

In: KSC-BC-2020-05
The 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: Dr Fidelma Donlon

Filing Participant: Defence

Date: 26 May 2022

Language: English

Classification: Public redacted

**Public redacted version of Defence response to
the SPO's request to present evidence in rebuttal**

Counsel for the Accused

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Specialist Prosecutor

Jack Smith

Victims' Counsel

Anni Pues

I. Introduction

1. The Specialist Prosecutor's Office ("SPO"), based on in-court Order¹, Rules 127(2)(d) and 133 of the Rules of Procedure and Evidence (Rules) of the Kosovo Specialist Chambers (KSC), has filed a request to present evidence in rebuttal.²
2. In short, the type of evidence can be summarized as **a)** supplemental testimony of a witness and **b)** additional documentary evidence.
3. The SPO considers that the presentation of this evidence is justified and is in the interests of justice.

II [Redacted]

4. The SPO request is to present the additional testimony of witness. This evidence contains new information which arose during, and directly as a result of, the defence case.
5. The SPO disclosed this new information on April 8, 2022.³
6. This disclosure (Report) contains information concerning the identification by the [Redacted] of an alleged accomplice of the accused.
7. On the occasion of disclosing the information, the SPO has submitted an official note where it describes the "meeting" with the [Redacted] in order to obtain additional information, regarding the case against Salih Mustafa.
8. The defence is of the opinion that this supplemental material cannot be admitted, and should not be admitted.
9. It is not to be regarded as a "testimony" in any manner.
10. The defence has had no opportunity to examine the witness in order to establish under which circumstances the [Redacted] was watching at that time the testimony of the person he later claimed to have "identified".
11. The defence had not any opportunity to examine the witness regarding the manner in which his claimed identification took place.

¹ In-court Oral Order/ KSC-BC-2020-05/ Trial Hearing 19 May 2022

² KSC-BC-2020-05/F00416

³ F00376 with confidential Annex 1

12. The defence was not present at the time of the “meeting” that the witness had with the SPO.
13. The report of the SPO in which it reported the telephone conversation with the witness cannot be admitted as evidence as the entire material and its content, could not be challenged in any manner by the defence.
14. The defence cannot even reliably verify whether the witness had actually and exactly stated what is in the report.
15. In case the supplemental material of the above mentioned witness were to be admitted, the defence contends that the witness must be heard in Court and the defence will have an ample opportunity to question the witness about the entire telephone conversation as such, the content of the report, the circumstances under which the witness claimed to have been while watching the testimony of the defence witness that he later claimed to identify, whether the witness was alone at the time, whether he reported it to anybody else at the time, whether he has been coached and whether his claimed identification was corroborated with anyone else who might have been present at the time he claimed to have identified the defence witness.
16. Without the defence having an opportunity to challenge anything about this claimed identification, such evidence cannot have any probative value of any kind, and cannot be regarded as in the interest of justice.
17. To introduce the requested material regarding [Redacted] would, in the opinion of the defence be a violation of the principal of the right to a fair trial.
18. The defence submits that the fact that the identification of a person or object in criminal proceedings is an investigative action and as such it must take place before filing an indictment. At this stage of the proceedings, when the witness in question needs to be heard on this issue, the defence is of the opinion that at this point in time this is too late in the proceedings or would prolong the proceedings for an unreasonable period of time.
19. The defence reminds the Panel that in statements the witness gave to the SPO he claimed that after the war he visited “Skifterat” restaurant where he saw various of his alleged perpetrators⁴. In his testimony in court, he gave just a vague and general description.⁵
20. The entire statement of the SPO witness that suddenly identified a perpetrator is also in contrast and contradiction with his earlier SPO statements and the description he now suddenly uses in the Report of the SPO.

