

Case No.: KSC-BC-2020-04
Specialist Prosecutor v. Pjetër Shala

Before: **Court of Appeals Panel**
Judge Michèle Picard
Judge Emilio Gatti
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Date: 17 January 2022

Filing Party: Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR
v.
PJETËR SHALA

**Defence Reply to Prosecution Response to Appeal against the
'Decision on Motion Challenging the Form of the Indictment'**

Specialist Prosecutor's Office:
Jack Smith

Specialist Counsel for the Accused:
Jean-Louis Gilissen
Hedi Aouini

I. INTRODUCTION

1. The Defence for Mr Pjetër Shala (*'Defence'*) hereby replies to the Prosecution's Response to the appeal against the *'Decision on Motion Challenging the Form of the Indictment'*.¹
2. While this Reply is limited to the issues raised in the Response, the Defence maintains its original submissions in full and rejects all submissions made by the Prosecution in their entirety.

II. SUBMISSIONS

A. *Error in upholding the lack of specificity as to the members of the alleged JCE violates the Prosecution's obligation to give sufficient notice of its case under Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution*

3. The Prosecution contends that the Pre-Trial Judge correctly applied the case law of the *ad hoc* tribunals as endorsed by the KSC to the effect that the names of JCE members should be provided in an indictment *'when known'* and that it is *'not necessary or always possible to do so.'*² The Prosecution conveniently omits to make reference to the principle that is meant to be guiding when it comes to the specificity required, namely: *'[D]ecisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case are the*

¹ KSC-BC-2020-04/IA004, F00006, Prosecution response to Defence appeal against the *'Decision on Motion Challenging the Form of the Indictment'*, 10 January 2022 (*'Response'*); KSC-BC-2020-04/IA004, F00004, Defence Appeal with Leave against the *'Decision on Motion Challenging the Form of the Indictment'*, 17 December 2021 (*'Appeal'*); KSC-BC-2020-04, F00116, Decision on Application for Leave to Appeal "Decision on Motion Challenging the Form of the Indictment", 29 November 2021 (*'Certification Decision'*); KSC-BC-2020-04, F00089, Decision on Motion Challenging the Form of the Indictment, 18 October 2021 (confidential) (*'Impugned Decision'*); KSC-BC-2020-04, F00055, Preliminary Motion by the Defence of Pjetër Shala Challenging the Form of the Indictment, 12 July 2021 (confidential) (*'Motion'*). All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² Response, paras. 15, 16, referring to ICTR, ICTR-01-75-AR72(C), *Prosecutor v. Uwikingi*, Decision on Defence appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011 (*'Uwikingi Decision'*), para. 16.

*Prosecution's characterisation of the alleged criminal conduct and [importantly in this case] the proximity of the accused to the underlying offence.'*³ Evidently, the lack of specificity was accepted by the *ad hoc* tribunals in light of the sheer scale of the cases before them. The present case is of a very different nature: it involves a single accused and events taking place over the course of merely 19 days at specific premises.

4. The lack of specificity in the Indictment as to the identity of alleged JCE members prevents the Defence from carrying out meaningful investigations and requires a considerable amount of resources spent on issues that are either known by the Prosecution (such as the identity of alleged JCE members that play a role in the alleged events in the Indictment) or are not relevant. The Pre-Trial Judge made a discernible error in accepting such lack of specificity and fairness requires the Appeals Chamber to intervene and correct it.
5. The Prosecution erroneously submits that the Pre-Trial Judge rightly found that the alleged JCE members were pleaded with sufficient specificity.⁴ It interprets the applicable standard of specificity required inaccurately.⁵ The Prosecution is required to provide sufficient detail of the relevant circumstances to allow proper identification, particularly in a case of such small scale such as the present. It ought to provide the Defence with all information known as to the identity and role of alleged JCE members. It is expected to know its allegations before proceeding to trial and should not be allowed to develop its case as the trial progresses, depending on how the evidence unfolds.⁶ In the present

³ See, e.g., *Uwikindi* Decision, para. 5; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/A-A, Judgement, 27 January 2014, para. 575; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, 28 February 2005, Judgement, para. 28.

