

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

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

Date: 26 June 2023

Filing Party: Specialist Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR
v.
PJETËR SHALA

**Public Redacted Version of "Request for Leave to Appeal and/or Reconsideration
of the 'Decision on the Prosecution Motion for Judicial Notice of
Facts of Common Knowledge and Adjudicated Facts' "**

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law") and Rules 77 and 79 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), the Defence of Mr Pjetër Shala ("Defence" and "Accused", respectively) hereby files this Request seeking leave to appeal and/or reconsideration of the Trial Panel's "Decision on the Prosecution motion for judicial notice of facts of common knowledge and adjudicated facts" issued on 8 June 2023 ("Impugned Decision").¹
2. In the Impugned Decision, the Panel granted the Prosecution Request, in part, by, *inter alia*, taking judicial notice of 56 adjudicated facts as formulated in Annex 2 of the Impugned Decision.²
3. In its order dated 16 June 2023, the Panel granted the Defence request for an extension of the time allowed in Rule 77(1) of the Rules for the submission of the present request for certification to appeal the Impugned Decision.³
4. The Defence submits that the Panel erred by taking judicial notice of two proposed adjudicated facts, specifically facts nos. 53 and 56, in violation of the Accused's fair trial rights and against the interests of justice.
5. Adjudicated fact no. 53 as reformulated by the Panel states: "[REDACTED] and [REDACTED] were all detained in the KLA camp in Kukeš, ~~in three different~~

¹ KSC-BC-2020-04, F00538, Decision on the Prosecution Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts with Public Annex 1 and Confidential Annex 2, 8 June 2023 ("Impugned Decision"). *See also* KSC-BC-2020-04, F00484, Prosecution Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts, 14 April 2023 (public with public Annex 1 and Confidential Annexes 2-3)("Prosecution Request"); KSC-BC-2020-04, F00507, Defence Response to the "Prosecution Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts", 11 May 2023 (public with public Annex 2 and confidential Annex 2) ("Response"). All further references to filings in this Request concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² Impugned Decision, para. 33(a) to 33(d).

³ T. 16 June 2023, pp. 1946, 1947 (Oral Order on Defence Request for Extension of Time F00547).

locations.” Proposed fact no. 56 states that “[REDACTED] died while he was detained at the Kukeš camp on or about [REDACTED] June 1999”.

6. The Defence proposes the following issues for certification:

(1) Whether the Panel erred in fact and in law by taking judicial notice of proposed adjudicated facts nos. 53 and 56, thereby impermissibly shifting the burden of proof regarding the matters included therein to the Defence; and

(2) Whether the Panel erred in fact and in law by taking judicial notice of the above-mentioned contested facts which were adjudicated in the Sabit Geci et al. proceedings, which the Prosecution has treated as unreliable.

7. In the alternative, the Defence requests reconsideration of the findings in the Impugned Decision concerning the contested adjudicated facts in light of the Prosecution’s position as expressed in the course of the testimony of TW4-01 that effectively suggests that the *Sabit Geci* proceedings, from which the contested adjudicated facts originate, cannot be relied upon. Reconsideration is required to avoid injustice.

II. APPLICABLE LAW

8. Article 45(2) of the KSC Law and Rule 77 of the Rules provide that the party seeking certification for interim appeal must demonstrate the existence of an issue that would: (i) significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial; and for which (ii) the immediate resolution by a Court of Appeals Panel may materially advance the proceedings.

9. If a discretionary decision is being challenged, “a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i)

based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.⁴ The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight to relevant considerations in reaching its decision".⁵

10. Rule 157 of the Rules provides the following regarding adjudicated facts:
 - (1) The Panel shall not require proof of facts of common knowledge but shall take judicial notice thereof.
 - (2) Upon request by a Party or *proprio motu*, after hearing the Parties and, where applicable, Victims' Counsel, the Panel may, in the interests of a fair and expeditious trial, take judicial notice of adjudicated facts from other proceedings of the Specialist Chambers or from final proceedings before other Kosovo courts or from other jurisdictions relating to matters at issue in the current proceedings, to the extent that they do not relate to the acts and conduct of the Accused as charged in the indictment.
11. It is settled case law that trial chambers must take a cautious approach in exercising their discretion and taking judicial notice of adjudicated facts in order to ensure the rights of the accused to a fair trial.⁶
12. The Defence seeks to challenge the above-mentioned findings of the Panel by seeking certification to appeal the two issues set forth in paragraph 6 above.
13. Rule 79 of the Rules provides for the power to reconsider decisions. It states that, in exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice, a Panel may, upon request by a party, reconsider its own decisions.

⁴ KSC-BC-2020-07, IA001, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, para. 14.

⁵ KSC-BC-2020-07, IA001, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, para. 14.

