



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2020-04**
The 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: Fidelma Donlon

Date: 13 July 2023

Language: English

Classification: **Public**

**Decision on the Defence's Request for Leave to Appeal
and/or Reconsideration of F00538**

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Victims' Counsel
Simon Laws

TRIAL PANEL I (Panel) hereby renders this decision on the Defence's Request for Leave to Appeal and/or Reconsideration of F00538.

I. PROCEDURAL BACKGROUND

1. On 8 June 2023, the Panel issued the Decision on the Prosecution motion for judicial notice of facts of common knowledge and adjudicated facts (Impugned Decision), taking judicial notice of, *inter alia*, proposed adjudicated facts No. 53 and No. 56.¹
2. On 22 June 2023, the Defence for Pjetër Shala (Defence and Accused, respectively) filed a request seeking leave to appeal and/or requesting reconsideration of the Impugned Decision (Request).²
3. On 5 July 2023, the Specialist Prosecutor's Office (SPO) responded to the Request (Response).³
4. Victims' Counsel did not file a Response and the Defence did not file a reply.

II. SUBMISSIONS

5. The Defence requests certification to appeal the following two issues (collectively, Two Issues):
 - (i) Whether the Panel erred in fact and in law by taking judicial notice of proposed adjudicated facts No. 53 and No. 56 (collectively, Two Facts),

¹ KSC-BC-2020-04, F00538, Trial Panel I, [Decision on the Prosecution motion for judicial notice of facts of common knowledge and adjudicated facts](#), 8 June 2023, public, with public Annex 1 and confidential Annex 2.

² KSC-BC-2020-04, F00554, Defence, *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"*, 22 June 2023, confidential. A public redacted version was submitted on 26 June 2023, F00554/RED.

³ KSC-BC-2020-04, F00564, Specialist Prosecutor, *Prosecution response to Defence request for leave to appeal and/or reconsideration of adjudicated facts decision*, 5 July 2023, public.

thereby impermissibly shifting the burden of proof relating to the matters included therein to the Defence (First Issue); and

- (ii) 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 (Second Issue).⁴

6. The Defence argues that the Panel erred by taking judicial notice of the Two Facts, in violation of the Accused's fair trial rights and against the interests of justice.⁵ According to the Defence, the Two Issues significantly affect the fair conduct of the proceedings as well as the potential outcome of the trial,⁶ and a prompt resolution by the Appeals Panel will materially advance the proceedings.⁷ In the alternative, the Defence requests reconsideration of the findings in the Impugned Decision to prevent an injustice.⁸

7. The SPO responds that the Request has failed to identify appealable issues, and that on this basis alone, the Panel should dismiss the Request.⁹ The SPO further avers that the Defence fails to demonstrate how the Two Issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial,¹⁰ and argues that an immediate appellate resolution would not materially advance the proceedings at this stage.¹¹ As regards the Defence's request for reconsideration, the SPO submits that the Defence has failed to demonstrate that the Panel's findings warrant reconsideration.¹²

⁴ Request, para. 6.

⁵ Request, paras 4, 16-19.

⁶ Request, para. 24.

⁷ Request, para. 25.

⁸ Request, para. 7, 23.

⁹ Response, para. 3.

¹⁰ Response, para. 13.

¹¹ Response, paras 15-16.

¹² Response, para. 18.

III. APPLICABLE LAW

8. The Panel notes Articles 21 and 45(2) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rules 77(1) and (2) and 79 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (Rules), and incorporates by reference the standards for certification to appeal under Rule 77(2) of the Rules, as outlined in past decisions.¹³

IV. ANALYSIS

A. REQUEST FOR LEAVE TO APPEAL

1. First Issue

9. The Panel notes that the Defence's argument in relation to the First Issue is two-fold. First, the Defence argues that the Panel erred by interpreting Rule 157 of the Rules inconsistently with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 31 of the Kosovo Constitution,¹⁴ shifting the burden of proof to the Accused and amounting to an abuse of discretion.¹⁵ In particular, the Defence avers that the Panel's decision to take judicial notice of the Two Facts means that the Defence must now rebut the admitted facts and the elements contained therein, which will impact on the type and scope of evidence the Defence will be required to present in the course of its case.¹⁶ The Defence adds that this only became known shortly before the scheduled start of the presentation of

¹³ KSC-BC-2020-04, F00401, Trial Panel I, [Decision on Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala](#), 24 January 2023, public, paras 13-20; F00116, Pre-Trial Judge, [Decision on Application for Leave to Appeal "Decision on Motion Challenging the Form of the Indictment"](#), 29 November 2021, public, paras 11-13.

¹⁴ Request, para. 16.

¹⁵ Request, paras 16-19.