⁴ Response, para. 15.

⁵ Response, paras. 15-18.

⁶ *Uwikindi* Decision, para. 5 and authorities cited therein; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/A-A, Judgement, 27 January 2014, para. 575; ICTY, *Prosecutor v. Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006, para. 71. See also KSC-BC-2020-07, IA004, F00007, Decision on the

circumstances, pleading a material fact such as the identity of alleged JCE members with notable vagueness; describing them merely as *'soldiers, policemen and guards'*⁷ constitutes an error of law that merits appellate intervention.

6. In order to illustrate the prejudice caused to the ability of the Defence to investigate effectively the allegations set out in the Indictment, the Defence refers the Appeals Chamber as an example to paragraph 21 of the Indictment that describes a specific incident allegedly taking place at the Kukës Metal Factory on a specific day. The Indictment provides that the Accused *'and certain other KLA members, including'* two individuals interrogated and assaulted at least six detainees; that the Accused *'and certain other KLA members'* ordered two detainees to beat another detainee; that the Accused *'individually and in concert with certain other KLA members, beat'* certain detainees; that in the Accused's presence, *'certain other KLA members'* beat and assaulted a number of detainees; that the Accused *'and other KLA members threatened the detainees and accused them of collaborating with the Serbian authorities and/or supporting the KLA'*; that *'[o]ne KLA member informed [a detainee] that he had been sentenced to prison and execution, even though no trial had taken place.'* At paragraph 21 of the Indictment, the

Defence Appeals Against Decision on Preliminary Motions, 23 June 2021, para. 43 and authorities cited therein. See also Appeal, paras. 17, 18; Motion, para. 28.

⁷ Impugned Decision, paras. 55, 56. See Indictment, paras. 8 (*'certain other KLA soldiers, police and guards'*), 10 (*'other members of the JCE included [...] and certain other KLA soldiers, police, and guards present at the Kukës Metal Factory'*), 14 (*'and certain other KLA members, including [...]'*), 15 (*'together with a KLA member nicknamed [...] and certain other KLA members'*), 18 (*'SHALA and certain other KLA members, including [...]'*), 19 (*'SHALA and certain other KLA members, including [...]'*), 21 (*'SHALA and certain other KLA members, including [...]'*), (*'SHALA and certain other KLA members ordered [...]'*, *'SHALA, individually and in concert with certain other KLA members, beat [...]'*, *'[I]n Pjetër SHALA's presence, certain other KLA members beat and assaulted [...]'*, *'Pjetër SHALA and other KLA members threatened the detainees and accused them of collaborating with the Serbian authorities and/or of not supporting the KLA. One KLA member informed [...] that he had been sentenced to prison and execution, even though no trial had taken place'*), 22 (*'[c]ertain KLA members, excluding Pjetër SHALA, then forced [...]'*), 26 (*'SHALA and certain other KLA members, including [...]' inflicted severe pain or suffering'*), *'SHALA and certain other KLA members, including [...] questioned the detainees and recorded confessions, and accused the victims of having collaborated with the Serbian authorities, and/or of not supporting the KLA'*), 28 (*'certain KLA members, excluding Pjetër SHALA, forced [...] to [...] and shot at them with automatic weapons.'*), (*'certain KLA members, including Pjetër SHALA, severely beat [...]'*).

Prosecution states – for instance – that ‘[o]ne KLA member’ informed a detainee that he had been sentenced to prison and execution. It is evident that the identity of the unidentified persons, whose identity must be known to the Prosecution, is a material fact that ought to be pleaded properly in the Indictment. The Prosecution should not be allowed to present charges on such vague and uncertain terms and develop its case as the evidence is presented. The Accused has the right to an effective opportunity to defend himself and the time and facilities necessary to do so; knowing the identity of the persons present or allegedly involved in the specific incidents set out in the Indictment at a time allowing for effective preparation for trial is part of this right and should be recognised and respected as such.⁸

7. The conduct or alleged role of purported JCE members, particularly in light of the lack of specificity in identifying them, is directly relevant to the Defence ability (or lack thereof) to understand the Prosecution’s case in this respect. The Prosecution’s submissions as set out in its Response at paragraphs 24-27 should be dismissed.