⁶ ICTY, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.1, Decision on Ratko Mladić's Appeal Against the Trial Chamber's Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 12 November 2013 ("*Mladić Appeal Decision*"), para. 24.

III. SUBMISSIONS

A. The issues are appealable

14. Without addressing the substance of the submissions of the Defence, the Panel found that the contested adjudicated facts do not relate to the acts and conduct of the Accused and found that taking judicial notice of them: (i) serves the interests of justice, and (ii) “only establishes a rebuttable presumption of accuracy of such facts” that “does not eliminate the burden that rests upon the SPO to prove its case beyond reasonable doubt”.⁷
15. The Defence seeks to challenge the above-mentioned findings of the Panel by seeking certification to appeal the two issues set forth in paragraph 6 above.
16. The proposed issues, which arise directly from the Impugned Decision, are sufficiently concrete and precise.
17. The Defence submits that the Panel erred by accepting the two contested adjudicated facts. The Panel erred by interpreting Rule 157 of the Rules inconsistently with Article 6 of the European Convention on Human Rights (“EHCR”) and Article 31 of the Kosovo Constitution, shifting the burden of proof to the Accused who now needs to rebut the elements contained in those adjudicated facts that are central elements in the Prosecution’s case against him. It is the Defence submission that the manner in which Rule 157 has been interpreted and applied is in breach of the principles set out in Article 6 of the ECHR and constitutes an abuse of discretion. Both proposed appealable issues concern the Accused’s right to a fair trial, including his right to be presumed innocent and to confront witnesses against him.

⁷ Impugned Decision, para. 27.

18. Judicial notice has been taken of important elements of the Prosecution's case, which were set out in the contested adjudicated facts that the Defence will now be forced to attempt to rebut.⁸ These elements because of their importance will inevitably have an impact on the outcome of the trial. The Accused should not be required to rebut central elements of the Prosecution's case against him. Although taking judicial notice is matter within a Panel's discretion, such discretion is limited by the obligation to respect the rights of the Accused. A Panel is obliged to decline taking judicial notice of proposed adjudicated facts if doing so would not serve the interests of justice.⁹ Certification to appeal the two proposed issues is warranted to ensure timely appellate review of this matter and prevent further prejudice in these proceedings.
19. By taking judicial notice of the proposed adjudicated facts that purport to identify persons allegedly detained, accept the alleged act of detention, accept that [REDACTED] died at a specific time and that his death occurred while he was being detained, the Panel took judicial notice of central elements of the Prosecution's case against the Accused. The Prosecution is no longer required to admit evidence to prove these facts beyond reasonable doubt. The onus is impermissibly reversed, as the Defence must now rebut the admitted facts and the elements contained in them by adducing evidence at trial. Inevitably, this has an impact on the type and scope of evidence the Defence will be required to present in the course of its case. This only became known shortly before the scheduled start of the presentation of the Defence case.

⁸ The centrality and importance of the said proposed facts to the Prosecution's case, as well as the facts' relevance to the acts and conduct of the Accused, are further demonstrated in the consistent focus on these facts in the course of TW4-01's live testimony before the Panel on 30 and 31 May 2023. See, for example, T. 30 May 2023 pp. 1395, l. 10-13, 1403, l. 2 – 1404, l. 3, 1407, l. 11-17, 1421, l. 14, 15, 1429, l. 17-20, 1433, l. 13, 1435, l. 7, 1438, l. 9-15, 1440, l. 13-21, 1449, l. 13-24, 1452, l. 3-15; T. 31 May 2023 pp. 1587, l. 13 – 1588, l. 16, 1529, l. 6-25, 1532, l. 1-10, 1533, l. 10, 11.

⁹ See also *Mladić* Appeal Decision, para. 25; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision of Prosecution Motion of Judicial Notice of Adjudicated Facts with Annex, 26 September 2006, para. 4.

20. The Panel failed to consider that by accepting proposed adjudicated facts nos. 53 and 56, it took notice of facts that are directly related to elements of the offences with which the Accused is charged. This is inconsistent with Article 6 § 2 of the ECHR.¹⁰ Although the proposed adjudicated facts do not come within the narrow category of the specific alleged acts, conduct, or mental state of the Accused, in the specific circumstances of this case, the interests of justice require that the Prosecution demonstrates its case on these points at the requisite standard.¹¹ The specific circumstances of this case in which the Accused faces trial more than two decades after the alleged events and while he has cut all links with Kosovo after the war is not only unrealistic. It impermissibly places on him an excessive burden. It is unfair to expect the Accused at present to show that the contested adjudicated facts are inaccurate or unsafe.¹²
21. The second appealable issue focuses on the fact that the two contested adjudicated facts originate from the *Sabit Geci et al.* proceedings which the Prosecution treats as unreliable and openly disputes their outcome.¹³ However, whereas the Prosecution appears to rely, for the purposes of seeking judicial notice, on certain findings of the said judgements, it evidently rejects others and disputes the outcome in those proceedings.