⁴ KSC-BC-2020-05-060698-TR-ET Part 2 Revised RED3 (page 25, lines 14 to 22)

⁵ Testimony of the [Redacted] in a Trial Hearing held on 5 October 2021 (page 978, line 8 of the official transcript)

21. To simply introduce this kind of material and with such material trying to corroborate a testimony of a witness on the one hand and at the same time trying to discredit the testimony of a defence witness would, in the opinion of the defence, be a violation of the right to a fair trial.
22. In particular when the [Redacted] could not be examined by the defence on the issue that the SPO is trying to introduce with the supplemental material.
23. Not even the Panel itself would be able to question the witness about it, and therefore could not make any kind of assessment on the credibility of the "testimony" of the witness or his claimed identification of a particular person.
24. As the Panel endeavours to determine the truth of the case, it seems impossible to do so on an issue that is critical, which is the identification of any perpetrator in a criminal case.

III Defence position regarding the additional documentary evidence

25. As to the additional documentary evidence, the defence submits that the SPO's material is of a general nature and not sufficiently specified. The description that the material relates to the movement of population in March and April 1999 within the territory of Kosovo is basically not of any relevance as far as it might challenge any of the defence witnesses' credibility.
26. The movement of population "within the territory of Kosovo" is too generally formulated, as witnesses have not testified about general movements but of a specific movement that they witnessed themselves at some point in time.
27. Such material, as it is apparently open-source material could have been used during the examination of the defence witnesses. Then at least the defence witnesses as well as the defence could have seen whether this material would have been of any relevance to the testimony of any particular defence witnesses in particular, and if so, on which exact part of their testimony.
28. The SPO asserts in its submission that "contrary to the evidence presented during testimony of certain defence witnesses, these documents indicate that refugees began leaving Prishtina shortly after the NATO bombing campaign commenced on 24 March 1999, and that the exodus continued at least until 6 April 1999". The SPO does not in any manner specify which witness they envisage, and in particular which part of their testimony. As the defence witnesses testified about their own experiences, general material as envisaged by the SPO cannot alter or change their experiences or what they have seen with their own eyes and what they have heard with their own ears.
29. The defence stresses that the SPO did not in any manner specify for any of the defence witnesses for which particular part of their testimony the material would rebut the assertions, if there were made any at all by the defence witnesses. The SPO remains vague on this issue

and does not demonstrate in which manner the material would actually rebut the testimony of the defence witnesses and whether it would rebut it for the entire testimonies or of any specific parts of their testimonies. The request and the material indicated lacks specificity.

30. Apparently, the SPO intends to discredit defence witnesses with general and unspecified documents, and when the SPO had the opportunity to put such material to the witness, they simply chose not to do that.
31. It is unfair to the defence witness, and unfair to the defence, to request admission of material –documentary evidence - without having the opportunity to put such material to the defence witness and see whether that would make a difference to the testimony that the defence witness gave in court.
32. In addition, even the Panel would neither be able to rule the testimony of a witness as credible or not credible, if the witness could not be confronted with the material that the SPO now intends to introduce. The Panel could not even make any assessment of the credibility.
33. If it would be to ascertain the truth, the SPO should have presented the material earlier on, especially as the material is of apparently open-source material that most probably existed before the witnesses testified.
34. The defence further submits that the great majority of the statements of defence witnesses have been disclosed within a time frame in which the SPO could have used the now requested material for their cross-examination the defence witnesses.
35. As far as the material by the SPO is requested to be used for the purpose to discredit the defence witnesses (“contrary to the evidence presented during testimony of certain defence witnesses” and: “The Prosecution intends to rebut the assertions of these witnesses”)⁶, then why would the SPO not have used such material when cross-examining the defence witnesses. There was ample time and opportunity for that. And the requested material existed long before the witnesses appeared.
36. To simply introduce any kind of material and with such material to trying to challenge the credibility of the witnesses, would, in the opinion of the defence be a violation of the principle of the right to a fair trial.

⁶ Prosecution Request to present Evidence in rebuttal 24 may 2022/F00416, para.4

IV. Concluding submissions

37. The defence opposes this request of the SPO, considering that at this stage of the procedure this evidence is inadmissible and/or should not be admitted.
38. The defence submits that the SPO request of admission of the requested material, as described under a) and b) in paragraph 2 of this document is to be rejected.
39. The Defence submits that, as explained under II and III of this document, the material is not of any probative value.
40. The defence submits that admission of the SPO's requested additional material would violate the principle of the right of a fair trial.

Word count: 1805



Julius von Bóné
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26 May 2022
At the Hague, the Netherlands