B. Error in Upholding the Lack of Specificity as to the Victims violates the Prosecution’s obligation to give sufficient notice of its case and Mr Shala’s rights under Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution

8. The Prosecution alleges that the Defence’s submissions ‘grossly mischaracterise the information contained in the Confirmed Indictment’ and subsequently provides one example to refute the Defence argument regarding the failure to provide ‘any number or identity’ of the alleged victims. The Prosecution maintains that,

⁸ This applies to all the Indictment references identified in fn. 7 above.

contrary to the Defence submissions, the Indictment '*specifies*' that the victims are the detainees at the Kukës Metal Factory.⁹

9. However, mere reference to '*detainees*' and '*victims*' fails to provide the requisite clarity, contrary to the Prosecution's claims in this respect. The Indictment does not specify the alleged victims' number or identity in a manner that meets the required standard. Contrary to the Prosecution's submissions, there is nothing to suggest that the victims referred to in paragraph 14 or 21 of the Indictment are the same persons as those intended in paragraphs 19 and 26. Should this be the Prosecution's case, this should be clearly set out in the Indictment.
10. Consequently, the Prosecution's submission that the Defence claims such failure by reference to a selected number of paragraphs read in isolation is inapposite. On the contrary, reading the Indictment as a whole and the inconsistent yet deliberate choice to identify the alleged victims of certain crimes but not others supports the Defence complaint about the lack of sufficient specificity in breach of the Accused's rights in this respect.¹⁰ The Prosecution should know and be able to set out its case prior going to trial.
11. Nevertheless, even where certain information *is* provided, for instance when it comes to the charge of illegal or arbitrary detention, the information provided is still insufficient.¹¹ Further information about the victims would assist the Defence in its investigations and preparation for trial. In light of the limited scope of the Indictment and the fact that the charges concern specific incidents the Prosecution is obliged to set out its case in a clear and certain manner in the primary accusatory instrument.

⁹ Response, paras. 29-31, *referring to* Indictment, paras. 19, 24, 26.

¹⁰ *See, for instance*, Appeal, para. 26.

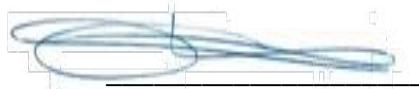
¹¹ *See, for instance*, Appeal, para. 28.

12. The Prosecution states that *'the status of the victims at the time of their arrest is not determinative of whether the crime of arbitrary detention was committed'*.¹² Yet, it is an important aspect of the Prosecution's case; namely the circumstances of the alleged arrests and the Accused's alleged participation in them. This constitutes material information the Accused is entitled to know prior to trial. The Prosecution's clarification that, at the time of arrest, the victims enjoyed protected status under international law is helpful but ought to have been clearly set out in the Indictment together with improved particulars as to the circumstances of the alleged arrests and the Accused's role in them. Providing such information would enable the Accused to know the case against him and properly prepare his defence.

13. The Pre-Trial Judge made an error of law in dismissing the Defence request to uphold the standard requiring the Prosecution to particularise with the greatest possible degree of precision its allegations, including by providing sufficient detail concerning the victims in the Indictment.¹³

III. CONCLUSION

14. In light of the above, the Defence respectfully invites the Appeals Chamber to grant the Appeal on all grounds.



Jean-Louis Gilissen
Specialist Defence Counsel



Hedi Aouini
Defence Co-Counsel

Word Limit: 1980

¹² Response, para. 33.

¹³ Appeal, para. 30; Motion, para. 34 and references made therein.