



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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: Fidelma Donlon

Date: 19 March 2024

Language: English

Classification: **Public**

Public redacted version of

Decision on the Defence request for leave to reopen its case

To be notified to:

Specialist Prosecutor

Kimberly P. West

Counsel for the Accused

Jean-Louis Gilissen

Victims' Counsel

Simon Laws

TRIAL PANEL I (Panel) hereby renders this decision on the Defence request for leave to reopen its case.

I. PROCEDURAL BACKGROUND

1. On 9 February 2024, the Panel closed the evidentiary proceedings in the present case and set the deadline for the submission of the Final Trial Briefs and statement on the impact of the alleged crimes on victims participating in the proceedings (Impact Statement).¹
2. On 29 February 2024, the Defence for Pjetër Shala (Defence and Accused, respectively) submitted the “Defence Motion Requesting Leave to Reopen its Case to Present Exculpatory Evidence Recently Disclosed in Breach of the Prosecution’s Disclosure Obligations” (Request).²
3. On 8 March 2024, Victims’ Counsel and the Specialist Prosecutor’s Office (SPO) responded to the Request.³

¹ KSC-BC-2020-04, F00795, Trial Panel I, *Decision on the Defence motion for a crime site visit, closing the evidentiary proceedings and giving directions on final briefs, request for reparations and closing statements*, 9 February 2024, confidential, para. 52(b), (g). A public redacted version was issued on 20 February 2024, [F00795/RED](#).

² KSC-BC-2020-04, F00803, Defence, *Defence Motion Requesting Leave to Reopen its Case to Present Exculpatory Evidence Recently Disclosed in Breach of the Prosecution’s Disclosure Obligations*, 29 February 2024, confidential. A public redacted version was submitted on 6 March 2024, F00803/RED.

³ KSC-BC-2020-04, F00807, Victims’ Counsel, *Victims’ Counsel’s Response to Defence Motion Requesting Leave to Reopen its Case to Present Exculpatory Evidence Recently Disclosed in Breach of the Prosecution’s Disclosure Obligations* (Victims’ Counsel Response), 8 March 2024, confidential; F00808, Specialist Prosecutor, *Prosecution response to motion to reopen the Defence case* (SPO Response), 8 March 2024, confidential. A public redacted version was filed on 15 March 2024, F00808/RED. For reasons of expeditiousness, the time limits for responses and reply were shortened and the briefing schedule was communicated to the Parties and Victims’ Counsel *via* email; *see* CRSPD167, Email from the Court Management Unit to the Parties and Victims’ Counsel, transmitting the Panel’s directions, sent on 1 March 2024, at 15:14.

4. On 12 March 2024, the Defence replied.⁴

II. SUBMISSIONS

A. DEFENCE REQUEST

5. The Defence submits that the SPO breached its disclosure obligations by making available too late (between 20 and 26 February 2024) certain exculpatory material pertaining to witness W02540 (W02540 Material).⁵ It avers that the W02540 Material is relevant to the credibility and reliability of SPO witness TW4-01, is important and exculpatory in nature, and should have been disclosed sooner.⁶

6. Specifically, the Defence claims that the evidence of W02540 [REDACTED] contradicts the testimony of TW4-01 on several points, such as (i) the date of [REDACTED], (ii) the number of [REDACTED] involved, (iii) the number of detainees [REDACTED], and (iv) [REDACTED].⁷ It contends that, by disclosing late, the SPO deprived the Defence of the possibility to call W02540 and use the W02540 Material to challenge the evidence and credibility of TW4-01 on time and further investigate the information recently disclosed in order to advance its case, thus causing serious and irreparable prejudice.⁸ According to the Defence, the W02540 Material would have informed its cross-examination of SPO witnesses and its direct examination of Defence witnesses for eliciting further information.⁹

⁴ KSC-BC-2020-04, F00810, Defence, *Reply to the Prosecution and Victims' Counsel Response to the Motion Requesting Leave to Reopen its Case to Present Exculpatory Evidence Disclosed in Breach of the Prosecution's Disclosure Obligations* (Reply), 12 March 2024, confidential. A public redacted version was filed on 15 March 2024, F00810/RED.

⁵ Request, paras 1, 6-12, 19-20, 29.

⁶ Request, paras 20-23.

⁷ [REDACTED].

⁸ Request, paras 23, 29, 35.

⁹ Request, para. 29.