¹⁰ See, for instance, ECtHR, *Salabiaku v. France*, no. 10519/83, 7 October 1988, pp. 15-16, para. 28; ECtHR, *Janosevic v. Sweden*, no. 34619/97, 23 July 2002, para. 101; *Telfner v. Austria*, no. 33501/96, 20 March 2001, para. 18.

¹¹ See *mutatis mutandis* ICC, *Prosecutor v. Al Hassan Ag Abgdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18 OA4, Judgment on the appeal of the Prosecution against Trial Chamber X's "Decision on second Prosecution request for the introduction of P-0113's evidence pursuant of Rule 68(2)(b) of the Rules", 13 May 2022, paras. 55, 56, referring, inter alia, to ICTR, *The Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo, 15 December 2006, para. 9. As held in the ICTY case of *Popović*, "[i]n balancing judicial economy with the Accused's right to a fair and public trial, the Trial Chamber is of the view that a number of these facts [that go to issues which are at the core of this case] should be excluded in the interests of justice".

¹² See also Response, paras. 20-23, 32, 33.

¹³ Prosecution Request, Annex 2, pp 11, 12; *Sabit Geci et al.*, District Court of Mitrovicë/Mitrovica, P. No. 45/2010, 29 July 2011, paras. 64, 78, 122 respectively.

22. As recently demonstrated during its examination-in-chief of Witness TW4-01, the Prosecution requested TW4-01 to explain to the Panel the “inconsistency” between, on the one hand, [REDACTED] for the murder of [REDACTED].¹⁴ In response, TW4- 01 stated that, in his view, [REDACTED].¹⁵
23. The Panel erred by taking judicial notice of the contested facts that were adjudicated in proceedings the Prosecution itself treats as unreliable.
24. In the alternative, the Defence submits that the Prosecution’s position on the *Sabit Geci et al.* proceedings, as set out above, constitutes a valid reason to reconsider the contested aspects of the Impugned Decision to prevent an injustice.

B. The issues significantly affect the fair conduct of the proceedings as well as the outcome of the trial

25. The issues identified in paragraph 4 of this Request directly affect the right of the Accused to a fair trial and the potential outcome of the trial. By taking judicial notice of proposed adjudicated facts nos. 53 and 56, the Panel erred in fact and in law and impermissibly shifted the burden of proof, requiring the Defence to rebut a presumption for the accuracy of these facts instead of allowing – as required under Article 6 of the ECHR- the Prosecution to prove central aspects of its case. Appellate review of the issues set forth for certification and a determination on the compatibility of the reversal of the burden of proof for the elements of the Prosecution’s case contained in the contested adjudicated facts must be allowed at the present stage to prevent irremediable prejudice.

C. An immediate resolution by an Appeals Panel will materially advance the proceedings

¹⁴ T. 31 May 2023 pp. 1533, l.12 - 1534, l. 1.

¹⁵ T. 31 May 2023 p. 1534, l. 10-24.

26. A prompt determination by an Appeals Panel would provide certainty on whether the proceedings are continuing in compliance with the fundamental guarantees of fairness. Appellate intervention at the present stage will clarify the basis from which the Defence will have to adduce its evidence and ensure that the proceedings can proceed in a narrow and effective way that respects the rights of the Accused, including his right to be presumed innocent. The Defence will be able to present its case with certainty and will not have to rebut facts that have been the subject of erroneous judicial notice at the expense of other evidence.

IV. CONCLUSION

27. For these reasons, the Defence respectfully requests the Panel to grant the Request and certify the issues proposed in paragraph 6 above. In the alternative, the Defence invites the Panel to reconsider its findings concerning the contested adjudicated facts for the reasons set out in paragraphs 20-23 above.

V. CLASSIFICATION

28. Pursuant to Rules 82(3) and 82(4) of the Rules, this Request is filed as confidential as it relates to the confidential Annex 2 of the Impugned Decision and contains confidential information. The Defence seeks leave to file a public redacted version of this Request in due course.

VI. RELIEF REQUESTED

29. In view of the above, the Defence respectfully requests the Panel to grant the Request and certify the proposed issues or, in the alternative, reconsider its decision concerning the contested adjudicated facts in light of the position taken by the Prosecution during the testimony of Witness TW4-01.

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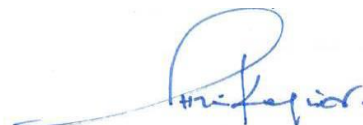
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Monday, 26 June 2023

The Hague, the Netherlands