In: **KSC-CA-2023-02**

The Specialist Prosecutor v. Mr. Salih Mustafa

Before: **A Panel of the Court of Appeals Chamber**

Judge Michele Picard

Judge Kai Ambos

Judge Nina Jorgensen

Registrar: Fidelma Donlon

Filing Participant: Defence of Salih Mustafa

Date: 2 February 2023

Language: English

Classification: Public Redacted

Public Redacted Version of Defence Notice of Appeal pursuant to Rule 176 (of Rules of Procedure and Evidence) against the Judgment of the Trial Panel I of 16 December 2022

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I. INTRODUCTION

1. The Appellant appeals:

(i)- Counts 1,3 and 4, on the basis that the Trial Panel ("TP") made errors on questions of law ("erred in law") which invalidate the Judgment ("ITJ") and/or errors of fact ("erred in fact") which occasioned a miscarriage of justice ("OMJ"); and

(ii)-the sentence, on the basis that the TP made errors in sentencing.

2. The Appellant seeks:

(a)-the reversal of convictions on counts 1,3 and 4, to be replaced with:

(i)-acquittals on each count; or

(ii)-an order returning the case to the TP; or

(b)-if any/all convictions are affirmed, a reduction in sentence.

3. Footnote references are to paragraphs in the Judgment, unless otherwise stated.

II. GROUNDS OF APPEAL

All Counts

4. Ground-1

TP erred in law:

(1A)-by finding that the facts as of April 1999 established a non-international armed conflict when in fact the conflict was properly characterized as international;[1]

[1] Judgment KSC-BC-2020-05, 16 December 2022/F00494 §696-711

(1B)-by admitting and placing reliance upon the suspect interviews of the Appellant, when those interviews had been obtained by means of a violation of the Law and standards of international human rights law, namely that the Appellant had not been informed of the nature and cause of the allegation under investigation, and that violation cast substantial doubt on the reliability of the interviews and/or seriously damaged the integrity of the proceedings pursuant to Rule 138(2)[2];

(1C)-by permitting in-court identification evidence of the Appellant when such identification evidence has no probative weight, and should accordingly be excluded in accordance with Rule 138[3];

(1D)-in finding that it was permissible for the TP to rely upon documentary evidence which lacked indicia of authenticity and reliability[4];

(1E)-in failing to exercise properly, or at all, its discretion when admitting, and thereafter placing reliance upon, the written statements and related documents of [Redacted] and [Redacted], and the oral statement of [Redacted], and when the same ought properly to have been excluded or otherwise afforded no weight[5];

(1F)-by failing to exercise its discretion properly, or at all, when permitting the SPO to cross-examine Prosecution witnesses as hostile, as demonstrated by the complete absence(s) of reasons[6];

[2] Ibid §238
[3] Ibid §541,404
[4] Ibid §42
[5] [Redacted]
[6] Judgment KSC-BC-2020-05, 16 December 2022/F00494 § 81,89,551,558,559,577,

(1G)-by failing to exercise its discretion properly, or at all, when providing assurances to [Redacted] under Rule 151(3), as demonstrated by the complete absence of a reasoned basis for the decision[7];

(1H)-by failing to recognise the need for, and thereafter exercise, special caution before reliance upon the testimony of [Redacted] where it implicated the Appellant[8];

(1I)-by placing reliance upon the claim by [Redacted] that he told the Appellant, "[Redacted]", when the same was not an admission made by the Appellant[9];

(1J)-by failing to apply the same fair and impartial standards when weighing up the evidence of witnesses for the prosecution and the defence (and of evidence which favoured the defence when provided by witnesses called by the Prosecution)[10];

(1K)-by failing to acknowledge and consider the possible financial motive to lie, fabricate or distort information, on the part of the dual status victim/witnesses who claim reparations[11];

(1L)-by unfairly regarding evidence of 'alibi' as irrelevant unless it was capable of excluding entirely the alleged acts attributed to the Appellant, when the TP should have considered such evidence as nevertheless continuing to be relevant to 'likelihood' (that is, evidence tending to show that by reason of the presence, or absence, of the Appellant at a particular place or in a particular area at a particular time he was *unlikely* to have been at the place where the offence was alleged to have been committed at the time of commission, even if it remained a possibility)[12];

[7] [Redacted]
[8] [Redacted]
[9] [Redacted]
[10] Ibid §34-39,49-223
[11] Ibid §35 and §49-223
[12] Ibid §274

(1M)-by reversing the burden of proof in relation to alibi[13]; and

(1N)-by admitting additional evidence in the form of [Redacted] after the closure of the defence case and in circumstances where the defence were unfairly deprived of adequate time and facilities to develop a strategy with respect to the same[14].

