



In: KSC-CA-2023-02

Name: The Specialist Prosecutor v. Salih Mustafa

Before: Judge Michèle Picard, Presiding
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr. Fidelma Donlon

Date: 26 October 2023

Classification: PUBLIC REDACTED

[IN COURT REDACTION ORDER]

The Presiding Judge of a Panel of the Court of Appeals Chamber FINDS that the following blacked out text contains confidential information and ORDERS this information shall be removed/ edited from the PUBLIC broadcast/streaming, audio visual recording and transcripts in all three languages *Albanian/ English/ Serbian*. Hearing of 26 October 2023, transcript reference Page 42 Line 19 to Page 42 Line 20, (time code from 14:57:50 to 14:57:56).

42:16	It is unknown with whom the person was when the other detainees	14:57:35
17	had left the premises to go to Prishtine. Whether the victim	14:57:40
18	remained unattended or not is an unknown fact. It is equally unknown	14:57:45
19	with whom the victim was or remained. [REDACTED]	14:57:50
20	[REDACTED] who was said to remain at the detention location as well, has	14:57:56
21	never been found and there is no knowledge of this person, but nobody	14:57:59
22	knows whether there were any other people at the location.	14:58:05
23	We do not know whether these people were KLA soldiers from the	14:58:09
24	brigade, BIA members, or any other unit, or still civilians who were	14:58:13
25	at the scene. No evidence regarding this matter has been produced.	14:58:16
43:1	It is simply unknown, so any assumption is pure speculation.	14:58:20
2	It is equally unclear whether or not the victim received medical	14:58:25
3	aid. The TP cannot infer availability or unavailability of medical	14:58:31
4	aid on the basis of any factual ground. We simply do not know. And	14:58:39
5	neither can the TP infer that he was denied medical aid. It simply	14:58:48
6	remains unknown, let alone that it can infer that it is the BIA	14:58:54
7	members who would deny the person medical aid.	14:58:59
8	There is simply no proof, not at least in the judgment given, on	14:59:02
9	the fact who would have denied medical aid to this person and whether	14:59:08
10	such person would be a subordinate of Salih Mustafa or whether	14:59:13
11	Salih Mustafa was aware of this person being there in his condition,	14:59:18

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44:13	this person. It is baseless. The way the TP reasoned it was the	15:02:01
14	following, and that is in paragraph [REDACTED]:	15:02:07
15	"As a confirmation that the decision not to release the murder	15:02:11
16	victim could only have been made by the accused as a BIA commander,	15:02:14
17	the Panel unids that the release of other detainees was executed by	15:02:22
18	the accused's BIA subordinate including his deputy, Mr. Mehmetaj."	15:02:25
19	The that this that the detainees were released by [REDACTED]	15:02:35
20	Mr. Mehmetaj, is in no fact a confirmation that any such decision	15:02:39
21	could have been made by Mr. Mustafa ^ , apart from the fact that	15:02:42
22	Mr. Mehmetaj, the person who released the people, himself denies the	15:02:49
23	entire issue, he was not even a subordinate at the time that he	15:02:52
24	allegedly released the detainee.	15:02:55
25	The Trial Panel itself stated earlier in the judgment about his	15:02:58
45:1	role in the BIA, and I quote, paragraph 338:	15:03:01
2	"His," that is Mr. Mustafa.	15:03:09
3	"His position as a commander is confirmed by the fact that until	15:03:11
4	[REDACTED] 1999 Mr. Mehmetaj, after [REDACTED] in [REDACTED] was the commander	15:03:11

