



In: KSC-BC-2020-05

The Prosecutor v. 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

Date: 26 May 2022

Language: English

Classification: Public

**Decision on items used with Defence witnesses 200, 300, 400 and 500 during their
in-court testimonies**

with one public annex

To be notified to:

Specialist Prosecutor

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Counsel for the Accused

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Victims' Counsel

Anni Pues

TRIAL PANEL I (Panel) hereby renders this decision on items used with Defence witnesses 200, 300, 400 and 500 during their in-court testimonies.

I. PROCEDURAL BACKGROUND

1. On 25 August 2021, the Panel issued the “Decision on the submission and the admissibility of evidence”, in which it set out the principles governing the admission of non-oral evidence in the present case (Admissibility Decision).¹
2. On 26 August 2021, the Panel issued the “Decision on the conduct of the proceedings” (First Conduct of Proceedings Decision), ordering *inter alia* the Parties and/or Victims’ Counsel, as the case may be, to submit at the latest on the last working day of each calendar month an application for the admission of any material which had not already been submitted to the Panel and which was used during their respective questioning of the witnesses who testified in that month.²
3. On 8 April 2022, following an extension of the time limit,³ the Specialist Prosecutor’s Office (SPO) and the Defence filed their requests for the admission of exhibits used during their examinations of the witnesses who testified in the month of March 2022, namely Defence witnesses 200, 300, 400 and 500.⁴
4. On 19 April 2022, the SPO responded to the Defence request.⁵

¹ KSC-BC-2020-05, F00169, Trial Panel I, *Decision on the submission and the admissibility of evidence*, 25 August 2021, public.

² KSC-BC-2020-05, F00170, Trial Panel I, *Decision on the conduct of the proceedings*, 26 August 2021, public, para. 37.

³ KSC-BC-2020-05, Transcript of Hearing, 28 March 2022, public, p. 2803, line 23 to p. 2804, line 12.

⁴ KSC-BC-2020-05, F00377, Specialist Prosecutor, *Prosecution Request for Admission of Documents from the Cross-Examinations of Defence Witnesses 200, 300, 400 and 500* (SPO Request), 8 April 2022, public with Annex 1 confidential; F00380, Defence, *Defence Request for Admission of Documents from the Direct-Examinations of Defence Witnesses 200, 300, 400 and 500* (Defence Request), 8 April 2022, public, with Annex 1 confidential.

⁵ KSC-BC-2020-05, F00387, Specialist Prosecutor, *Prosecution Response to Defence Request for Admission of Documents from the Direct-Examinations of Defence Witnesses 200, 300, 400 and 500 with Confidential Annex 1* (SPO Response), 19 April 2022, public.

II. SUBMISSIONS

5. The SPO and the Defence request the admission into evidence of portions of prior statements and other material used during their examinations of Defence witnesses 200, 300, 400 and 500.⁶ Both the SPO and the Defence submit that the documents are relevant, authentic, have probative value and their admission would cause no undue prejudice to the Accused.⁷ In some cases, the Parties seek to tender into evidence larger portions of prior statements than those strictly used, in order to provide context to the questions, answers and comments made by the witnesses.⁸

6. In its response, the SPO opposes the Defence request. It submits that the Defence seeks to introduce statements and/or documents, or parts thereof, which were not used by the Defence during its direct or re-direct examinations.⁹ The SPO asks the Panel to reject the Defence request in this regard, as it is contrary to the principle of orality and the Panel's previous directions.¹⁰

III. APPLICABLE LAW

7. The Panel notes Articles 37 and 40(2), (5) and 6(h) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office and Rules 24(1) and 137-139 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers.

⁶ SPO Request, paras 1, 8; *see also* Annex 1 to SPO Request, listing the material; Defence Request, paras 1, 6; *see also* Annex 1 to Defence Request, listing the material.

⁷ SPO Request, para. 2; Defence Request, para. 2.

⁸ SPO Request, para. 4; Defence Request, para. 4.

⁹ SPO Response, paras 2, 7.

¹⁰ SPO Response, paras 1, 3, 5-6, 8.

IV. ANALYSIS

8. The Panel notes, first, that the Defence seeks to introduce into evidence items which were not used during its examination of the witnesses,¹¹ or seeks to introduce prior statements in their entirety, although only portions thereof were used.¹² The Panel recalls that the Parties and participants may submit through a witness only material which has actually been used during their questioning of the witness.¹³ Further, in the case of prior statements, only those portions of the statements may be introduced that have been discussed with the witnesses in court. To do otherwise would be contrary to the principle of orality.¹⁴ Accordingly, the Panel will not consider items not used during the questioning of the witnesses¹⁵ and, as far as prior statements are concerned, it will only consider those portions discussed with the witnesses in court. The Panel expects the Defence to comply in the future with the Panel's directions in this regard.

9. Second, the Panel observes that one of the items that the Defence seeks to introduce – item DSM00434-00437 – is part of an item that has already been admitted into evidence.¹⁶ The Panel does not find it necessary to rule on its admissibility again. However, as the item was now used in court under a different ERN number than the one under which it was previously admitted, the Panel directs the Registrar to also record it as admitted under the ERN number DSM00434-00437.

¹¹ See, for example, Annex 1 to Defence Request, items 1-3.

¹² See Annex 1 to Defence Request, items 5, 8, 10, 12.

¹³ First Conduct of Proceedings Decision, para. 37; Transcript of Hearing, 2 November 2021, public, p. 1281, lines 10-24.

