

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: Dr Fidelma Donlon

Filing Participant: Victims' Counsel

Date: 8 December 2023

Language: English

Classification: Public Redacted

Public Redacted Version of Victims' Counsel's Response to the "Defence Request to Admit the Evidence of DW4-01 Pursuant to Rules 153 and 155 of the Rules"

Specialist Prosecutor
Kimberly P. West

Counsel for the Accused
Jean-Louis Gilissen

Counsel for Victims
Simon Laws

I. INTRODUCTION

1. Pursuant to the Oral Order of Trial Panel I¹ and Rule 114(4) of the Rules, Victims' Counsel responds to the Defence Request to Admit the Evidence of DW4-01 Pursuant to Rules 153 and 155 of the Rules.²

2. Victims' Counsel submits that the Request fails to meet the criteria for admissibility for either Rule 153 or 155 and should be dismissed. The legal framework of the Kosovo Specialist Chambers permits the departure from the principle of orality in relation to trials in narrowly confined circumstances, none of which apply here.

II. CLASSIFICATION

3. This filing is confidential pursuant to Rule 82 (3) to give effect to existing protective measures, and Rule 82 (4) of the Rules, as it responds to a confidential filing.

III. PROCEDURAL HISTORY

4. On 8 September 2023, the Defence informed the Panel that it was not able to re-establish contact with DW4-01 and secure his voluntary appearance.³

5. [REDACTED].⁴

6. On 29 September 2023, the Panel summoned DW4-01 to testify, at the earliest, on 6 October 2023, and ordered the Registry to serve the summons on the witness.⁵

7. On 3 October 2023, the Registry informed the Panel that it would not be feasible to facilitate the testimony of DW4-01 on 6 October 2023 or to serve the summons on DW4-01 prior thereto.⁶

¹ *Prosecutor v. Pjetër Shala*, KSC-BC-2020-04, In Court Oral Order, Transcript, 29 November 2023, T. 3877:6-15 ("Oral Order").

² KSC-BC-2020-04/F00733, Defence Request to Admit the Evidence of DW4-01 Pursuant to Rules 153 and 155 of the Rules, 4 December 2023 ("Defence Request").

³ Email from the Defence to the Panel, Prosecution, Victims' Counsel, and the Court Management Unit of the Registry, 8 September 2023, 1:56 pm.

⁴ [REDACTED].

⁵ KSC-BC-2020-04/F00674, Decision on the Defence request under Rule 121(3) of the Rules to summons witness DW4-01, 29 September 2023.

⁶ KSC-BC-2020-04/F00679, Registrar's Submissions on Summons to Testify via Video-Conference, 3 October 2023, para. 4.

8. On 5 October 2023, the Panel again summoned DW4-01 to testify before it.⁷
9. On 28 November 2023, the Registry informed the Panel, the Parties and Participants that [REDACTED] had located DW4-01 and attempted to serve the summons upon him [REDACTED], but that he had refused to accept it.⁸
10. On the same day, the Panel instructed the Defence to inform it by 29 November 2023 whether it still intended to call DW4-01 as a witness.⁹
11. On 29 November 2023, the Defence informed the Panel that it no longer sought to call DW4-01 to testify, but that it would request the admission of his prior testimony [REDACTED].¹⁰
12. On the same day, the Panel ordered the Defence to file, by 4 December 2023, a request to introduce the prior testimony of DW4-01 in writing in lieu of his oral testimony in these proceedings, and instructed the SPO and Victims' Counsel to respond by 8 December 2023.¹¹
13. On 4 December the Defence Request was filed.

IV. SUBMISSIONS

14. The Defence seeks admission of the transcript of DW4-01's testimony [REDACTED] pursuant to Rule 153, or in the alternative, Rule 155(1).¹²

A. THE EVIDENCE OF DW4-01 SHOULD NOT BE ADMITTED PURSUANT TO RULE 153(1)(A)

15. Victims' Counsel notes the factors militating against admission of prior written statements as listed (non-exhaustively) in Rule 153(1)(b):

⁷ KSC-BC-2020-04/F00682, Second Decision on the Defence request under Rule 121(3) of the Rules to summons witness DW4-01, 5 October 2023.

