

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: 4 December 2023

Filing Party: Specialist Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Public Redacted Version of Defence Request to Admit the Evidence of DW4-01

Pursuant to Rules 153 and 155 of the Rules

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Victims

Simon Laws KC

Maria Radziejowska

Specialist Defence Counsel

Jean-Louis Gilissen

Hédi Aouini

Leto Cariolou

I. INTRODUCTION

1. Pursuant to the Oral Order of the Trial Panel,¹ and Rules 137, 138(1), 153(1), and 155(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), the Defence for Mr Pjetër Shala (“Defence” and “Accused”, respectively) hereby files this request to admit the evidence of witness DW4-01, [REDACTED], pursuant to Rule 153 of the Rules, or, in the alternative, Rule 155(1) of the Rules.

II. PROCEDURAL HISTORY

2. On 30 August 2023, the Defence filed its updated list of witnesses, presenting DW4-01 as a witness for the Defence.²
3. On 1 September 2023, the Defence scheduled DW4-01 to testify live between 18 and 20 September 2023 during the sixth evidentiary block.³
4. On the same day, the Defence informed the Panel that DW4-01, who had previously confirmed [REDACTED] readiness to testify and had already filled out relevant forms with the Registry, indicated that [REDACTED] was no longer willing to testify or cooperate, without offering any explanation.⁴
5. On 5 September 2023, the Panel instructed the Defence to take all necessary steps to secure DW4-01’s appearance.⁵ The Panel ordered the Defence, in case

¹ T. 29 November 2023 (provisional), p. 3877.

² KSC-BC-2020-04, F00629, A01, ANNEX I to Defence Submission of Revised Confidential Annex I to the Updated List of Witnesses and Revised Witness Summaries, 30 August 2023 (confidential). All further references to filings in this Request concern Case No. KSC-BC-2020-04 unless otherwise indicated.

³ F00634, Defence Submission of Order of Appearance of Witnesses for the Sixth Evidentiary Block, 1 September 2023 (confidential), para. 2(a).

⁴ F00634, Defence Submission of Order of Appearance of Witnesses for the Sixth Evidentiary Block, 1 September 2023 (confidential), para. 7.

⁵ Email from the Court Management Unit of the Registry to the Parties and Victims’ Counsel, 5 September 2023, at 2:20 pm.

it failed to secure DW4-01's testimony, to file an application under Rule 121(3) of the Rules to summons the witness by 11 September 2023.⁶

6. On 8 September 2023, the Defence informed the Panel that, in spite of taking all possible steps, neither the Defence, the Registry, nor the Witness Protection and Support Office of the Registry ("WPSO") were able to re-establish contact with DW4-01 and secure [REDACTED] voluntary appearance.⁷
7. On 11 September 2023, the Defence [REDACTED].⁸
8. On 29 September 2023, the Panel issued the [REDACTED].⁹
9. On 5 October 2023, the Panel issued the [REDACTED],¹⁰ issued [REDACTED].¹¹
10. On 28 November 2023, the Registry informed the Panel and all Parties that, on 27 November 2023, [REDACTED].¹² [REDACTED].¹³ The Panel instructed the Defence to provide submissions the following day as to whether [REDACTED].¹⁴
11. On 29 November 2023, the Defence informed the Panel that [REDACTED] but would request the admission of [REDACTED] prior testimony (in the form of a written transcript) [REDACTED].¹⁵

⁶ Email from the Court Management Unit of the Registry to the Parties and Victims' Counsel, 5 September 2023, at 2:20 pm.

⁷ Email from the Defence to the Panel, Prosecution, Victims' Counsel, and the Court Management Unit of the Registry, 8 September 2023, at 1:56 pm.

⁸ F00645, [REDACTED], 11 September 2023 (confidential).

⁹ F00674, [REDACTED], 29 September 2023 (confidential), paras. 20-24. See also Annex 1.

¹⁰ F00679, [REDACTED], 3 October 2023 (confidential), para. 4.

¹¹ F00682, [REDACTED], 5 October 2023 (confidential), para. 3.

¹² T. 28 November 2023 (provisional), pp. 3797, 3798.

¹³ T. 28 November 2023 (provisional), pp. 3797, 3798.

¹⁴ T. 28 November 2023 (provisional), pp. 3828, 3829.

¹⁵ T. 29 November 2023 (provisional), pp. 3831, 3832.

12. On the same day, the Panel ordered the Defence to file written submissions by 4 December 2023, setting out the basis on which it requested the admission of the prior testimony of DW4-01 *in lieu* of his oral testimony in these proceedings.¹⁶

III. APPLICABLE LAW

13. Written evidence admitted pursuant to either Rule 153 or 155 of the Rules must satisfy the standard admissibility criteria provided for in Rules 137 and 138 of the Rules, namely, relevance, authenticity and a probative value which is not outweighed by any prejudicial effect.¹⁷ Further, in accordance with Rule 141(1) of the Rules, in all instances where written statements are introduced as evidence, their admission must not be prejudicial to or inconsistent with the rights of the accused.¹⁸

14. The Defence recalls the applicable law as previously stated by the Panel.¹⁹ Pursuant to Rule 153 of the Rules, the Panel may admit, *in lieu* of oral testimony, the written statements of a witness, or a transcript of evidence and associated exhibits provided by a witness in proceedings before the Specialist Chambers, if the following two requirements are met:

- (1) First, the written statement or transcript goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.
- (2) Second, the written statement or transcript meets certain formal requirements or procedural requisites as provided in Rule 153(2) of the Rules. The statement shall be signed by the person who records and conducts the questioning and by the witness and his/her

¹⁶ T. 29 November 2023 (provisional), p. 3877.