5. Ground-2

TP erred in fact:

in making the following findings of fact for which there was no evidence, or no sufficient evidence, upon which a reasonable tribunal could so find, namely:

Determining the location as the Zllash detention centre

(2A)-TP established that the ZDC was in fact the location where people have been arbitrarily detained, tortured and murdered. The Panel from the outset labelled the location as a "detention center" before factually concluding that the alleged location central to the case was, in fact, a detention center[15];

(2B)-TP systematically made a presumptive finding that the location central to the case was "BIA base" or that BIA occupied a specific compound and that it was in fact controlled by the BIA. The Panel erred in fact by stating that the Appellant provided evidence himself as being in charge of the base. It systematically made a presumptive and contradictory finding that the location central to the case was "a KLA base that

[13] Ibid §332
[14] [Redacted]
[15] Ibid §348-378.

was "lent to the BIA" or "lent to the KLA for the establishment of the BIA base in Zllash"[16];

(2C)-TP misquoted the Appellant asserting that he stated that "BIA occupied a specific compound, with a safe house"[17], whereas in fact the Appellant never said that;

SPO indicating the specific location where the alleged crimes took place

(2D)-TP noted that the defence claim that the SPO deceived the defence by changing its case with regard to the specific building(s) was groundless whereas it was clearly indicated by the SPO in which building of the compound the alleged crimes of the indictment were committed. The SPO at the time singled out only 1 building[18];

Identification of the location by SPO witnesses

(2E)-TP, while conceding [Redacted] to describe and see the detention location upon them leaving the area[19];

(2F)-TP stated that [Redacted] the detention location. [Redacted] has been misquoted[20];

[16] Ibid §349 (title and 2nd sentence. §350,352,353-355,365
[17] Ibid §349
[18] Ibid §373 See: 15 September p.328 Opening Statement SPO, including the slides that were shown.
[19] [Redacted]
[20] [Redacted]

(2G) -While TP found that some defence witnesses were able to observe the location central to the case, nevertheless the TP rejected observations of the latter on grounds completely unrelated to their observations[21];

(2H) -TP erred in fact where, with regard to [Redacted], the Defence arguments were found unpersuasive, while at the same time, TP conceded that these witnesses did not have time to look around properly. As [Redacted] to the extent that they truthfully described it. The TP's finding that [Redacted] overall ability to describe the location properly is intrinsically contradictory[22];

Regarding credibility and reliability of defence witnesses and of evidence which favoured the defence

(2I)-TP erred in fact where it consistently considers, signals, states, and/or presumes that witnesses would have an inclination to provide evidence generally favorable to the Accused and unfavorable to the SPO[23];

(2J)-TP erred in fact where it presumes or suggests that witnesses coordinated changes in their respective testimonies[24];

(2K)-TP erred in fact where it failed to consider self-imposed factors in order to assess the credibility and reliability of the witnesses. In particular the TP considered the testimony of defence witnesses one-sided and biased and failed to apply self-imposed

[21] Ibid §368,369,370,215,216,217,218-223,201-207,208-213
[22] [Redacted]
[23] Ibid §144,147,148,151,158,165,170,181,188,200,206,213,223
[24] Ibid §281,286

factors and failed to consider the testimony of defense witnesses in a holistic manner as prescribed in Rule 139. The TP failed to properly determine the weight to be given to the testimony of the defense witness[25];

(2L)-TP erred in fact where it made, as prescribed in Rule 140, incorrect inferences of circumstantial evidence concerning defense witnesses while these inferences were not the only reasonable ones that could be drawn from the evidence presented[26];

(2M)-TP erred in fact where it considered factors related to witnesses personally, which were unrelated to the events and facts that witnesses testified about. It wrongly assessed those irrelevant issues supposedly affecting the credibility or reliability of the witness[27];

