

In: KSC-BC-2023-10

**The Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and
Haxhi Shala**

Before: Pre-Trial Judge

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Haxhi Shala

Date: 19 February 2024

Language: English

Classification: Public

**Public Redacted Version of Response to Prosecution Request for authorisation for
Rule 102(1)(b) disclosure**

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I. INTRODUCTION

1. The Defence for Mr. Haxhi Shala (“Accused”) hereby responds to the request of the Specialist Prosecutor’s Office¹ (“SPO”) for authorisation for the disclosure of certain limited additional evidentiary materials (“Further Materials”) pursuant to Rule 102(1)(b) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers² (“Rules”).

II. PROCEDURAL HISTORY

2. On 24 October 2023 the Pre-Trial Judge ordered the SPO in Prosecutor v. Sabit Januzi and Ismet Bahtijari (“Case 10”) to complete disclosure of material falling under Rule 102(1)(b) of the Rules, by Friday, 15 December 2023;³ and on 19 December 2023 he ordered the SPO in Prosecutor v. Haxhi Shala (“Case 11”) to complete the same disclosure by Friday, 19 January 2024.⁴

¹ KSC-BC-2023-10/F00164, Prosecution submission of Rule 109(c) chart and witness and exhibit lists and related request for Rule 102(1)(b) disclosure with confidential Annexes 1-3, 9 February 2024, paras. 3-7 (“Prosecution Request”).

² KSC-BD-03/Rev3/2020.

³ KSC-BC-2023-10/F00076, Public Redacted Version of the Framework Decision on Disclosure of Evidence and Related Matters, para. 122(d).

⁴ KSC-BC-2023-11/F00023, Framework Decision on Disclosure of Evidence and Related Matters, para. 111(f).

3. On 8 February 2024 in the Decision on Request for Joinder and Amendment of the Indictment (“Joinder Decision”)⁵, the Pre-Trial Judge (i) granted the joinder of Case 10 and Case 11, (ii) directed the Registry to rename the record of the case to The Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala while retaining the case record number KSC-2023-10 and (iii) directed the Registry to discontinue the Case 11 case record.⁶

III. SUBMISSIONS

4. On 9 February 2024 the SPO sought authorisation for the disclosure of certain limited additional evidentiary materials (“Further Materials”) pursuant to Rule 102(1)(b) of the Rules, namely the forensic image of a ‘phone seized from the Accused as well as extracts of records, including text messages and call log records, taken from the forensic image of the ‘phone.⁷ The items for which the SPO seeks authorisation to disclose are numbered 168-170 in Annex 3 to the Prosecution Request, which gives the list of proposed exhibits that the SPO intends to present at trial.

⁵ KSC-BC-2023-10/F00041.

⁶ Joinder Decision, paras. 58a, 58f, 58g.

⁷ Prosecution Request, para. 4.

5. The 'phone was seized from the Accused on the date of his arrest, 11 December 2023.⁸ [REDACTED].⁹ The latter 'phone was seized from the Accused on 3 May 2023.¹⁰ Items 150 and 156 in Annex 3 give analyses of its contents.
6. A Panel of the Specialist Chambers in *Specialist Prosecutor v. Hashim Thaçi et al.* has summarised the grounds for authorising additions to an exhibit list as follows:

“The Court of Appeals Panel has stated that a certain level of flexibility must be maintained with respect to amendments of witness and exhibit lists at the pre-trial stage, provided that adequate protection of the accused’s rights is guaranteed. The Panel further stresses that, in deciding whether to grant the addition of a particular item to a Party’s Exhibit List, the Panel need not assess whether the proposed items are admissible. The Panel need only satisfy itself that the proposed evidence is *prima facie* relevant and of sufficient importance to justify the late addition. Accordingly, a decision authorising the addition of an item to

⁸ Prosecution Request, para. 5.

⁹ KSC-BC-2023-10/F00167, Shala Defence Response to Prosecution Request for Retention of evidence, 11 February 2024, confidential para. 6.

¹⁰ Annex 3, Item 73.

a Party's Exhibit List is without prejudice to the Panel's subsequent decision on whether that item should be admitted into evidence.

"[.....]"

"As regards good cause for the addition of the Requested Amendments to the SPO's Exhibit List, the Panel notes that leave to amend the Exhibit List should not be granted with respect to items that are obviously irrelevant and would, therefore, ultimately be denied admission into evidence. Such an evaluation does not call for an assessment of the admissibility of the proposed material, but of a *prima facie* evaluation only. The Panel may also take into account other factors which militate in favour of, or against, a requested addition, including whether the proposed evidence is *prima facie* relevant and of probative value to the charges against an accused, the complexity of the case, on-going investigations, and translation of documents and other materials. In addition, the Panel will carefully balance any amendment to the Prosecution's exhibit list with an adequate protection of the rights of the accused. That is, the Panel must be satisfied that amendments to the

exhibit list at that stage of the proceedings provide an accused sufficient notice and do not adversely affect his ability to prepare for trial.”¹¹

7. Notwithstanding the need for flexibility in regard to additions to exhibit lists, the Defence submits that authorising the addition of Items 168-170 would not meet the criteria just outlined.
8. They do not achieve the threshold of *prima facie* relevance. The Accused bought the ‘phone that is the source for the Further Materials *after* the seizure of his other ‘phone on 3 May 2023. Consequently, it only holds information from long *after* the period within which it is alleged that the Accused committed the criminal offences with which he has been charged.¹² The Further Materials therefore have no *prima facie* relevance to the case against the Accused and there is no reason why they fall under Rule 102(1)(b) of the Rules.
9. The ‘phone has [REDACTED]. Its continued retention is causing the Accused very real difficulties. If authorisation for disclosure of Items 168-170 were not to be granted, there would be no reason why the ‘phone should not be

¹¹ KSC-BC-2020-06/F01352/RED, Public Redacted Version of Decision on Prosecution Request to Amend the Exhibit List and Related Matters, 1 November 2023 (original: 8 March 2023) paras. 29,31 [Footnotes omitted].

¹² Public Redacted Indictment (Annex 1 to KSC-BC-2023-11/F00013, Submission of public redacted version of confirmed Indictment, 12 December 2023) paras. 2-28.

returned. For as long as the Accused is held in the Specialist Chambers Detention Facilities, he is unable to take possession of it. However, the return of the 'phone to a designated member of his family would reduce the convenience of being separated from it. The Defence submits that, if the Pre-Trial Judge were to find Items 168-170 to be of marginal *prima facie* relevance, the hardship that the Accused is caused by the ongoing retention of the 'phone would tip the scales in favour of not granting authorisation to disclose them.

10. If authorisation to disclose Items 168-170 is granted the Defence asserts the right to challenge their admissibility after disclosure.

11. **CONCLUSION**

12. For the foregoing reasons the Defence requests that

- (i) the Prosecution Request for authorisation to disclose the Further Materials pursuant to Rule 102(1)(b) of the Rules be dismissed; and
- (ii) the 'phone seized from the Accused on the day of his arrest be returned to him or, if he remains in the Specialist Chambers Detention Facilities, to a designated member of his family.

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19 February 2024

At London, United Kingdom