⁸ KSC-BC-2020-04, Transcript, 28 November 2023, T. 3797:25 - T. 3798:9.

⁹ KSC-BC-2020-04, Transcript, 28 November 2023, T. 3828:18 - T. 3829:6.

¹⁰ KSC-BC-2020-04, Transcript, 29 November 2023, T. 3831:23 - T. 3832:4.

¹¹ Oral Order.

¹² Defence Request, para. 16. [REDACTED] ("Proposed Evidence").

Factors militating against the admission of a written statement or transcript in lieu of oral testimony include instances whereby:

- (i) a Party or, where applicable, Victims' Counsel objects to the admission of the witness's evidence in written form and, demonstrates that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value;
- (ii) the evidence contained therein is incriminatory in character or pertains to an issue central to the Specialist Prosecutor's case;
- (iii) there are any other factors that make it appropriate for the witness to appear for cross-examination; or
- (iv) there is an overriding public interest in the evidence in question being presented orally.

16. The Defence argues generally on admissibility that DW4-01's prior testimony "addresses information and persons central to the case" and that his testimony "is important to the Defence case".¹³ It explains that this is because DW4-01's Proposed Evidence pertains to the credibility of the "central Prosecution witness, TW4-01" and will thereby allow "the Panel to more properly and fully assess the credibility of TW4-01".¹⁴

17. The Defence specifies that DW4-01 "[REDACTED]".¹⁵ Specifically, as indicated by the Defence, DW4-01 stated that TW4-01 "[REDACTED]", as a result of which "[REDACTED]".¹⁶ Furthermore, the Defence also argues that DW4-01's previous statement contradicts TW4-01 in relation to the latter's testimony about his relationship with DW4-01.¹⁷ Finally, DW4-01's previous statement is said to provide further evidence on the criminal background of TW4-01,¹⁸ and his relationship with [REDACTED].¹⁹

¹³ Defence Request, paras 19, 21.

¹⁴ Defence Request, para. 21.

¹⁵ Defence Request, para. 22.

¹⁶ Defence Request, para. 22.

¹⁷ Defence Request, para. 24.

¹⁸ Defence Request, para. 24.

¹⁹ Defence Request, para. 23.

18. Victims' Counsel objects to the Defence's request in relation to DW4-01. As acknowledged by the Defence,²⁰ TW4-01 is a key witness in the case against the Accused. Therefore, his credibility must be considered as a central element of the Prosecution's case.

19. The Defence claims that the fact that DW4-01 was a summoned [REDACTED], and the fact that he testified under oath and was subject to cross-examination are factors that should militate in favour of the admission of the Proposed Evidence under Rule 153(1)(a) of the Rules.²¹ It supports its position with the ICTY jurisprudence in the *Prilić* case which, however, concerned the testimony of a deceased witness.²²

20. The Defence, in its assessment of admissibility pursuant to Rule 153(1)(a), fails to acknowledge DW4-01's own criminal past and non-cooperative attitude towards judicial institutions. Specifically, the fact that in 2011, DW4-01 had to be summoned [REDACTED], and the fact that in 2023 he explicitly, and in-person, refused to be served with a summons issued by the Specialist Chambers. These facts undermine DW4-01's credibility.

21. The Defence intends to undermine the reliability of TW4-01, who testified in court and was cross-examined about the inconsistency of his statement with that of DW4-01.²³

22. Victims' Counsel submits that should the evidence of DW4-01 be considered by the Panel for the assessment of TW4-01's credibility, the Parties, Participants, and the Panel must have the opportunity to question DW4-01 directly and to hear his explanations as to the inconsistencies between his testimony and that of TW4-01. This is especially so as a reading of the Proposed Evidence indicates that his testimony in that case was evasive and that he avoided giving straightforward and clear answers.²⁴

²⁰ Defence Request, para. 21.

²¹ Defence Request, para. 28.

²² Defence Request, para. 27.