¹⁶ Request, para. 18.

the Defence's case.¹⁷ Secondly, the Defence avers that the Two Facts are directly related to the elements of the offences with which the Accused is charged. The Defence alleges that, considering that the Accused faces trial more than two decades after the alleged events and while he has cut all links with Kosovo after the war, the interests of justice require that the SPO demonstrates its case on these points at the requisite standard.¹⁸

10. The SPO responds that the First Issue constitutes a mere disagreement with the Impugned Decision, and that the Defence 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) of the Rules, and (iii) the Panel's obligation to ensure the rights of the Accused.¹⁹ The SPO also submits that, as acknowledged by the Defence, the Two Facts do not concern the acts and conduct of the Accused.²⁰ It adds that the Panel taking judicial notice of facts does not shift the burden of proof, but rather creates a rebuttable presumption of accuracy.²¹ In the SPO's view, such a presumption does not, without more, violate the rights of the Accused.²²

11. The Panel recalls that, as per the standard for certification, if an appeal does not lie as of right according to the Law and Rules, only an "issue" may form the basis of an appealable decision pursuant to Rule 77 of the Rules. An "issue" has been described as an identifiable topic or subject emanating from the Impugned Decision, the resolution of which is essential for determination of the matters arising in the judicial

¹⁷ Request, para. 18.

¹⁸ Request, para. 19.

¹⁹ Response, para. 4.

²⁰ Response, paras 5, 7.

²¹ Response, para. 7.

²² Response, para. 8.

cause under examination, and not merely a question over which there is disagreement or conflicting opinion.²³

12. The “fair and expeditious conduct of the proceedings” in Rule 77(2) of the Rules is generally understood as referencing the norms of fair trial.²⁴

13. The Panel considers that the First Issue arises from the Impugned Decision as it concerns the consequences of the Panel’s judicial notice of the Two Facts. It is therefore an appealable issue.

14. As regards the question whether the First Issue significantly affects the fair and expeditious conduct of the proceedings, the Panel recalls that taking judicial notice of adjudicated facts in no way absolves the SPO from proving beyond a reasonable doubt the individual criminal responsibility of the Accused, in relation to the crimes and modes of liability, as charged in the Confirmed Indictment.²⁵ As already stated in the Impugned Decision, by taking judicial notice of adjudicated facts, the Panel establishes a rebuttable presumption of the accuracy of these facts.²⁶ The Defence is entitled to rebut this presumption by introducing credible and reliable evidence to the contrary at trial. Nothing is proven as yet at this stage, and the Panel will assess the reliability and credibility of the evidence in light of the entire evidentiary record. Taking issue with this mechanism means to disagree with the existence and operation of Rule 157 as such. This disagreement cannot form the basis for formulating a request under Rule 77 of the Rules.²⁷ Any perceived violation of Article 6(2) of the ECHR is not further explained by the Defence. In these circumstances, the Panel cannot accept

²³ KSC-BC-2020-04, F00401, Trial Panel I, [Decision on Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala](#), 24 January 2023, public, para. 15 (*Shala Leave to Appeal Decision*).

²⁴ *Shala Leave to Appeal Decision*, para. 17.

²⁵ *See, similarly*, Impugned Decision, para. 27.

²⁶ *See* Impugned Decision, para. 27, with accompanying references.

²⁷ *See* the decision of the Pre-Trial Judge on a similar argument raised by the Defence, KSC-BC-2020-04, F00218, Pre-Trial Judge, *Decision on Defence Application for Leave to Appeal the Decision on Request for Protective Measures for Documents Containing Exculpatory Information*, 14 June 2022, confidential, para. 14.

the Defence's proposition that the Impugned Decision has resulted in an impermissible shift in the Defence's burden of proof.

15. It is worth noting that the Defence does not seem to take issue with the Panel taking judicial notice of other adjudicated facts, alleging a reversal of the burden of proof. Rather, the Defence's main argument lies in the fact that the Two Facts pertain to "important elements" of the SPO's case.²⁸ However, when exercising its discretion under Rule 157 of the Rules, the Panel is not tasked to make a distinction between important facts and those that are not. The Panel has discretion to take judicial notice of any relevant facts, including facts that go to the core of the case, as long as they do not relate to the acts and conduct of the Accused.²⁹ Importantly, in the view of the Panel, the Defence does not advance any further arguments to show an *abuse* of the Panel's discretion in this regard. In particular, the Defence's claim that the Panel did not consider the rights of the Accused is entirely unsupported.³⁰ Indeed, without more, it is difficult for the Panel to see what concrete prejudice arises to the Accused's rights to be presumed innocent and to confront witnesses against him.³¹ The Defence's claim in this regard is therefore unsubstantiated.

16. As to the Defence's point about receiving late notice about having to rebut the elements contained in the Two Facts, the Panel notes that the period between the issuance of the Impugned Decision and the scheduled date of the beginning of the presentation of the Defence's case exceeds three months. This could hardly be described as "shortly before the scheduled start" of the Defence's case.

²⁸ Request, para. 17.

²⁹ See, *inter alia*, ICTY, *Prosecutor v. Dragomir Milošević*, IT-98-29/1-AR73.1, Appeals Chamber, [Decision on Interlocutor Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts](#), 26 June 2007, para. 16, with accompanying references; ICTR *Prosecutor v. Karemera*, ICTR-98-44-AR73(C), Appeals Chamber, [Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice](#), 16 June 2006, paras 52-53.