¹⁷ F00491, Decision on the Specialist Prosecutor's motion for admission of documentary evidence, 20 April 2023 (confidential), para. 24; F00562, Decision on the Specialist Prosecutor's motion for admission of evidence pursuant to Rule 155 of the Rules, 4 July 2023 (confidential) ("Rule 155 Decision"), para. 15.

¹⁸ Rule 155 Decision, para. 14.

¹⁹ F00556, Decision on the Specialist Prosecutor's requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules, 23 June 2023 ("First Rule 153 Decision"), para. 19.

counsel, if present, as well as, where applicable, the prosecutor or the judge who is present. The record shall note the date, time and place, and all persons present during the questioning. If, in exceptional circumstances, the witness has not signed the record, the reasons thereof shall be noted.²⁰

15. Rule 155(1) of the Rules sets out the conditions under which a Panel may admit the evidence of a person in the form of a written statement, transcript, or other written record specifically when: (i) there is a compelling reason rendering the person unavailable or unable to testify orally, and (ii) the written record is *prima facie* reliable.

IV. SUBMISSIONS

16. The Defence requests the admission of the following material in relation to DW4-01 pursuant to Rule 153 of the Rules, or in the alternative, Rule 155(1) of the Rules:

[REDACTED] (ERN SITF00015437-00015510 RED2) (“the Proposed Evidence”).

The Proposed Evidence contains the [REDACTED] testimony of DW4-01 [REDACTED].

17. DW4-01 is a [REDACTED] from [REDACTED].²¹ In [REDACTED], he testified [REDACTED].²²
18. The Proposed Evidence should be admitted as it: (i) is relevant to the proceedings; (ii) is *prima facie* reliable and contains sufficient indicia of authenticity; (iii) has probative value which is not outweighed by a prejudicial

²⁰ First Rule 153 Decision, paras. 20, 21.

²¹ ERN SITF00015437-00015510 RED2, p. 9.

²² ERN SITF00015437-00015510 RED2.

effect; and (iv) meets the requirements of Rule 153 of the Rules, or, in the alternative, Rule 155(1) of the Rules.

A. Standard Admissibility Criteria

19. First, the Defence submits that the Proposed Evidence is relevant to the proceedings. [REDACTED], DW4-01's prior testimony addresses information and persons central to the case. Further, during his testimony, TW4-01 was asked about certain information contained in the Proposed Evidence.²³
20. Next, the Defence submits that the Proposed Evidence can be considered *prima facie* reliable. Indeed, this Panel has previously held that [REDACTED] met this standard.²⁴
21. Third, the Defence submits that the probative value of the evidence is not outweighed by any prejudicial effect. The Proposed Evidence is important to the Defence case, as it includes information which, in part, contradicts that provided by central Prosecution witness TW4-01, thereby allowing the Panel to more properly and fully assess the credibility of TW4-01.

B. Request Under Rule 153 of the Rules

(a) The Proposed Evidence Does Not Relate to the Acts and Conduct of the Accused

22. Turning to the admissibility criteria articulated under Rule 153(1) of the Rules, the Defence notes that the Proposed Evidence does not relate to the acts and conduct of the Accused. The Proposed Evidence details [REDACTED].²⁵ The Proposed Evidence pertains to TW4-01's credibility. It contains information

²³ See, for example, T. 5 June 2023 p. 1843; ERN SITF00015437-00015510 RED2, pp. 12, 13 ([REDACTED]). See also paragraphs 22 and 24 of this Request.

²⁴ Rule 155 Decision, para. 47.

²⁵ ERN SITF00015437-00015510 RED2, pp. 10, 11.

including that TW4-01 [REDACTED];²⁶ [REDACTED].²⁷ This is contrary to what TW4-01 testified during his cross-examination, [REDACTED].²⁸

23. In addition, the evidence of DW4-01 contains information on [REDACTED].²⁹
24. DW4-01's evidence also contains information regarding [REDACTED],³⁰ which contradicts the testimony of TW4-01.³¹ Finally, DW4-01's testimony gives further evidence on the criminal background of TW4-01.³²
25. As demonstrated above, the material relates to matters other than the acts and conduct of the Accused. DW4-01 does not mention or provide information concerning the Accused or his role or involvement in any of the crimes charged in the Indictment.
- (b) Factors Militating in Favour of Admission Under Rule 153(1) of the Rules
26. A factor militating in favour of admission under Rule 153(1)(a)(viii) of the Rules is if the evidence "has been given by the witness in the presence of the Parties who have had the opportunity to examine or cross-examine him or her."³³
27. In the case of *Prlić et al.* at the ICTY, the Trial Chamber held that prior testimony of an unavailable witness is appropriate for admission in writing and in examining whether the evidence is reliable, in view of the circumstances it was given, it will consider in particular indicia of reliability including, whether the

²⁶ ERN SITF00015437-00015510 RED2, pp. 11, 12, 18, 19.