²³ See, for example: Transcript, 5 June 2023, T. 1796:20 - T. 1800:21 (in relation to the relationship between DW4-01 and TW4-01), T. 1847:9 - T. 1849:1 [REDACTED], or T. 1849:2 - T.1850:17 [REDACTED].

²⁴ For example: ERN SITF00015449, ERN SITF00015454, ERN SITF00015455, ERN SITF00015456.

It is also noteworthy that the judgement [REDACTED] does not refer to DW4-01's testimony, whereas it does rely on TW4-01's evidence.

B. THE REQUEST UNDER RULE 155(1)

23. In the alternative, it is argued by the Defence that the Proposed Evidence should be admitted into evidence under Rule 155 (1) on the basis that DW4-01 is unavailable to testify as a result of a compelling reason.

24. The Request under Rule 155(1) can be determined by answering two questions: whether the witness is "unavailable", and whether there is a "compelling reason" for the witness not testifying orally.

1. Is the witness "unavailable"?

25. DW4-01 is unwilling to attend the trial, he is not "unavailable".

26. Having sought a summons to compel the witness's attendance at the trial, the Defence has chosen not to call the witness.²⁵ This decision was taken after the Defence was informed that DW4-01 had refused to accept the summons that had been served on him.²⁶

27. This is a decision that the Defence has taken of its own volition. In doing so, it has, as it accepts, decided not to seek to call him. This is the same thing as saying that the Defence has chosen to permit the witness to decide not to attend the trial. This was not the only choice open to the Defence. Under Rule 122 and Article 42(7) of the Law, the Panel has at its disposal the power to compel the attendance of the witness. These powers will not be exercised as a result of the Defence's decision not to call the witness.

28. It follows that the Defence's decision means that the witness will not be compelled to attend the trial, despite his availability. He cannot therefore be described as "unavailable": he is unwilling to attend and the Defence decision not to seek his compulsion does not render him "unavailable".

²⁵ KSC-BC-2020-04, Transcript, 29 November 2023, T. 3831:23 - T. 3832:4.

²⁶ KSC-BC-2020-04, Transcript, 28 November 2023, T. 3797:25 - T. 3798:9.

2. Is there a “compelling reason” for the witness to not testify orally?

29. The Defence argues that the witness’s non-attendance should be attributed to an “other compelling reason” within Rule 155(1).

30. At the same time, the Defence admits that they do not know the reason for the witness refusing to testify:

[REDACTED].²⁷

31. It follows that there is no basis on which the Trial Panel could conclude that there is a “compelling” reason for DW4-01’s non-attendance. He may be acting from malice, hostility, indifference, or many other non-compelling reasons. It would be pure speculation to hold that his non-attendance should be attributed to an unknown and uncommunicated reason of a compelling kind. The Defence suggests that the introduction of the “other compelling reason” test indicates that unavailability should be given a “broad definition”.²⁸ Given that there is *no* information as to the reason for DW4-01’s unavailability, Victims’ Counsel submits that, for the statement to be admissible under Rule 155, the word “compelling” would need to be deleted, not broadly defined.

32. The Request under Rule 155 therefore fails to meet the requisite test and should be dismissed.

V. CONCLUSION

33. To grant the application would be to incentivise non-cooperation by witnesses, and to admit evidence from a source of highly questionable credibility, who has displayed contempt towards the jurisdiction of the Specialist Chambers. His unexplained decision not to provide testimony in these proceedings is an insuperable obstacle in the path of the admission of his testimony from previous proceedings.


VI. RELIEF

²⁷ Defence Request, para. 33.

²⁸ Defence Request para. 32.

34. For the foregoing reasons, Victims' Counsel respectfully requests that the Trial Panel rejects the Defence Request.

Word count: 2057

A handwritten signature in black ink, appearing to read "Simon Laws", written over a horizontal line.

Simon Laws KC

Counsel for Victims

A handwritten signature in blue ink, appearing to read "Maria Radziejowska", written over a horizontal line.

Maria Radziejowska

Co-Counsel for Victims

8 December 2023

At The Hague, the Netherlands.