(2N)- TP erred in fact when it specifically left out the evidence of the SPO witness Mr. Humolli who observed and described the location in detail, and discounted his testimony about BIA not having any authority or mandate to arrest or detain anyone[28];

[25] Ibid §138-223,263,273,274,264-267,268-269,270-272,273-290,291-292,293-295,296-301,302-303,304-306,307-311,312-320,321-322,323-333
[26] Ibid §138-223,263,273,274,264-267,268-269,270-272,273-290,291-292,293-295,296-301,302-303,304-306,307-311,312-320,321-322,323-333
[27] Ibid §138-223,263,273,274,264-267,268-269,270-272,273-290,291-292,293-295,296-301,302-303,304-306,307-311,312-320,321-322,323-333
[28] Mr. Humolli: T. 1st February 2022 page 2357-2358 and 2361 (line 20-25) and 2362-2363 (line 7-15+24-25 until page 2364 line 3), 2365 (line 12) -2370 (line 14); Mr. Humolli T. 2nd of February 2022, page 2405 (line 9-25)-2409 (line 19), page 2424 (line 16) up to page 2425 (line 15), Judgment KSC-BC-2020-05, 16 December 2022 / F00494 § 375 related to Mr. Humolli: T. 2 February, Page 2425 (line 16)-2427 (line 6) and page 2429 (Line 14-22)

Whether Mustafa could be at more than one place in the same day

(2O)-Where TP considered, on multiple occasions in the judgment, that the Appellant in the circumstances of April 1999 could realistically have been in multiple locations (among them eg. Rimanishte, Bellopoje and Zllash) in one and the same day[29]; and

[Redacted]

(2P)-TP erred in fact where it noted that [Redacted]. To the contrary, [Redacted] [30].

The errors in grounds 1 and 2 above, individually and cumulatively, ITJ/OMJ in relation to the *actus reus* and/or *mens rea* of counts 1, 3 and 4 and the convictions should be reversed.

Murder

6. Ground-3

TP erred in law by failing to make a decision under Rule 40 and exercise the power to authorise an exhumation and examination of the body believed to be [Redacted], with a view to establishing *inter alia* (a) the identity of the body, (b) the cause and time of death; and (c) the nature of any injuries, following the preceding failure of the Specialist Prosecutor to make a mandatory application for authorisation[31].

The error in ground 3 above ITJ on the *actus reus* of count 4 and the conviction should be reversed.

[29] Ibid §310
[30] Ibid §472
[31] [Redacted]

7. Ground-4

TP erred in law and fact:

(4A)-by finding that mistreatment at Zllash prior to 19 April 1999 was a substantial cause of death of [Redacted], in the absence of evidence that any injuries pre-gunshot and attributable to such mistreatment, were operative causes at the time of death[32];

(4B)-by finding that the *actus reus* of murder was made out in circumstances where it was not established that the only reasonable inference from the evidence was that the deceased had died as a result of the Appellant's actions or omissions (i.e. it was also a reasonable inference that the deceased died solely as a result of the gunshot wound(s) received)[33]; and

(4C)-by failing to consider the principle of *novus actus interveniens* in relation to the killing by gunshot, that is, whether the free, deliberate and informed killing of the deceased by another using a gun was an intervening event which operated to break the chain of causation, relieving the Appellant of any liability for the ultimate result, whether reasonably foreseeable or not[34];

(4D)-by making findings as to the role and responsibility of the Appellant for the death of [Redacted] in relation to which there was no evidence, or no sufficient evidence upon which a reasonable tribunal could so find.[35]

The errors in ground 4 above, individually and cumulatively, ITJ/OMJ on the *actus reus* of count 4 and the conviction should be reversed.

[32] Ibid §689,690
[33] Ibid §624
[34] Ibid §638
[35] [Redacted]

8. Ground-5

TP erred in law and fact:

(5A)- by finding an intent to kill when there was no evidence, or no sufficient evidence, upon which a reasonable tribunal could be sure of an intent to kill[36]; and

(5B)- in finding that the *mens rea* for the war crime of murder was also satisfied when an accused (i) wilfully omitted/denied to provide medical care to a detainee (ii) which the perpetrator should reasonably have known might lead to death[37] when the correct *mens rea* for murder requires at a minimum (i) the intention to wilfully cause serious bodily harm with (ii) knowledge that death was likely to follow/a probable consequence/would follow in the ordinary course of events; and when liability under JCE1 for murder requires that all participants must intend to kill at a minimum.

