



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-04
Specialist Prosecutor v. Pjetër Shala

Before: **Trial Panel I**
Judge Mappie Veldt-Foglia, Presiding
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve

Registrar: Dr Fidelma Donlon

Filing Party: Acting Specialist Prosecutor

Date: 5 July 2023

Language: English

Classification: Public

**Prosecution response to Defence request for leave to appeal and/or
reconsideration of adjudicated facts decision**

Specialist Prosecutor's Office

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Counsel for the Accused

Jean-Louis Gilissen

I. INTRODUCTION

1. The Request¹ should be rejected because it fails to establish that either of the Issues² meet the standard for certification to appeal under Article 45 of the Law³ and Rule 77 of the Rules.⁴ It also fails to demonstrate that the Panel's findings warrant reconsideration pursuant to Rule 79.

2. Certification must be the absolute exception⁵ and reconsideration can only occur in exceptional circumstances.⁶ Rather than demonstrating that such exceptional relief is justified, the Defence merely disagrees with the Decision,⁷ misrepresents the record, and fails to demonstrate any impact justifying certification or reconsideration.

II. SUBMISSIONS

A. THE ISSUES FAIL TO MEET THE STANDARD FOR CERTIFICATION

3. As the certification test is cumulative and the Defence has failed to identify appealable issues arising from the Decision,⁸ on this basis alone, the Panel should

¹ 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", KSC-BC-2020-04/F00554, 22 June 2023, confidential ('Request'). A public redacted version was filed on 26 June 2023 (KSC-BC-2020-04/F00554/RED).

² The Request raises two issues ('Issues'). See Request, KSC-BC-2020-04/F00554/RED, para.6.

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁵ ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para.5. While this decision concerned admission of evidence, the same considerations apply to discretionary decisions to notice adjudicated facts. Like evidence, the Panel is required to assess noticed adjudicated facts at the end of the proceedings in light of the entire record.

⁶ Rule 79.

⁷ Decision on Prosecution motion for judicial notice of facts of common knowledge and adjudicated facts, KSC-BC-2020-04/F00538, 8 June 2023, public ('Decision').

⁸ The standard for certification to appeal has been articulated by the Pre-Trial Judge in the Decision on Application for Leave to Appeal "Decision on Motion Challenging the Form of the Indictment", KSC-BC-2020-04/F00116, 29 November 2021, public, paras 12-13, relying on *Specialist Prosecutor v. Thaçi et al.*, Decision on the Thaçi Defence Application for Leave to Appeal, KSC-2020-06/F00172, 11 January 2021, public ('Thaçi Decision') paras 10-17.

dismiss the Request. However, in addition, the Request also fails to demonstrate any significant impact on the proceedings or the outcome of the trial, and that appellate resolution would materially advance the proceedings.

1. The Issues are not appealable

Issue 1 does not constitute an appealable issue

4. Issue 1 constitutes a mere disagreement with the Decision, and fails to acknowledge or engage with: (i) the discretionary nature of judicially noticing facts going to the core of the Prosecution's case; (ii) the nature and purpose of Rule 157(2) which creates a *rebuttable* presumption of accuracy of the adjudicated facts; and (iii) the Panel's obligation to ensure the rights of the Accused.

5. The Panel has discretion to take judicial notice of facts going to the core of the case.⁹ The Defence has failed to show that taking judicial notice of facts 53 and 56¹⁰ ('the Two Facts') causes undue prejudice to the Accused and is not in the interests of justice.¹¹ The Two Facts have been adjudicated in two Kukës-related trials held in Kosovo.¹² As accepted by the Defence, they do not concern the acts and conduct of the Accused¹³ but rather crime-base facts.¹⁴ Many witnesses in this case have already provided evidence about these facts.¹⁵

⁹ ICTR, *Prosecutor v. Karemera*, ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ('*Karemera Appeals Decision*'), paras 48, 52-53.

¹⁰ Decision, KSC-BC-2020-04/F00538, Annex 2.

¹¹ *Contra*, Request, KSC-BC-2020-04/F00554/RED, para.18.

¹² *Xhemshit Krasniqi*, Basic Court of Mitrovicë/Mitrovica, P.No. 184/15, 8 August 2016, paras 78, 97, 103-104; *Sabit Geci et al.*, District Court of Mitrovicë/Mitrovica, P.No. 45/2010, 29 July 2011, paras 64 and 122.

