conference was held.¹³ Regarding the scheduling of the plea hearing and next status conference, Counsel for Mr Mustafa indicated a preference against the dates of 15 and 20 October 2020.¹⁴
9. On 9 October 2020, the Pre-Trial Judge issued the “Framework Decision on Disclosure of Evidence and Related Matters”, which sets out a framework for disclosure which extends into January 2021.¹⁵
10. On 12 October 2020, the SPO requested protective measures in relation to material pertaining to five witnesses.¹⁶

⁹ KSC-BC-2020-05, Transcript, 28 September 2020, public, p. 11, lines 24-25.

¹⁰ KSC-BC-2020-05, F00023, Pre-Trial Judge, *Order Setting the Date for a Status Conference*, 30 September 2020, public, with Annex 1, public.

¹¹ KSC-BC-2020-05, F00024, Specialist Prosecutor, *Observations on a Redaction Regime*, 1 October 2020, public.

¹² KSC-BC-2020-05, F00029, Defence, *Defence Observations for the for the [sic] Status Conference to be Held on 5 October 2020*, 5 October 2020, public; KSC-BC-2020-05, F00030, Specialist Prosecutor, *Prosecution Submissions for the First Status Conference*, 5 October 2020, strictly confidential and *ex parte*. A public redacted version of the SPO’s submissions was filed that same day.

¹³ KSC-BC-2020-05, Transcript, 5 October 2020, pp. 19-46, public, pp. 47-50, confidential and *ex parte*.

¹⁴ KSC-BC-2020-05, Transcript, 5 October 2020, public, p. 45, line 25 to p. 46, line 2.

¹⁵ KSC-BC-2020-05, F00034, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 9 October 2020, public.

¹⁶ KSC-BC-2020-05, F00035, Specialist Prosecutor, *Request for Protective Measures*, 12 October 2020, strictly confidential and *ex parte*, with Annexes 1-5, strictly confidential and *ex parte*. A confidential redacted version of the SPO’s submissions was filed on 12 October 2020. *See also* KSC-BC-2020-05, F00036, Specialist Prosecutor, *Supplement to Request for Protective Measures*, 13 October 2020, confidential, with Annex 1, confidential.

II. APPLICABLE LAW

11. Pursuant to Rule 92(2)(b) of the Rules, the Accused may admit guilt or plead not guilty on each charge, either at his initial appearance or within 30 days of it. Pursuant to Rule 92(2)(f) of the Rules, if the Accused fails to admit guilt or plead not guilty at the initial or any further appearance, the Pre-Trial Judge shall enter a plea of not guilty on his behalf.

12. Pursuant to Rule 96(1) of the Rules, following the first status conference, the Pre-Trial Judge shall convene subsequent status conferences as deemed necessary in order to: (i) organise exchanges between the Parties and, where applicable, Victims' Counsel so as to ensure expeditious preparation for trial; (ii) take steps to ensure that all necessary preparations are being conducted by the Parties in a timely and diligent fashion; and (iii) review the status of the case and allow the Parties and, where applicable, Victims' Counsel the opportunity to raise issues in relation thereto.

13. Pursuant to Article 21(6) of the Law, all material and relevant evidence or facts in the possession of the SPO which are for or against the Accused shall be made available to the Accused before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied. Pursuant to Rule 102(3), the SPO shall provide detailed notice to the Defence of any material and evidence in its possession.

14. Pursuant to Rule 95(4) of the Rules, the Pre-Trial Judge shall order the SPO to file, within a set time limit: (i) its pre-trial brief, including any admissions by the Defence and a statement of matters which are not in dispute; (ii) a list of witnesses it intends to call; and (iii) a list of exhibits it intends to present, including, where possible, any Defence objections to authenticity.

15. Pursuant to Rule 95(5) of the Rules, after submission of the items under Rule 95(4) of the Rules, the Pre-Trial Judge shall invite the Defence to file a pre-trial brief within

a set time limit. Moreover, within a time limit set by the Pre-Trial Judge, the Defence shall notify the SPO of its intention to offer a defence of alibi or any other grounds excluding criminal responsibility, including that of diminished or lack of mental capacity, intoxication, necessity, duress, and mistake of fact or law.

16. Pursuant to Rule 96(2) of the Rules, with the Accused's written consent after receiving advice from Counsel, a status conference may be conducted: (i) in the Accused's presence, with Counsel participating via video-conference; (ii) in Defence Counsel's presence, with the Accused participating via video-conference; or (iii) in the Accused's absence, with Counsel present or participating via video-conference.

III. DISCUSSION

17. Taking into account the preference of the Defence, and considering the time limit set forth in Rule 92(2)(c) of the Rules, the Pre-Trial Judge convenes a hearing on Wednesday, 28 October 2020, at 15:00 hours.

18. During the first part of the hearing, Mr Mustafa will be asked to admit guilt or plead not guilty on the charges brought against him in the Confirmed Indictment, pursuant to Rule 92(2)(c) of the Rules. If the Accused declines to do so, the Pre-Trial Judge will enter a plea of not guilty on his behalf, pursuant to Rule 92(2)(f) of the Rules.

19. The second part of the hearing will serve as a second status conference in this case. The Pre-Trial Judge will ask the Parties for their updates, if any, on the outstanding issues detailed in the agenda of the first status conference, and the written and oral submissions they have made thereon to date. Specifically and in addition, the Pre-Trial Judge will seek updates on the following:

- a. Whether the Parties are facing any difficulties related to the disclosure of evidentiary material;

- b. Whether the SPO's outstanding investigations have been completed or whether an estimated date of completion can be provided;
- c. The SPO's estimate of when it will be able to file its pre-trial brief and related material pursuant to Rule 95(4)(a)-(c) of the Rules, in light of the disclosure calendar set out in the Framework Decision on Disclosure;
- d. Based on the SPO's estimate on the above point and the ongoing disclosure of evidence process (scheduled to continue until January 2021), whether the Defence is in a position to provide more information on: (i) the status of its investigations; (ii) any intention to give notice of an alibi or grounds for excluding responsibility, pursuant to Rule 95(5) of the Rules, and any associated disclosure, pursuant to Rule 104(1) and (2) of the Rules; and (iii) any intention to make requests concerning unique investigative opportunities, pursuant to Rule 99(1) of the Rules.

20. Finally, the Parties will be asked to share their views on the date of a third status conference in this case.

21. The Parties are invited to file written submissions, if they so wish, by Tuesday, 27 October 2020 on any of the above matters, including the topics discussed at the first status conference, any other matter not covered in the agenda of the second status conference, or any difficulty related to the disclosure of evidentiary material.

IV. DISPOSITION

22. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **DECIDES** to convene a hearing in the presence of the SPO and the Defence on **Wednesday, 28 October 2020, at 15:00 hours;**
- b. **ORDERS** the SPO and the Defence to file written submissions, if they so wish, by **Tuesday, 27 October 2020**, as set forth in paragraph 21.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Monday, 19 October 2020
At The Hague, the Netherlands.