



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-04
Specialist Prosecutor v. Pjetër Shala

Before: **Trial Panel I**
Judge Mappie Veldt-Foglia, Presiding
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve

Registrar: Dr Fidelma Donlon

Filing Party: Specialist Prosecutor's Office

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Public Redacted Version of

'Prosecution response to motion to reopen the Defence case'

Specialist Prosecutor's Office

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I. INTRODUCTION

1. For the reasons outlined below, W02540's Evidence¹ is not exculpatory and, at best, of very marginal relevance. Nonetheless, the Specialist Prosecutor's Office ('SPO') does not oppose its admission in writing, should the Trial Panel ('Panel') deem it appropriate. The Motion² should be denied to the extent it requests a suspension of the current deadline for final briefs, and the hearing of W02540's testimony live.

II. SUBMISSIONS

2. Whether re-opening of a party's case should be permitted in any particular instance is a discretionary matter within the control of the Panel. The exercise of that discretion should be guided by the probative value of W02540's Evidence, considered in conjunction with the advanced stage of the trial, any delay likely to be caused by a re-opening of the case, and the suitability of an adjournment in the overall context of the trial.³

3. For motions to reopen which are filed at a very advanced stage of the proceedings, a stricter approach is warranted in weighing the probative value of the proposed evidence against the delay that its admission would cause.⁴ The existence or otherwise of any disclosure violation is not a relevant factor in the assessment of whether or not re-opening is warranted.⁵

¹ 069539-TR-ET Part 1 Revised 1 RED; 069539-TR-ET Part 2 Revised 1; 069539-TR-ET Part 3 Revised 1; 069539-TR-ET Part 4 Revised 1; U002-6107-U002-6112 RED; U002-6101-U002-6106-ET RED; U002-4992-U002-4995; 5005585-5005591; SITF00224444-00224445; SITF00224444-SITF00224445-ET ('W02540's Evidence').

² Defence Motion Requesting Leave to Reopen its Case to Present Exculpatory Evidence Recently Disclosed in Breach of the Prosecution's Disclosure Obligations, KSC-BC-2020-04/F00803, 29 February 2024 ('Motion').

³ ICTY, *Prosecutor v. Popović et al.*, Decision on Motion to Reopen the Prosecution Case, IT-05-88-T, Decision on Motion to Reopen the Prosecution Case, 9 May 2008, para.25.

⁴ ICTY, *Prosecutor v. Prlić et al.*, Decision on the Prosecution's Motion to Re-Open Its Case, IT-04-74-T, 6 October 2010, para.58.

⁵ ICTY, *Prosecutor v. Karadžić*, Decision on Accused's Seventh Motion to Re-Open Defence Case, IT-95-5/28-T, 20 April 2015, para.13.

A. W02540'S EVIDENCE LACKS RELEVANCE AND PROBATIVE VALUE, AND IS CUMULATIVE IN NATURE

4. The Indictment in this case exclusively concerns crimes committed between approximately 17 May and 5 June 1999 at the Kukës Metal Factory, in Kukës, Albania.⁶ Events [REDACTED] June 1999 are not charged. Certain information in relation to those events may be considered to have some, limited, relevance to the case only to the extent [REDACTED], and thereby may inform assessments of his credibility. However, as the Panel has already held in rejecting the evidence of [REDACTED],⁷ cumulative and background information in relation to [REDACTED] is not of assistance in assessing the particular facts of this case.

5. As set out below, W02540's Evidence is cumulative. Moreover, contrary to the Defence's submissions, there are no material discrepancies between W02540's Evidence and that of TW4-01. On the contrary, to the extent it is relevant, W02540's Evidence corroborates TW4-01's account in all material respects.

6. As such, W02540's Evidence is incapable of meeting the requisite standard to warrant re-opening of the case. Nonetheless, should the Panel consider it useful for its determination, the SPO does not oppose its admission, in writing, in accordance with the modalities specified below.⁸

7. The SPO addresses each of the alleged discrepancies identified by the Defence in turn below.

1. Date of [REDACTED]

8. The first discrepancy alleged by the Defence concerns the date of the liberation [REDACTED], which TW4-01 testified [REDACTED] June 1999, while W02540 stated took place [REDACTED] June.⁹ A difference of one day in TW4-01's account, 24 years

⁶ Public Redacted Version of Corrected Indictment, KSC-BC-2020-04/F00107/A01, 16 November 2021, paras 8, 31.

⁷ Oral Order, Directions concerning the presentation of evidence by the Defence, 25 August 2023,

⁸ See Section II.B. below.

