

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: 22 January 2024

Filing Party: Specialist Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR
v.
PJETËR SHALA

**Public Redacted Version of Defence Consolidated Response to Prosecution and
Victims' Counsel's Requests for Admission of Material Used During the
Examination of W04405**

Specialist Prosecutor's Office:

Kimberly P. West

Specialist Defence Counsel

Jean-Louis Gilissen

Hédi Aouini

Leto Cariolou

Counsel for Victims

Simon Laws KC

Maria Radziejowska

I. INTRODUCTION

1. Pursuant to the Trial Panel's Oral Order dated 29 November 2023, the "Decision on the submission and admissibility of non-oral evidence" and Rules 76 and 138(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"),¹ the Defence for Mr Pjetër Shala ("Defence") hereby files a consolidated response to the Prosecution and Victims' Counsel's respective request for the admission of material used during the examination of W04405.²

II. PROCEDURAL BACKGROUND

2. On 17 March 2023, the Panel issued the "Decision on the submission and admissibility of non-oral evidence", in which it, *inter alia*, set out the principles governing the admission of non-oral evidence and ordered the Parties and Victims' Counsel to submit, no later than one week after the completion of each evidentiary block, an application for the admission of any material used during their respective questioning of the witnesses whose testimonies were completed within that block and which had not already been submitted to the Panel.³
3. On 29 November 2023, the Panel ordered the Parties and Victims' Counsel to submit any applications for the admission of material used during their respective questioning of witnesses to be heard during the tenth evidentiary

¹ T. 29 November 2023 p. 3878; KSC-BC-2020-04, F00461, Decision on the submission and admissibility of non-oral evidence, 17 March 2023, para. 56. All further references to filings in this Response concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² F00768, Prosecution request for admission of material used during the cross-examination of W04405 with confidential Annex 1, 15 January 2024; F00765, Victims' Counsel's Request for admission of an exhibit used during the examination of W04405 with confidential annex 1, 15 January 2024 (confidential).

³ F00461, Decision on the submission and admissibility of non-oral evidence, 17 March 2023, paras 55-65.

block.⁴ The Panel also ordered the Parties and Victims' Counsel to submit objections and observations, if any, within the five-day limit set in the "Decision on the submission and admissibility of non-oral evidence".⁵

4. On 9 and 10 January 2024, W04405 testified before the Panel during the tenth evidentiary block.⁶
5. On 15 January 2024, the Prosecution filed its request for admission of material used during the cross-examination of W04405.⁷
6. On the same date, Victims' Counsel filed his request for admission of an exhibit used during the examination of W04405.⁸

III. APPLICABLE LAW

7. Rule 138(1) of the Rules provides that "[u]nless challenged or *proprio motu* excluded, evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect".
8. In the "Decision on the submission and admissibility of non-oral evidence", the Panel found that the Parties and Victims' Counsel:

may submit through a witness only material which has been disclosed and *actually* used during their questioning of the witness. [...] in accordance with the principle of orality, only the portions discussed with the witnesses during their in-court testimony are part of the evidentiary record. This is because

⁴ T. 29 November 2023 p. 3878.

⁵ T. 29 November 2023 p. 3878; F00461, Decision on the submission and admissibility of non-oral evidence, 17 March 2023, para. 56.

⁶ W04405, T. 9 January 2024 pp. 3885- 3999; W04405, T. 10 January 2024 pp. 4000-4076.

⁷ F00768, Prosecution request for admission of material used during the cross-examination of W04405 with confidential Annex 1, 15 January 2024 ("Prosecution Request").

⁸ F00765, Victims' Counsel's Request for admission of an exhibit used during the examination of W04405 with confidential annex 1, 15 January 2024 (confidential) ("Victims' Counsel Request").

evidence that is testimonial in nature is inadmissible when not elicited orally or introduced through Rules 153-155 of the Rules.⁹

9. In the “Decision on requests for admission of items used with DW4-06, DW4-02, DW4-05 and W04754 during their in-court testimonies”, the Panel found that it:

may rely on other parts of these items [put to the respective witnesses in court], as necessary, to assess the correct meaning and context of the parts put to the witnesses in court. Mindful of the principle of orality and the Rules – which provide for specific procedures for the admission of written statements *in lieu* of oral testimony – the Panel will not rely on these statements for any other purposes than those for which they were used with the witnesses in court.¹⁰