²⁷ ERN SITF00015437-00015510 RED2, pp. 12, 13.

²⁸ T. 5 June 2023 pp. 1849, 1850.

²⁹ ERN SITF00015437-00015510 RED2, p. 13.

³⁰ ERN SITF00015437-00015510 RED2, p. 16.

³¹ T. 5 June 2023 pp. 1796-1797, 1799.

³² ERN SITF00015437-00015510 RED2, p. 18.

³³ Rule 153(1)(a)(viii).

statement was made under oath, was subject to cross-examination, or has been corroborated by other evidence.³⁴

28. The Proposed Evidence that the Defence seeks to admit under Rule 153 is DW4-01's testimony in the trial against [REDACTED]. It was made under oath and was subject to cross-examination. This should militate in favour of the admission of DW4-01's written evidence under Rule 153(1)(a) of the Rules.

(c) The Evidence Satisfies the Procedural Requirements of Rule 153(2) of the Rules

29. The proposed material fulfils the formal and procedural requirements of Rule 153(2) of the Rules. The material is dated and bears specific indicia of authenticity.³⁵ Signed by the Presiding Judge and two Court Recorders, it represents a word-by-word record of the testimony DW4-01 provided [REDACTED].³⁶ Further, the material records the date, time, and place of the testimony, as well as all persons present during the testimony.³⁷ Additionally, it also indicates that DW4-01 has been informed of the purpose of the testimony as well as of [REDACTED] rights and obligations as a witness.³⁸

C. Request Under Rule 155(1) of the Rules

30. The Defence first notes that the transcript satisfies the threshold for *prima facie* reliability,³⁹ thus meeting the requisite aspect of Rule 155(1)(b).

³⁴ ICTY, *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and *quarter* of the Rules, 27 October 2006, para. 10.

³⁵ ERN SITF00015437-00015510 RED2.

³⁶ ERN SITF00015437-00015510 RED2, p. 23.

³⁷ ERN SITF00015437-00015510 RED2, p. 1.

³⁸ ERN SITF00015437-00015510 RED2, p. 9.

³⁹ See paragraph 20 of this Request.

31. The Defence further submits that DW4-01 is unavailable for 'other compelling reasons', thereby satisfying the first requisite element of Rule 155(1) of the Rules.
32. It is the Defence view that the inclusion of a non-exhaustive clause regarding the reasons for unavailability suggests that the term 'unavailable' be given broad interpretation.
33. The Defence is not in possession of information as to why DW4-01, a previously cooperative and engaged witness, suddenly became uncooperative, cut all communication with the Defence, and is now [REDACTED]. As such, the Defence submits that in these circumstances, the witness is 'unavailable' within the meaning of Rule 155 of the Rules.

D. The Evidence Satisfies the Criteria of Rule 138(1) of the Rules

34. Pursuant to Rule 138(1) of the Rules, evidence shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect. First, the authenticity requirement is met and has already been discussed while assessing the requirements of Rule 153(2) of the Rules.
35. Given the contradictions between the testimony of DW4-01 and the testimony of TW4-01, the evidence of DW4-01 challenges the credibility of TW4-01. It will assist the Panel for its consideration and assessment of TW4-01's credibility. The material is relevant and has probative value, and there is no prejudicial effect to its admission.

E. Admitting the Evidence is in the Interests of Justice

36. The Defence submits that admitting the requested material into evidence under Rule 153 of the Rules or alternatively, Rule 155 of the Rules, is in the interests of justice.

37. The admission of the evidence of DW4-01 is warranted as it will assist the Panel to evaluate the evidence of TW4-01 in the case. It is thus in the interests of justice to admit the Proposed Evidence.

V. CLASSIFICATION

38. Pursuant to Rule 82(3) of the Rules, this Request is filed as confidential as it contains confidential information. The Defence will file a public redacted version of the Request in due course.

VI. RELIEF REQUESTED

39. The Defence respectfully requests the Panel to admit the evidence of DW4-01 in writing pursuant to Rule 153 of the Rules, or, in the alternative, Rule 155 of the Rules.

Word count: 2787

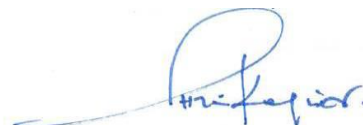
Respectfully submitted,



Jean-Louis Gilissen
Specialist Defence Counsel



Hédi Aouini
Defence Co-Counsel



Leto Cariolou
Defence Co-Counsel

Monday, 4 December 2023

The Hague, the Netherlands