¹⁴ Transcript of Hearing, 4 October 2021, public, p. 852, line 16 to p. 854, line 21.

¹⁵ The Panel notes that, while some of the items that the Defence seeks to introduce were not used by the Defence, they were used by the SPO and the Panel will consider them accordingly.

¹⁶ Annex 1 to Defence Request, item 4, part of SPOE00213459-00213487, at SPOE00213475-00213478, admitted through KSC-BC-2020-05, F00281, Trial Panel I, *Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material*, 13 December 2021, confidential, paras 18, 26(e). A public redacted version was filed the same day, F00281/RED.

10. Third, the Panel observes that both the Defence and the SPO have, at times, requested to introduce the very same item several times.¹⁷ The Panel will consider them only once.

11. Turning to the remaining items that the Parties seek to introduce, the Panel does not consider it necessary to exercise its discretion with a view to excluding any of them. Therefore, in accordance with the Admissibility Decision and the First Conduct of Proceedings Decision, the Panel dispenses with rendering a discrete item-by-item ruling and considers all these items available to the Panel for the purpose of its deliberations for the judgment on the guilt or innocence of the Accused,¹⁸ with the following caveat.

12. As far as the prior statements of the witnesses are concerned,¹⁹ the Panel recalls that, in accordance with the principle of orality, only those portions discussed with the witnesses during their in-court testimonies will be considered.²⁰ In accordance with paragraph 37 of the Admissibility Decision, the same applies to the corresponding portions of any audio-visual recordings of such prior statements.

13. As far as the admission of lengthy material is concerned, as a general rule, such material shall be considered in its entirety, in order to allow the Panel to assess the correct meaning and broader context of the portion(s) relied upon by the Parties, as the case may be.²¹ Accordingly, the Panel will consider items 16, 21 and 22 used by the SPO during its questioning of Defence Witnesses 300 and 400 in their entirety.

14. Lastly, in accordance with paragraph 37 of the Admissibility Decision, any subsequent unredacted or lesser redacted versions of the items addressed in the present decision will automatically be considered by the Panel for the purpose of its

¹⁷ Annex 1 to Defence Request, items 4 and 6, 8 and 9, 10 and 11; Annex 1 to the SPO Request, items 6, 13 and 28, 4 and 14, 24 and 25.

¹⁸ Admissibility Decision, para. 21; First Conduct of Proceedings Decision, para. 37.

¹⁹ Annex 1 to Defence Request, items 7, 9, 11; Annex 1 to SPO Request, items 1-3, 20, 26.

²⁰ KSC-BC-2020-05, Transcript of Hearing, 4 October 2021, public, p. 852, line 14 to p. 854, line 21.

²¹ Admissibility Decision, para. 38; First Conduct of Proceedings Decision, para. 38.

deliberations and judgment, subject to any objections from the Parties and Victims' Counsel.²² For the purpose of maintaining an accurate record of the proceedings, should any unredacted or lesser redacted versions of these items be disclosed in the future, the disclosing Party shall immediately inform the other Party, Victims' Counsel, the Panel and the Court Management Unit (CMU) thereof. This will allow CMU to link in Legal Workflow any such subsequent unredacted or lesser redacted versions with the version considered part of the evidence for the purpose of the Panel's deliberations and judgment pursuant to the present decision. Should the opposing Party or Victims' Counsel have any objections in relation to any such subsequent unredacted or lesser redacted versions, they shall inform the Panel thereof within five days of the notification of their disclosure.

15. For ease of reference, the Panel lists all items addressed in the present decision which should receive an exhibit number in an annex to the decision. To the extent that, for some items, only portions thereof are considered to be available to the Panel for the purpose of its deliberations and judgment, said portions shall be recorded by the Registrar in Legal Workflow, in the field "General comments", as reflected in the transcripts and recorded by CMU for administrative purposes.

V. DISPOSITION

16. For the above-mentioned reasons, the Panel hereby:
- a. **PARTLY GRANTS** the Defence Request;
 - b. **GRANTS** the SPO Request;
 - c. **ORDERS** the Registrar to record item DSM00434-00437 as admitted in Legal Workflow;

²² See also First Conduct of Proceedings Decision, para. 38.

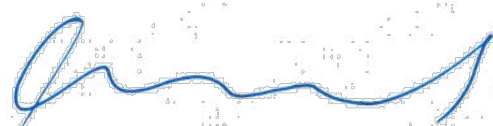
- d. **ORDERS** the Registrar to assign exhibit numbers to the items listed in the annex to the present decision, as indicated therein, and to classify the items as confidential;
- e. **ORDERS** the Registrar to reflect in the field “General comments” in Legal Workflow, as applicable, the portions of the items listed in the annex to the present decision used with each respective witness by the Parties, Victims’ Counsel and/or the Panel, as reflected in the transcripts and recorded by CMU for administrative purposes;
- f. **ORDERS** the disclosing Party to immediately inform the other Party, Victims’ Counsel, the Panel and CMU should any subsequent unredacted or lesser redacted versions of the items listed in the annex to the present decision be disclosed and **ORDERS** the Registrar to link in Legal Workflow any such subsequent unredacted or lesser redacted versions with the respective exhibit number(s) assigned pursuant to this decision; and
- g. **ORDERS** the non-disclosing Party and Victims’ Counsel to file any objections to any such subsequent unredacted or lesser redacted versions within five days of notification of their disclosure.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Thursday, 26 May 2022

At The Hague, the Netherlands.