¹³ Request, KSC-BC-2020-04/F00554/RED, para.20.

¹⁴ See e.g. *Specialist Prosecutor v. Thaçi et al.*, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01534, 17 May 2023, public ('*Thaçi Judicial Notice Decision*').

¹⁵ See e.g. in relation to Fact 53: TW4-01: Transcript 30 May 2023, p.1421, l.25 – p.1422, l.11; p.1414, ll.14-20; p.1417, ll.13-20; p.1418, l.25-p.1419, l.25; p.1431, l.22-p.1432, l.5; TW4-06: Transcript 28 March 2023, p.815, ll.9-19; p.816, ll.14-21; p.823, l.5-p.824, l.3; TW4-07: Transcript 29 March 2023, p.903, ll.1-18; TW4-10: Transcript 1 May 2023, p.1074, ll.1-5; p.1097, l.23-p.1098, l.19; TW4-11: Transcript 2 May 2023, p.1199, ll.1-17; p.1211, l.7-p.1212, l.19; p.1214, ll.4-9; p.1216, ll.12-19. See in relation to Fact 56: TW4-01: 31 May

6. The Defence submissions that ‘the centrality and importance of the said proposed facts to the Prosecution’s case [...] are further demonstrated in the consistent focus on these facts in the course of TW4-01’s live testimony’¹⁶ is misplaced. The focus on these facts in the course of TW4-01’s live testimony only demonstrates he was the best-placed witness to testify about these events. It also demonstrates that throughout its case, the Prosecution continued to tender evidence in order to meet its burden of proof in relation to each of the charged crimes and modes of liability.

7. Furthermore, it is established jurisprudence that taking judicial notice of adjudicated facts does not shift the burden of proof, rather it creates a presumption of accuracy,¹⁷ which is rebuttable.¹⁸ As acknowledged by the Defence,¹⁹ the Two Facts do not concern the acts and conduct of the Accused, or directly incriminate him in respect of the charged crimes. Rather, the Two Facts relate to underlying crimes, which can be properly judicially noticed by the Trial Panel.²⁰

8. Such a rebuttable presumption does not, without more, violate the rights of the Accused to a fair trial.²¹ The Panel took judicial notice of the Two Facts within the limits of the applicable framework of Rule 157(2) and the relevant jurisprudence. It did so with full respect of the Accused’s rights,²² and the Defence has not identified any appealable error.

Issue 2 does not constitute an appealable issue

2023, p.1528, l.10-p.1529, l.19; p.1530, l.19-p.1531, l.4; TW4-10: 2 May 2023, p.1170, l.18-p.1171, l.17; TW4-11: 3 May 2023, p.1258, ll.3-14.

¹⁶ Request, KSC-BC-2020-04/F00554/RED, para.18, ftn.8.

¹⁷ Decision, KSC-BC-2020-04/F00538, para.24 ftn.58 and para.27, ftn.65, and authorities cited therein. *See also Karemera Appeals Decision*, para.42.

¹⁸ Decision, KSC-BC-2020-04/F00538, para.24 footnote 59 and authorities cited therein. *See also Karemera Appeals Decision*, para.42.

¹⁹ Request, KSC-BC-2020-04/F00554/RED, para.20.

²⁰ *See e.g. Thaçi Judicial Notice Decision*, KSC-BC-2020-06/F01534.

²¹ *Contra* Request, KSC-BC-2020-04/F00554/RED, paras 16, 19, 24.

²² Decision, KSC-BC-2020-04/F00538, paras 23-24.

9. Issue 2 misrepresents the Prosecution's examination in chief of TW4-01 and improperly raises arguments for the first time.

10. First, the Prosecution never submitted that it considered the *Sabit Geci et al.* proceedings to be unreliable. The Prosecution merely questioned TW4-01 with regard to Sabit Geci's presence in Kukës at certain times.²³ These matters discussed during TW4-01's testimony are not related to the *Sabit Geci et al.* findings from which the Two Facts are drawn.

11. Second, even if the SPO had taken a position on the *Sabit Geci et al.* judgment as submitted by the Defence – which it has not – this would have no bearing on the Panel's discretion to take judicial notice of adjudicated facts originating from it.