⁹ Motion, KSC-BC-2020-04/F00803, para.25.

after the fact, is not a material discrepancy, and certainly not one that can affect TW4-01's credibility. W02540's Evidence on the date of [REDACTED] is also cumulative with multiple other pieces of evidence in this case, which records [REDACTED] June 1999.¹⁰

2. TW4-01's estimate of number of [REDACTED]

9. Second, the Defence alleges a discrepancy concerning the number [REDACTED] as estimated by TW4-01 and by W02540 respectively.¹¹ W02540 provides a figure of [REDACTED],¹² and TW4-01 of [REDACTED].¹³ To call this a discrepancy is disingenuous. If anything, W02540's evidence corroborates TW4-01's estimate that [REDACTED]. Moreover, it is of absolutely no relevance to the case.

3. TW4-01's estimate of number of [REDACTED]

10. TW4-01 was detained at [REDACTED].¹⁴ Based on the time he spent there, he testified that [REDACTED].¹⁵ W02540's evidence that, [REDACTED] is not necessarily a discrepancy at all. It is certainly not one that goes to TW4-01's credibility,¹⁶ since TW4-01 admitted that he did not know the precise number [REDACTED].

11. In any event, W02540's statement on the number of [REDACTED] is again cumulative with other evidence already in this case. Specifically, W03881 estimated [REDACTED].¹⁷

¹⁰ See e.g. SITF00189121-00189140 RED2, p.SITF00189121; 071139-071313 RED4, p.071180; 071136-TR-ET Part 2 RED, pp.11-12.

¹¹ Motion, KSC-BC-2020-04/F00803, para.25.

¹² U002-6101-U002-6106-ET RED, p.2.

¹³ Transcript (TW4-01), 5 June 2023, p.1734. The SPO notes that the Defence did not actually ask the witness to estimate the number of [REDACTED].

¹⁴ TW4-01 was brought there [REDACTED], and liberated the following day [REDACTED], see Transcript (TW4-01), 31 May 2023, pp.1539-1540. [REDACTED] June 1999.

¹⁵ Transcript (TW4-01), 2 June 2023, pp.1697-1698.

¹⁶ *Contra*. Motion, KSC-BC-2020-04/F00803, para.26.

¹⁷ SITF00189121-00189140 RED2, p.1; DPS00125-DPS00141, p.DPS00125 [REDACTED].

4. Description of [REDACTED]

12. The Defence alleges a discrepancy between TW4-01's evidence and that of W02540 in relation to.¹⁸ However, in doing so, the Defence misrepresents TW4-01 evidence. Contrary to the Defence's submissions, TW4-01 did not testify that he 'had seen [REDACTED]'.¹⁹ In fact, TW4-01 testified that he [REDACTED]. When confronted by the Defence with a previous statement, TW4-01 acknowledged that it is possible he might have stated previously that [REDACTED].²⁰ In a context where TW4-01 was [REDACTED],²¹ [REDACTED],²² and after approximately a month of detention at the Kukës Metal Factory, and further considering [REDACTED],²³ this is again not a material discrepancy.

13. In any event, W02540's recollection of [REDACTED].²⁴ Further undermining the Defence's current claim that this is a matter of significance to TW4-01's credibility, is the fact that –[REDACTED]– the Defence did not even put this alleged discrepancy to TW4-01 at trial, stating that they did not see the need to put to the witness documents not emanating from him, and that they could adduce these documents in different ways.²⁵

5. TW4-01's presence in the room where [REDACTED]

14. The last issue identified by the Defence concerns W02540's Evidence that [REDACTED].²⁶

¹⁸ Motion, KSC-BC-2020-04/F00803, para.28.

¹⁹ Motion, KSC-BC-2020-04/F00803, para.28.

²⁰ Transcript (TW4-01), 2 June 2023, pp.1709-1710.

²¹ Transcript (TW4-01), 31 May 2023, p.1541; Transcript (TW4-01), 2 June 2023, p.1711.

²² Transcript (TW4-01), 31 May 2023, p.1541.

²³ 059113-059144, p.059136.

²⁴ Compare 069539-TR-ET Part 1 Revised 1, p.34, where W02540 stated [REDACTED] with DPS00125-DPS00141, pp.DPS00139-DPS00140.

²⁵ Transcript (TW4-01), 2 June 2023, p.1714.

²⁶ Motion, KSC-BC-2020-04/F00803, para.27.

15. TW4-01's testimony is clear that [REDACTED],²⁷ [REDACTED].²⁸ As such, there is again no apparent discrepancy with W02540's Evidence that, when [REDACTED]. Based on the Defence's cross-examination of TW4-01, it does not appear to be in dispute that TW4-01 was freed by [REDACTED], and TW4-01 was even able to recognise at trial [REDACTED].²⁹

6. Conclusion

16. As outlined above, any probative value that W02540's Evidence may have in relation to TW4-01's credibility is very limited (if anything, it is further corroborative of TW4-01's overall account), which weighs against reopening the Defence case to introduce this evidence in this trial.