The errors in ground 5, individually and cumulatively, ITJ/OMJ on the *mens rea* of count 4 and the conviction should be reversed.

Torture

9. Ground-6

TP erred in fact by finding that the *actus reus* and *mens rea* for torture was established when there was no evidence, or no sufficient evidence, upon which a reasonable tribunal could so find[38].

[36] Ibid §695
[37] Ibid §688
[38] Ibid §678,685

10. Ground-7

TP erred in law and fact when finding that the *actus reus* and *mens rea* for the count of torture, which particularised the torture of at least *six* persons, were established when, on the TP's findings, the Appellant participated in the torture of two persons only with the relevant specific purpose[39].

The errors in ground 6 and 7 ITJ/OMJ on count 6 and the conviction should be reversed

Arbitrary Detention

11. Ground-8

TP erred in law when finding that arbitrary detention in a non-international armed conflict constitutes a war crime within the jurisdiction of the Kosovo Specialist Chambers (previously considered by the KSC Court of Appeals but yet to be considered the KSC Supreme Court)[40].

The error in ground 8 ITJ on count 1 and the conviction should be reversed

[39] Ibid §685,733
[40] Ibid §645

Sentencing

12. Ground-9

TP made discernible errors in sentencing:

Aims and purposes of sentencing

(9A)-by defining in a very prejudicial manner the purposes of sentencing, shifting the whole purpose of Article 38 of the Code No. 06/L074 (KCC) towards punishment of the Accused.[41]

(9B)-by defining in a prejudicial manner for the purpose of imposing harsher sentences uses extra legal arguments.[42] It refers, in footnote no. 1626, to cases from the ICTY, which are inappropriate for this case for the simple reason that the Appellant has never been a political party dignitary or served in politics in any period of his life.

Application of the principle of lex mitior

(9C)-Regarding the policy of sentencing applied in this case,[43] the Panel has straightforwardly rejected the application of one of the most stable principles of criminal law of the Western world – the principle of *lex mitior.*

[41] Ibid §772
[42] Ibid §774,775,777
[43] Ibid §780

(9D)-TP did not and/or wrongly apply/applied the *lex mitior* principle[44] thus violating constitutional rights of the Appellant.

(9E)-TP erred in its application of Article 44 of the Law, leading to the violation of constitutional guarantees from art. 33 (2) of the Constitution of Kosovo; the TP erred as it construed the provision of Article 44 of the Law in such a manner ignoring its unconstitutional nature as against Article 33 (2) of the Constitution. To this effect, the defence proposes, that the Appeals Court refers for constitutional review, under the incidental control of constitutionality as stipulated in Article 113.8 of the Constitution of Kosovo, provisions of Article 44 of the Law;

General

(9F)-by failing in any event to consider the general sentencing practice of the former Yugoslavia at the time of commission (not just the provisions of the CCSFRY);

(9G)-by failing to give reasons for departing from the provisions of the CCSFRY and the general sentencing practice of the former Yugoslavia at the time of commission;

(9H)-in failing to take into consideration the range of sentences imposed on persons convicted of similar offences at other Kosovo and international courts/tribunals[45];

(9I)-when sentencing the Appellant in relation to count 3 on the basis that at least six persons were tortured, when on the TPs findings, the Appellant had only participated in the torture of two persons, and had the requisite *mens rea* for torture in relation to those two persons[46];

[44] Ibid § 761- 781
[45] Ibid §778-781
[46] Ibid §813-817

(9J)-TP itself chose to act upon mitigating circumstances,[47] yet it took into consideration only aggravating factors when deciding to sentence the Accused; it rejected any mitigating circumstance in favor of the accused[48]; and

Overall

(9K)-by rendering a sentence of 26 years imprisonment which was both capricious and manifestly excessive in all the circumstances

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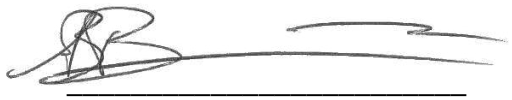

2 February 2023 **Julius von Bóné**

At The Hague, the Netherlands **Defence Counsel**

[47] Ibid §820
[48] Ibid §786,826