IV. SUBMISSIONS

10. The Defence objects to the admission of the parts of evidence requested by Prosecution or Victims’ Counsel which were not put to W04405 in court, specifically: i) pages 7, 18, 20-21, 23-24, and 31-32 of the Redacted version of Part 2 of the transcript of the Prosecution interview with [REDACTED] dated [REDACTED],¹¹ which were tendered by the Prosecution;¹² and ii) the Redacted version of Part 3 of the transcript of the Prosecution interview with W04405 dated [REDACTED],¹³ besides the portion read out to W04405 by Victims’ Counsel,¹⁴ which was tendered by Victims’ Counsel.¹⁵
11. The Prosecution has requested the admission of pages 8-9, 19, 22, 27, and 30 of Part 2 of the transcript of its interview with [REDACTED], which were put to

⁹ F00461, Decision on the submission and admissibility of non-oral evidence, 17 March 2023, paras 58, 60.

¹⁰ F00714, Decision on requests for admission of items used with DW4-06, DW4-02, DW4-05 and W04754 during their in-court testimonies with one public annex, 13 November 2023 (confidential), para. 14.

¹¹ ERN 065236-TR-ET Part 2 RED.

¹² Prosecution Request, para. 5.

¹³ ERN 063317-TR-ET Part 3 RED2.

¹⁴ T. 10 January 2024 p. 4053 line, 4 to p. 4054, line 14.

¹⁵ Victims’ Counsel Request, para. 5.

W04405 in court, “to assess the credibility of his evidence”.¹⁶ However, it also cursorily requested that “also pages 7, 18, 20-21, 23-24, and 31-32 should be considered by the Panel for the proper assessment of the evidence provided by the witness in court”.¹⁷ The Prosecution has made no effort to explain how these other specific pages are *relevant* and necessary for a full understanding of W04405’s testimony or the assessment of the correct meaning and context of the pages actually put to W04405 in court, in line with the Panel’s instructions.¹⁸

12. Similarly, besides the portion read out to W04405 in court, Victims’ Counsel has tendered the whole of Part 3 of the transcript of the Prosecution interview with W04405 in its entirety without identifying or explaining how the rest of the item is *relevant* to the assessment of W04405’s testimony.¹⁹ It simply submits that the item “should be considered by the Trial Panel in assessing the evidence of the witness”.²⁰
13. The Prosecution and Victims’ Counsel have neither identified nor clarified the connection between the parts of the transcripts which were not used in court and any issue in W04405’s testimony. In other words, the Prosecution and Victims’ Counsel have failed to demonstrate any *probative value* these parts may have for the assessment of W04405’s testimony or how they are necessary for the determination of truth in this case.
14. The admission of the parts not used in court in the two items will be highly *prejudicial*. To rely on these parts in the evaluation of W04405’s credibility, without their contents being put to W4405 would not only violate the right of

¹⁶ Prosecution Request, para. 5.

¹⁷ Prosecution Request, para. 5.

¹⁸ F00714, Decision on requests for admission of items used with DW4-06, DW4-02, DW4-05 and W04754 during their in-court testimonies with one public annex, 13 November 2023 (confidential), para. 14.

¹⁹ Victims’ Counsel Request, para. 5.

²⁰ Victims’ Counsel Request, para. 5.

the Accused to examine the witnesses against him, but would also be highly unfair to the witness, who ought to have been given a chance to explain any contradictions or inconsistencies. Indeed, this is a fundamental principle of cross-examination, and the failure to put such contradictions to a witness may necessitate recalling them to ensure trial fairness.²¹ Any probative value these parts may have, is thus significantly outweighed by their prejudicial effect.

- 15. Based on the above, the Defence objects to the admission of the parts not used with W04405 in court of the respective transcripts.

V. CLASSIFICATION

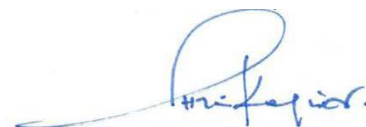
- 16. Pursuant to Rule 82(3) of the Rules, this Response is filed as confidential as it relates to a confidential filing. The Defence will file a public redacted version of the Response in due course.

Word count: 1384

Respectfully submitted,



Jean-Louis Gilissen
Specialist Defence Counsel



²¹ *Browne v Dunn* (1893) 6 R. 67 (H.L.).

Hédi Aouini

Defence Co-Counsel

Leto Cariolou

Defence Co-Counsel

Monday, 22 January 2024

The Hague, the Netherlands