

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Defence

Date: 20 November 2020

Language: English

Classification: Public

Defence submission for the

review on the detention of the Accused

Specialist Prosecutor's Office

Mr. Jack Smith

Counsel for the Accused

Mr. Julius von Bóné

I. The status of the case and the order of the Pre Trial judge

1. The defence has taken note of the content of the Order of the Pre Trial Judge regarding the review of the detention of the accused. In the current case, the detention is founded on the content of the confirmed indictment, the arrest warrant, and the transfer order dated 12 June 2020. The arrest was executed on 24 September 2020, and the accused was transferred on the same day to the Detention Facility of the KSC in The Hague.

2. The Accused, mr. Salih Mustafa, is accused of a number of crimes allegedly committed in 1999. The confirmation of the indictment states that there is a well-grounded suspicion that mr. Mustafa committed or participated in the commission of the alleged crimes.

3. Mr. Mustafa has pleaded not guilty to each of the charges.

4. It is a common rule that an accused is presumed innocent until the charges have been proved beyond a reasonable doubt before an independent judge.

5. The defence submits that, following the confirmation of the indictment, it must be contemplated whether it would be necessary to detain an accused, who has been at liberty for over 20 years. Within that period of time, while living in Kosovo, the accused has never been convicted of any crime. And he has hardly left his home country.

6. Even so, during all these years, until now, no particular statements regarding his involvement in any particular crime, have surfaced in this case. It is only at the investigation of the SPO that some incriminating evidence has surfaced. That evidence, presented by the SPO before the Pre Trial Judge therefore has to be scrutinized by the pre Trial Judge. The defence submits that the standard for prolongation of the detention must be that the longer an accused is detained, the stronger the evidence should be. And such evidence is to be presented by the SPO.

7. That purported evidence, disclosed only recently in the case material, has until today not been tested in any manner as to the veracity of the allegations within the statements that have been disclosed until now.

8. Neither a judge nor the defence has been able to test the statements as to their veracity. Moreover the SPO has not (even until today) substantiated the allegations that are made in the incriminating statements. Therefore, the merits of the evidence at this point are only formed by statements, which (on the surface) have been taken without any (further) intrinsic additional material supporting the claims that are made within the statements.

9. It is to this end, that the well-grounded suspicion as formulated in the confirmed indictment, has to be reviewed. In other words: how well-grounded is the suspicion today, after the material that until now has been disclosed by the SPO?

10. The defence submits that after more than five months after the confirmation of the indictment, the SPO has not provided any material from which objectively can be derived that the allegations in the incriminating statements find any other ground of support. The SPO has not provided objective material and has only initially (that is: at the time that the SPO requested that the indictment should be confirmed) presented material to the Pre Trial Judge that might have lead at *that* time to the conclusion that there was a well-grounded suspicion.

11. The defence submits that the Pre Trial Judge has to review the detention of the accused in light of the current case material and determine if any additional material has yet (after 5 months) been provided to substantiate the allegations that are made within the incriminating statements. In addition, the material should at least demonstrate the direct involvement of the accused at *each* of the alleged crimes.

12. The defence submits further that solely the statements cannot be the foundation for the conclusion that the allegations were directed by the accused, let alone that the accused himself committed or has participated in the commission of each of the crimes.

13. Even though the Pre Trail Judge has no obligation to draw any conclusion yet as to the merits of the statements, the defence believes and submits that the Pre Trial Judge may and should, in the light of any prolongation of the detention of an accused, require from the SPO to provide “harder” and more objective evidence than just statements, incriminating as they might look or sound.

14. After all, the detention of any individual should not be a decision that is to be taken lightly and without taking into consideration what the impact is on an individual to be suddenly deprived of his freedom, and being taken out of his family

life, his professional life (his work), just on the basis of some statements implicating him in a criminal offense.

15. The defence submits that for a well-grounded suspicion, at this point and in this stage of the proceedings, and especially for the question whether the detention of the accused should be prolonged or not, the SPO cannot solely rely on the basis of statements made by a witness, be it one or more, in order to justify the prolongation of the detention of the accused. For *each* of the charges in the indictment the SPO has the obligation to rely on supporting material that is objective and cannot be disputed. Such material should substantiate *each* of the allegations made by witnesses, and substantiate in particular *each* of the charges and the modes of its commission.

II. In the absence of additional objective evidence, it is just and fair to release the accused, with or without conditions set forth by the adjudicating Panel.

16. In the previous paragraphs the defence argues that the longer an accused is deprived from one of his most basic human rights (liberty), it is important that the SPO must not solely rely on statements to seek continuation of the detention, nor that the detention is prolonged proprio motu without additional material.

17. In the absence of it, the accused should be released. Alternatively, in the absence of additional material the prolongation of the detention should be stopped for the charges for which no additional material has been presented. In plain words: the detention for a particular charge cannot continue if for that charge no additional objective material has been presented. The presented material should not be “more of the same sort” material (i.e. more statements).

18. As in this case no such material exists, the accused must be released.

III. The trial Judge or the adjudicating Panel can determine if any conditions should be applied.

19. The defence is of the view that, if release is contemplated, the conditions as set forth in Article 41 (12) (a until d) of the Law can only be applied if the Pre Trial Judge or Panel makes specific findings concerning the accused whether: he or she will not be present during the proceedings, whether there is any justified risk that the accused would reoffend, or whether there is anything that justifies that a successful conduct of the criminal proceedings would be jeopardized.

20. Article 41 (12) prescribes that the measures *may be* ordered, which implies that this article does not dictate in any manner that the measures prescribed in the article are compulsory. The Pre Trial Judge or Panel can also decide not to apply any of these measures.

21. In the case of the accused it is a fact that he is a citizen of Kosovo, and resides in Kosovo. He has cooperated with the SPO in the sense that he has made a statement to the SPO and came voluntarily to The Netherlands to be interviewed by the SPO.

22. Not in any manner has he been uncooperative or has he done anything to impair the investigations of the SPO as they were conducted during the period in the past years. Not a single incident has been ever reported to that end, or has been put in the current case material. Therefore, there is no ground that the accused would do so when he would be released. If such assumption were to be made, it is without any grounded factual foundation.

23. The defence submits that if any summons to appear would be placed upon him, or any schedule to appear will be in place, that the accused will appear at each of the courts session, be it via VTC or in vivo. The accused will voluntarily submit his passport in order to ensure that he will not leave the country, or if necessary, will seek permission if any work related trip would necessitate this. Basically, the accused will stay at his home with his family and will pick up his current employment in order to provide for his family.

24. If nevertheless the Pre Trial Judge would, based on any specific findings, order any measures, the defence submits that the accused will comply with them.

25. The defence is ready to exemplify any of the submissions in a court session if that would be required or if it would further clarify the position of the defence and the accused regarding this matter.

26. The defence has at this point no further submissions.

Word count: 1548



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20 November 2020

At The Hague, the Netherlands