

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: 29 March 2022

Language : English

Classification : Public

Public redacted version of Defence submission for the review of the
Detention of the Accused with Confidential and *ex-parte* Annex, F342

Specialist Prosecutor's Office

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I. Procedural Background

1. Trial Panel I of the Specialist Chambers (SC) ordered the eight decision on the review of detention on the 21st of January 2022¹. The defence has taken note of the content of the Order of the Panel laid down in that decision. 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. The Accused has been detained ever since his transfer to the Den 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. The trial commenced on 15 September 2021. The SPO closed its case on 4 February 2022. All witnesses of the Specialist Prosecutor's Office (SPO)².

5. Meanwhile, [Redacted]³. The Accused has been [Redacted]. [Redacted] Recently,[Redacted]⁴.

¹ KSBC 2020-05/F00295, 21 January 2022

² KSC-BC—05. F. 00308, Specialist Prosecutor, *Prosecution notice of the closing of its case pursuant to Rule 129*, 4 February 2022, public

³ [Redacted] , [Redacted]. [Redacted].

⁴ [Redacted] , [Redacted].

II. SUBMISSIONS

6. Considering the length of the current detention, [Redacted] of the Accused [Redacted] , [Redacted] , the defence is of the opinion that the [Redacted] . [Redacted] , Redacted] , [Redacted] .

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

7. The Panel has in its decision regarding the prolongation of the detention at length reviewed whether there is a risk that the Accused would be a risk for any obstruction of the SC proceedings ⁵.

8. [Redacted] , and at the same time the case of the SPO has now been closed. During the entire period of [Redacted] , [Redacted] , there has been never any unauthorized disclosure made by the Accused ⁶. The conclusion is that the Accused has not in any manner obstructed the proceedings, even though a theoretical possibility to that existed [Redacted] . He therefore has not in any manner obstructed the progress of the SC proceedings.

9. The Panel is of the view that the Accused 's knowledge of the charges and the potential lengthy sentence, if convicted, may serve as an incentive for the Accused, if released, to interfere with victims and witnesses, and/or their families ⁷. To that end, the Panel considered the testimony of [Redacted] , who reported that [Redacted] was threatened by [Redacted] . [Redacted] claimed that he was sure that the incident was related to [Redacted] to shed light on what had happened [Redacted] .

10. The entire incident has never been investigated, nor has there been any finding on this entire issue from local or national authorities. Regarding this alleged incident, if it happened at all, there has never been established any tie to the Accused. Nor has any relationship established been established between [Redacted] to shed light on what had happened to [Redacted] on the one hand and any direct or indirect relationship to the Accused on the other hand. The entire incident probably has nothing to do with anything relating to the

⁵ KSBC 2020-05/F00295, 21 January 2022, para. 20-24.

⁶ [Redacted] , [Redacted] , [Redacted]

⁷ KSBC 2020-05/F00295, 21 January 2022, para. 20

Accused. Yet, the Panel nevertheless takes the incident as an example for assumed interference of the Accused with victims and witnesses. The defence believes that there are simply no solid grounds to use the incident in any relation with the Accused's supposed or potential obstruction of the progress of the proceedings. It is unfair and unfounded to assume such interference, without any solid ground.

11. The Panel considered the relationship of the Accused with some of the witnesses to the extent that interference could take place. To that end it used the close ties that [Redacted] purportedly had with the Accused as an example. [Redacted] even stated in his court appearance that: "[Redacted]"⁸. [Redacted] [Redacted]. The defense believes that it is unfair, unfounded and unjust to assume that the purported "close tie" with the Accused existed with this Witness let alone that interference potentially would occur, given the testimony of [Redacted].

12. The Panel considered that [Redacted] stated in [Redacted] testimony that the witness [Redacted] was a [Redacted]⁹, as a possibility that the Accused could potentially interfere with the progress of the proceedings. Even though in the same testimony of [Redacted] stated that [Redacted] until the time of the indictment. It can hardly be established in light of the testimony of the witness, that Mustafa had any tie, relationship or be viewed as [Redacted]. In fact, Mustafa had no tie whatsoever with the witness. The defense believes that it is unfair, unfounded and unjust to assume such [Redacted] given the testimony of [Redacted].

13. Mr. Mustafa has no position anymore within the Kosovo Intelligence apparatus, due to his detention. His ties to it have become inexistent due to his detention. The defence submits that his past experience has at this point become so obsolete to make any current finding on it. His assumed ties to the apparatus with regard to potential interference with victims or witnesses are presumptive, obsolete and inaccurate. The finding implies that Kosovo Intelligence apparatus would share any information to the Accused or give him access to that, and the defence submits that there is no solid ground to suppose that any information of any kind would be shared with the Accused.

⁸ Transcript 13 October 2021, p. 1210, line 13-25

⁹ Transcript hearing 18 November 2021, p. 1686-1688.

14. The defence submits that there is no risk whatsoever for the Panel to assume that there is an objective and concrete risk of the accused interfering with victims, witnesses, and /or their families. The defense submits that there is no such risk, and that the ground for maintaining his detention is therefore absent.

15. 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.

III. Measures to ensure that the accused remains 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 Panel. The Panel might consider any alternative to that end, i.e. keep the Accused in The Netherlands and have his phone-calls, if any, being monitored. [Redacted] if he were to remain inside or outside the Netherlands on a location that gives him the possibility to move around, for example some kind of center, or any other location where [Redacted]. Once again, the defence reiterates that the Accused has during his entire stay in detention in no manner interfered with the proceedings or the progress of it. Apart from that, there is no point to it as the SPO's case has been closed.

17. It is the design of the 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 or interfere with it.

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

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

21. 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 circumstances impacted by prolonged detention of the Accused.

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

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

24. [Redacted] . The detention, [Redacted] fall very hard on him.

25. The Accused has recently found out that [Redacted] a situation has occurred that has to be addressed.

26. The defence considers it appropriate to address this matter to the attention of the Panel. It does so through *Ex-Parte* material, as it relates to medical information.

27. [Redacted].

28. The defense submits that it will be in the interest of the mental health of the Accused as well as for [Redacted]. The situation concerning [Redacted] is really constantly on the mind of the Accused. [Redacted].

29. The defense requests to this end that the Panel,[Redacted]

30. The defence submits and requests the Panel to give serious consideration to this matter

V. Conclusion

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

32. [Redacted]

Word count: 1767



Julius von Bóné
Defence Counsel

29 March 2022

Done at The Hague, the Netherlands