³⁰ See Impugned Decision, para. 23.

³¹ Article 21(3), (4)(f) of the Law.

17. In light of the above, the Panel finds that the Defence fails to demonstrate that the First Issue affects the fair and expeditious conduct of the proceedings. Accordingly, the Panel will not address the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules, and rejects this part of the Request.

2. Second Issue

18. The Defence submits that the Panel erred by taking judicial notice of the Two Facts, in light of the fact that they originate from the *Sabit Geci et al.* proceedings, which the SPO allegedly treats as “unreliable” and “openly disputes their outcome”.³²

19. The SPO responds that the Defence misrepresents the SPO’s examination in chief of TW4-01 and improperly raises arguments for the first time.³³ In particular, the SPO avers that: (i) it never submitted that it considered the *Sabit Geci et al.* proceedings to be unreliable; (ii) even if it would have taken a position on the *Sabit Geci et al.* judgment, this would have no bearing on the Panel’s discretion to take judicial notice of facts emanating from it; and (iii) the Defence raises for the first time an unclear issue that does not emanate from the Impugned Decision, rendering it unappealable.³⁴

20. As to whether there is an appealable issue,³⁵ the Panel notes that the Defence misrepresents the SPO’s position. The Panel pays heed to the SPO submission that it attempted to clarify an inconsistency with TW4-01 during its examination in chief, on a very specific point, and that it does not consider the *Sabit Geci et al.* proceedings to be unreliable. Notwithstanding the above, in the exercise of its discretion, the Panel carefully assessed whether judicial notice could be taken of the Two Facts from the *Sabit Geci et al.* trial and provided its reasons to do so in the Impugned Decision.³⁶ The

³² Request, paras 20, 22.

³³ Response, para. 9.

³⁴ Response, paras 10-12.

³⁵ See para. 11 above.

³⁶ Impugned Decision, paras 24-25, 27.

Panel thus fails to see the link between any alleged position, if at all, taken by the SPO and the findings made in the Impugned Decision.

21. In light of the above, the Panel finds that the Defence has failed to formulate a clear “appealable issue”. Accordingly, the Panel will not address the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules, and rejects this part of the Request.

B. REQUEST FOR RECONSIDERATION

22. In the alternative, the Defence requests reconsideration in light of the SPO’s alleged position that the *Sabit Geci et al.* proceedings, which the Two Facts originated from, cannot be relied upon.³⁷ The Defence avers that the SPO’s position on the *Sabit Geci et al.* proceedings constitutes a valid reason to reconsider the contested aspects of the Impugned Decision.³⁸

23. The Panel recalls that for an application for reconsideration pursuant to Rule 79 of the Rules to succeed, the moving party or participant must demonstrate either (i) the existence of a clear error of reasoning or (ii) that reconsideration is necessary to avoid injustice. New facts and arguments arising since the Impugned Decision was rendered may be relevant to this assessment. Given its exceptional character, reconsideration may not be invoked as an ordinary remedy (such as “a second appellate route”) to redress imperfections in a decision or to circumvent the unfavourable consequences. Hence, mere disagreement with the outcome or with the reasoning of a decision is not sufficient for that decision to be reconsidered.³⁹

³⁷ Request, para. 7.

³⁸ Request, para. 23.

³⁹ KSC-BC-2020-06, F00476, President, [Decision on Applications for Reconsideration and Disqualification of a Judge from a Court of Appeals Panel](#), 17 September 2021, public, paras 11-12; KSC-BC-2020-05, F00046, Pre-Trial Judge, [Decision on Specialist Prosecutor’s Request for Reconsideration or Certification for Appeal](#),

24. The Panel finds that the Request fails to meet the legal test under Rule 79 of the Rules as set out above. The Panel reiterates its finding regarding the Defence's mis-characterisation of the SPO's alleged position on the *Sabit Geci et al.* trial.⁴⁰ The Defence does not engage any further with the legal test under Rule 79 of the Rules, to demonstrate either a clear error of reasoning or a valid reason for the Panel to reconsider the Impugned Decision in order to avoid injustice.

25. In light of the above, the Panel also rejects this part of the Request.

V. DISPOSITION

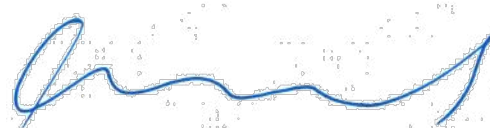
26. For the above-mentioned reasons, the Panel hereby **REJECTS** the Request.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Thursday, 13 July 2023

At The Hague, the Netherlands.

5 November 2020, public, para. 14; F00209, Trial Panel I, [Decision on Victims' Counsel request for reconsideration of the third decision on the appointment of expert\(s\)](#), 20 September 2021, public, para. 12.

⁴⁰ See para. 20 above.