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46:18	detention.	15:07:22
19	In the substantial cause test that the Trial Panel used, it	15:07:23
20	entirely left out the timeframe within which the person died. [REDACTED]	15:07:27
21	[REDACTED]	15:07:31
22	[REDACTED]	15:07:35
23	[REDACTED]	15:07:41
24	[REDACTED]	15:07:57
25	The Defence has stressed the issue of time and place of death of	15:07:57
47:1	the victim earlier.	15:07:57
2	The Trial Panel did not excuse the cause of death by gunshot	15:07:58
3	wound. It rather stated that the other injuries and the denial of	15:08:01
4	medical care were already enough for his death. The Trial Panel	15:08:04
5	failed to eliminate other possible causes of death.	15:08:08
6	Question 1(b). The short answer to 1(b) is: Yes. When the	15:08:14
7	causation is broken due to any subsequent new event that can equally	15:08:25
8	and by its very nature cause the death, the Defence submits that in	15:08:30
9	that case it impacts the causation standard.	15:08:34
10	The Trial Panel took for a possibility, based on statements of	15:08:42
11	witnesses, that there were a number of intervening events. However,	15:08:45
12	they could not establish it but they certainly did not exclude it.	15:08:49
13	The Trial Panel left open the possibility for these intervening	15:08:53

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65:6	commander that the murder victim was dead. The murder victim's body	16:16:09
7	was found later that year in July 1899 in a shallow grave [REDACTED]	16:16:15
8	[REDACTED] The body was already [REDACTED]	16:16:25
9	decomposing and showed signs of serious injuries on the arms and legs	16:16:31
10	as well as bullet wounds on the torso.	16:16:35
11	These are the facts, Your Honours, and I would urge you not to	16:16:42
12	lose sight of them as we go through the legal issues, the legal	16:16:45
13	principles in this appeal, and as you consider those legal	16:16:49
14	principles.	16:16:51
15	Turning now to those legal issues.	16:16:54
16	And before I address the substantive issues raised in these	16:16:56
17	grounds, and in particular the questions posed by Your Honours, I	16:17:01
18	want to emphasise that Mr. Mustafa has failed to substantiate these	16:17:05
19	grounds to even the minimum standard to escape summary dismissal.	16:17:10
20	We've made detailed submissions, written submissions on the form of	16:17:15
21	deficiencies in Mr. Mustafa's appeal in our brief, and these points	16:17:20
22	are especially pertinent when it comes to the grounds relating to	16:17:23
23	murder.	16:17:27
24	Mr. Mustafa's submissions on these grounds, both in his brief	16:17:28
25	and as well as this afternoon, fail to meaningfully develop the	16:17:33
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66:1	grounds as they were articulated in the Notice of Appeal, and the	16:17:40
2	Notice of Appeal raises issues that are raised for the first time on	16:17:48
3	appeal.	16:17:51
4	Now, the formal requirements of appellate proceedings have	16:17:53
5	developed for a reason, as we've explained in our brief, and they	16:17:58
6	require the appellant to clearly identify errors of law and explain	16:18:01

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69:15	detention compound, he would not have ended up in a shallow grave	16:24:53
16	[REDACTED] his	16:24:57
17	corpse pierced with bullet wounds.	16:25:02
18	Had they not mistreated him with murderous intent and left him	16:25:04
19	in a near-to-death state unable to move, he would have been able to	16:25:12
20	walk away like the other prisoners.	16:25:18
21	Had Salih Mustafa given the order to evacuate him or to provide	16:25:26
22	him with medical care, he would not have been found dead with signs	16:25:31
23	of obvious mistreatment as well as gunshot wounds.	16:25:36
24	Indeed, the Trial Panel explicitly found that the murder victim	16:25:43
25	would not have died but for the extreme mistreatment by the accused	16:25:48
70:1	or by the appellant and his BIA subordinates. And the Trial Panel	16:25:53
2	found that he would have survived had they provided medical aid to	16:26:00
3	him, and the trial judgment reference there is paragraph 626.	16:26:03
4	Those findings, Your Honours, are more than reasonable on the	16:26:12
5	evidence before the Trial Panel.	16:26:17
6	Now one might say in response, but this was a time of war. He	16:26:21
7	might have died like many other civilians who were killed during the	16:26:26

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