17. The SPO cannot, and is not expected to, anticipate every line of Defence and all matters that the Defence may ultimately consider material to its preparation. Disclosure in this case was done in good faith, and based upon what could reasonably be foreseen as material, including as to witness credibility. Although not inconsistent with TW4-01's account, it is acknowledged that W02540's Evidence could have been noticed at an earlier point in time, during the Defence case. In light of the nature of the discrepancies alleged by the Defence, and the largely cumulative nature of W02540's evidence, however, it is clear that the Defence has suffered no concrete prejudice. In light of the request, the SPO has conducted certain further searches and today, for completeness and to enable the Defence and Panel to make a fair assessment of the relevance (or otherwise) of W02540's Evidence, the statement of a further witness – W02560 [REDACTED]– has been disclosed. In Part 2 of his interview, W02560 discusses being one [REDACTED].³⁰ While the SPO maintains that these events have limited, if any, relevance to the facts for determination in this case, the

²⁷ Transcript (TW4-01), 31 May 2023, p.1541; Transcript (TW4-01), 2 June 2023, p.1711.

²⁸ See Transcript (TW4-01), 2 June 2023, pp.1712-1713, where TW4-01 testified that [REDACTED].

²⁹ Transcript (TW4-01), 2 June 2023, pp.1708-1709; 059113-059144, p.059136.

³⁰ 072882-TR-ET Part 2, pp.4-5.

SPO has no objection should the Defence, or the Panel, consider it appropriate to also admit the evidence of W02560.

B. W02540'S EVIDENCE SHOULD BE ADMITTED IN WRITING, IF AT ALL

18. For the reasons outlined above, the Defence has failed to demonstrate that the probative value of W02540's Evidence warrants reopening of the case. However, even if the Panel were to consider that it may be assisted by W02540's Evidence, there is no necessity that the evidence be heard *viva voce*. The very low probative value of the evidence – the relevance of which is confined to a [REDACTED]- clearly weigh against calling W02540 live.

19. Indeed, the Defence tendered the evidence of W03881, another [REDACTED], pursuant to Rule 153, arguing that the evidence 'largely concern[ed] background information on the situation in Kosovo, specifically in [REDACTED] June 1999'.³¹ It did so notwithstanding the fact that it also considered W03881's evidence relevant to TW4-01's credibility.³² The Defence's submission that W02540 needs to be called live because he was never interviewed 'in the context of this case' is also unpersuasive, and that was equally true in respect of W03881. The Panel, too, found that the limited scope of W03881's evidence made it unnecessary to hear him live.³³ There is no reason why W02540's Evidence should be treated differently.

20. Consequently, if the Panel considers that it would be assisted by W02540's Evidence in assessing TW4-01's credibility, the SPO does not oppose its admission in writing pursuant to Rule 153.³⁴

21. Should the Panel decided to admit the evidence, it can proceed *proprio motu* to admit it, pursuant to Rule 132. In the event that W02540's Evidence is admitted in

³¹ Defence Request to Admit the Evidence of W03881 Pursuant to Rule 153 of the Rules, KSC-BC-2020-04/F00656, 18 September 2023, para.12.

³² *Ibid.*, para.6.

³³ Decision on the Defence Requests to Admit the Evidence of W03881 Pursuant to Rule 153 of the Rules (F00656) or alternatively, to summons witness W03881 pursuant to Rule 121(3) of the Rules (F00657), para.19.

³⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

writing, the SPO waives its right to call any evidence in rebuttal. As such, no rejoinder request should be entertained, since even if the evidence is admitted pursuant to Rule 132, it is evidence that was requested by the Defence.

22. Finally, the requested suspension of deadline for filing of final trial briefs is unnecessary and should be denied. The Defence has already reviewed and analysed W02540's Evidence, including its purported significance in relation to TW4-01's credibility.³⁵ Considering the very narrow scope of the relevant part of W02540's Evidence on [REDACTED], the Defence will have more than sufficient time to incorporate it in their final brief and closing statements, if they wish to do so.

III. RELIEF REQUESTED

23. Based on the foregoing, the SPO requests the Panel to:

- a. **DENY** the request for suspension of the deadline for the Final Trial Briefs and Impact Statement;
- b. **DENY** the request to call W02540 to testify live; and
- c. **ADMIT** W02540's evidence *proprio motu* pursuant to Rules 132 and 153, should it consider it relevant to its assessment of TW4-01's credibility.

Word count: 2515



Kimberly P. West
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Friday, 8 March 2024

At The Hague, the Netherlands.

³⁵ Motion, KSC-BC-2020-04/F00803, paras 24-28.