12. Third, by submitting that the 'Panel erred by taking judicial notice of the contested facts that were adjudicated in proceedings the Prosecution itself treats as unreliable'²⁴ the Defence raises for the first time an unclear issue, that does not emanate from the Decision, rendering the issue not appealable.²⁵

2. The Issues would not significantly impact or materially advance the proceedings

13. The Defence fails to demonstrate how the Issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In this respect and as also noted above, (i) the Panel applied the plain language of Rule 157(2) and took into account established factors considered by other Chambers applying the same or similar provisions; (ii) the Prosecution's burden and the Defence's right and ability to challenge the evidence (and rebut the adjudicated facts) against the Accused remain unaffected; and (iii) at the end of the proceedings, the noticed adjudicated facts must be assessed in light of the entire record.²⁶

²³ Transcript, 31 May 2003, pp.1533-1534.

²⁴ Request, KSC-BC-2020-04/F00554/RED, para.23.

²⁵ *Thaçi* Decision, KSC-BC-2020-06/F00172, para.11.

²⁶ For similar reasons, various Chambers have previously denied leave to appeal adjudicated facts decisions. *See, for example, IRMCT, Prosecutor v. Stanišić and Simatović, MICT-15-96-T, Decision on*

14. Contrary to the Defence submissions, there is no reversal of the burden of proof that could impact the fair conduct of the proceedings or the outcome of the trial. When submitting that ‘the Panel erred in fact and in law [...] requiring the Defence to rebut a presumption for the accuracy of these facts instead of allowing [...] the Prosecution to prove central aspects of its case’,²⁷ the Defence fails to engage with the specific circumstances of this case, including the (i) notice provided, (ii) evidence elicited and admitted, and (iii) Defence rights and opportunities.

15. The events described in the Two Facts have been notified to the Defence in the Indictment²⁸ and in the Prosecution Pre-Trial Brief.²⁹ Several witnesses have testified on the Two Facts, thereby providing corroborating evidence to the Panel,³⁰ and the Defence had opportunities to cross-examine the SPO witnesses. The Defence will also have the opportunity to lead any contrary evidence during the presentation of its case and, at the end of the proceedings, the Two Facts will be considered in light of the entire record.

16. For the same reasons, immediate appellate resolution would not materially advance the proceedings at this stage.

B. THERE IS NO GROUND FOR RECONSIDERATION

Stanišić Defence Motion for Certification to Appeal Against Decision on Judicial Notice of Adjudicated Facts, 15 January 2019, p.2; ICTR, *Prosecutor v. Nizeyimana*, ICTR-00-55C-T, Decision on Defence Motion for Certification of the Trial Chamber 12 July 2011 Decision on Defence Motion to Take Judicial Notice of Adjudicated Facts, 8 August 2011, paras 10, 12-13; ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-PT, Decision on Request for Certification of Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 23 February 2010, p.3; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Defence Motion for Certification to Appeal Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 20 October 2006, pp.2-3; ICTY, *Prosecutor v. Ljubičić*, IT-00-41-PT, Decision on the Accused’s Application for Leave to Appeal the Trial Chamber’s Decision of 23 January 2003 on Judicial Notice of Adjudicated Facts, 3 February 2003, p.3.

²⁷ Request, KSC-BC-2020-04/F00554/RED, para.25.

²⁸ ANNEX 1 to Submission of Further Lesser Redacted Version of Confirmed Indictment, KSC-BC-2020-04/F00038/A01, 25 May 2021, confidential, paras 21, 28.

²⁹ ANNEX 1 to Submission of the Confidential Redacted Versions of Pre-Trial Brief, with witness and exhibit lists, KSC-BC-2020-04/F00136/A01, 31 January 2022, confidential, paras 30, 33, 61-62.

³⁰ See e.g. references at footnote 15.

17. Pursuant to Rule 77, the Panel may reconsider its own decision '[i]n exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid an injustice'. In the present case, such requirements are not met.

18. The Defence relies solely on 'the Prosecution's position on the *Sabit Geci et al.* proceedings', claiming that it 'constitutes a valid reason to reconsider the contested aspects of the Impugned Decision to present an injustice.'³¹ As discussed above, the SPO did not take a position, as asserted by the Defence, and even if it did, such position has no bearing on the Decision. The Defence has failed to demonstrate that the Panel's findings warrant reconsideration.

III. RELIEF REQUESTED

19. For the foregoing reasons, the Request should be rejected.

Word count: 1,932



Alex Whiting

Acting Specialist Prosecutor

Wednesday, 5 July 2023

At The Hague, the Netherlands.

³¹ Request, KSC-BC-2020-04/F00554/RED, para.24.