

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

Before: **Trial Panel I**
Judge Mappie Veldt-Foglia, Presiding Judge
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve judge

Registrar: Fidelma Donlon

Filing Participant: Defence

Date: 12 September 2021

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

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Victims' Counsel

Anni Pues

I. The status of the case

1. The defence has taken note of the content of the Order of the Panel dates 23 July 2021 regarding the review of the detention of the accused. In the current case, the detention is founded on the content of 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. That well-grounded suspicion has been affirmed by the previous decision regarding the prolongation of his detention.
3. Mr. Mustafa has pleaded not guilty to each of the charges.
4. The trial is to commence on 15 September 2021.
5. 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.
6. To date, only the prima facie evaluation of materials presented by the SPO, has been enough to maintain the detention of the Accused.
7. The Accused has been awaiting trial for nearly 1 year. The SPO has finished disclosure of the evidentiary material. The defence submits that there is no correlation whatsoever between the Accused and the evidence submitted for the alleged charges to that effect.
8. Mr. Mustafa vehemently denies the charges and disputes the evidence that has been submitted by the SPO.
9. The defence will address, once more, the alleged risks, the personal circumstances of the Accused and other relevant issues.

II. Risk that the accused would obstruct the Progress of the SC Proceedings

10. The defence submits that there is no risk of obstructing any of the (progress of the) proceedings by the Accused. The supposition that the accused would have an incentive to do so is disputed by the accused. In fact, interfering with any of the witnesses or victims and/or their families would come to the detriment of his case. As there are no objective grounds to suppose that the accused would actually interfere with any of the proceedings or in particular with victims, witnesses or whoever, this ground is rather theoretical, than that it is based on a clear and well-grounded suspicion that the accused would indeed do so.

11. Mr. Mustafa has been to the KSC at a previous occasion when he was interviewed as a suspect by the SPO. The accused has been at liberty for a very lengthy period of time since he has been initially interviewed by the SPO. He left The Netherlands back to his country and has never undertaken anything against anybody. In fact, he committed nothing that could even be viewed as investigating anything regarding witnesses, victims and/or families of those. He just continued with his life and his work. Such claims or suppositions are therefore fundamentally ill-founded as there has no fact ever come to light that mr. Mustafa ever even initiated such conduct.

12. Therefore, there is neither a real and objective risk nor is there any factual element that mr. Mustafa ever has done anything that interfered with either the (progress of the) proceedings or witnesses, victims and/or their families or anybody else.

13. Besides that, mr. Mustafa has been regularly evaluated by his employer. The office that he holds in public service in his home country is such, that regularly his personality, his stature and his capacity to serve within that office, is evaluated. Each time mr. Mustafa has received frequent "clearances" in order to continue the work within his position. Not a single issue has ever come to light that he might somehow interfere with anybody or abuse his position to investigate anything about the current case or the people that might be somehow involved in it.

14. To date, not in any manner has the accused done anything to impair the investigations of the SPO as they were conducted during the period in the past years. He came voluntarily to The Netherlands to be interviewed by the SPO. Not a single incident has been reported regarding interference of him in any manner within that period of time. No evidence to that effect has been put in the current case material. Therefore, there is no factual ground that the Accused would do so when he would be released

15. The defence submits that this merely theoretical ground can neither qualify as a real risk nor can it justify any decision to prolong his detention on this ground.

III. Measures to ensure that the accused remains at home (or at any other pre-determined location) will have as a consequence that there is no risk of interference in any trial proceeding, or with any of the witnesses or victims and/or their families.

16. The defence submits once again that the accused can be released under conditions to be determined by the Court. Measures to avoid any interference with anybody or with any of the proceedings can be made to exclude any kind of interference.

17. It is the design of those measures that can eliminate the (theoretical and alleged) risk(s) that the accused would interfere either with any kind of the proceedings or with witnesses or victims and/or their families.

18. Article 41 (12) of the Law is the basis on which the Court can design the measures that it finds appropriate in view of any type of risk it might want to eliminate, and at the same time ensure that the accused will not avoid to attend his trial proceedings.

19. The defence is of the view that the conditions as set forth in Article 41 (12) (a until d) of the Law can only be applied if the 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 re-offend, or whether there is anything that justifies that a successful conduct of the criminal proceedings would be jeopardized.

20. If, however any risk would be assumed or supposedly established, than still such risk can be eliminated as the Court can set the conditions to which the accused needs to adhere. Consequently, risks of any kind can easily be eliminated.

21. The defence submits that the accused should be released or conditionally released on conditions set forth by the Panel.

22. The defence submits that if any summons to appear or condition would be placed upon him would become placed upon him to appear in court, the accused will comply, 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 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. But if a condition is designed that he should not work at all than the accused will adhere to that.

23. In addition to this, conditions can be set as to control the people that might visit him at his home, or control his telephone conversations, social media activities, controlled activities within or around his home, or any other measures that can be put in place.

24. If the Panel would, based on any specific findings, order any other measures that it might find appropriate for this specific accused, the defence submits that the accused will comply with them.

IV. Personal and professional circumstances impacted by prolonged detention of the Accused.

25. An Accused in detention has in general a lot to lose once he is held in detention and when is detention is regularly being continued.

26. Very much counts the same for the Accused in this case.

27. The Accused has been employed up to the moment that he has been arrested and transferred to The Hague. His employment was full-time and he has maintained a family life, which has been greatly harmed by his detention.

28. The Accused has fear to lose his job and his employment which would of course damage the income that he was able to generate for himself and his family.

29. In deciding about the detention and the prolongation of it, the defence submits that the Court needs to address this personal issue. It is common knowledge that when someone will not show up for work for a long time, that he will simply lose his job.

30. The economic impact for the Accused and his family of the prolongation of detention is therefore a factor that needs to be considered and addressed by the Court. The defence submits that the economic impact of the prolongation of the detention is to be weighed as a factor in order to justify such prolongation.

31. The detention of the Accused has to be proportional as to the effects that the detention has on the Accused himself, his economic well-being, and that of his family.

32. The Accused fears the loss of his job, and with it, his income. It is as simple as that.

33. Therefore, the defence submits that in order to limit the damage to his economic life and that of his family, the Accused is to be released, at the minimum on a conditional basis, so that he will be able to secure for him and his family his economic life.

34. The conditions can be defined by the Panel and can be tailored to the extent that the Panel deems it necessary. Propositions put forward by the defence to this end, can serve as examples that can be reinforced in whatever manner.

35. Simply keeping the Accused detained, without any possibility of release, would most certainly have a profound impact of that of the Accused, his employment his economic life

and that of his family. And it is therefore a serious matter to contemplate, in the light of the possibilities that are proposed in order to limit any kind of theoretical and alleged risk that might have been put forward by the SPO in previous or current arguments.

36. The defence submits and requests the Court to give serious consideration to the justified fears that the Accused has as for his personal and professional circumstances.

37. Once again, the defence reiterates that the Accused will be present during Court sessions, will abide by any condition that is to be imposed by the Court, and will in no manner undertake anything that would harm the proceedings in any manner.

38. Therefore, any kind of condition to effectuate the above, will be accepted by the Accused.

V. Conclusion

39. The defence submits that the Accused will be released or released under conditions to be set by the Panel.

Word count: 1816



Julius von Bóné
Defence Counsel

12 September 2021

Done at The Hague, the Netherlands