7. In order to remedy the disclosure violation, the Defence requests the Panel: (i) to acknowledge this violation; (ii) grant the Defence leave to reopen its case to call W02540 to testify live; and (iii) suspend the deadlines for the Final Trial Briefs and Impact Statement.¹⁰ The Defence submits that it expects the testimony of W02540 to take only a few days, resulting in minimal delays.¹¹ It maintains that the expected testimony of W02540 is fresh evidence and could not have been presented before the closing of its case, as the Defence only became aware of it when the W02540 Material was disclosed in February 2024.¹²

B. SPO RESPONSE

8. The SPO opposes the Request.¹³ It contends that the decision to reopen the Defence case is discretionary in nature and should be guided by the probative value of W02540's evidence, the advanced stage of the trial, any delay caused and the suitability of an adjournment in the overall context of the trial.¹⁴ In its view, disclosure violations are not a relevant factor in assessing whether to reopen the Defence case.¹⁵

9. As regards W02540's evidence, the SPO maintains that it is not exculpatory and only of marginal relevance to the present case.¹⁶ Specifically, the SPO emphasises that: (i) the events [REDACTED] are not charged;¹⁷ (ii) W02540's evidence is cumulative with other evidence in the case;¹⁸ and (iii) there are no material discrepancies between

¹⁰ Request, paras 1, 29, 30-33, 35, 39.

¹¹ Request, para. 37.

¹² Request, paras 31, 36.

¹³ SPO Response, paras 1, 22, 23(a), (b).

¹⁴ SPO Response, para. 2.

¹⁵ SPO Response, para. 3.

¹⁶ SPO Response, paras 1, 18.

¹⁷ [REDACTED].

¹⁸ SPO Response, paras 5, 8, 11, 17.

W02540's evidence and that of TW4-01.¹⁹ In light of the foregoing, the SPO claims that the probative value of W02540's evidence is very limited and weighs against reopening the Defence case.²⁰ While it concedes that the W02540 Material could have been noticed at an earlier point in time during the Defence case, the Defence has not suffered any concrete prejudice considering the nature of the alleged discrepancies and the largely cumulative nature of W02540's evidence.²¹ The SPO also reports that, in light of the Request, it conducted further searches. As a result, the SPO proposes the admission of the evidence of a further witness, W02560, for the purpose of enabling the Defence and the Panel to make a fair assessment of the relevance of W02540's evidence, although this evidence too is of limited relevance to the present case.²²

10. The SPO submits that, even though the low probative value of the W02540 Material does not warrant reopening the Defence case, it does not oppose its admission in writing and waives its right to call evidence in rebuttal.²³ Lastly, the SPO requests that the Defence application to suspend the deadlines for the Final Trial Briefs be rejected.²⁴

C. VICTIMS' COUNSEL RESPONSE

11. Victims' Counsel responds that the Request should be dismissed, as the Defence fails to present any proper basis for reopening its case.²⁵ In particular, Victims' Counsel contends that the alleged discrepancies between the evidence of W02540 and TW4-01 are either wholly irrelevant or relate to aspects of the case that are of marginal relevance, [REDACTED].²⁶ Victims' Counsel avers that the marginal matters raised by the Defence

¹⁹ SPO Response, paras 8-15.

²⁰ SPO Response, paras 16, 18.

²¹ SPO Response, para. 17.

²² SPO Response, para. 17.

²³ SPO Response, paras 1, 6, 18-21, 23(c).

²⁴ SPO Response, paras 1, 22, 23(a).

²⁵ Victims' Counsel Response, paras 3, 21.

²⁶ [REDACTED].

have such low probative value that calling W02450 to testify could not advance the Defence case in any meaningful way, but would only bring delays.²⁷

12. Alternatively, Victims' Counsel proposes that the Request be granted by admitting in writing the parts of the evidence relied upon by the Defence.²⁸

D. DEFENCE REPLY

13. In reply, the Defence submits that, following the filing of the Request, the SPO has disclosed additional material from another witness, W02560, related to [REDACTED], which further demonstrates that the SPO has continuously violated its disclosure obligations.²⁹ The Defence reiterates its submissions on the relevance of W02540's evidence for assessing TW4-01's credibility and the prejudice it has suffered as a result of the late disclosure.³⁰ It adds that the fact that W02540's evidence falls outside the scope of the charges does not change the fact that his evidence seriously undermines the credibility of the most important SPO witness in this case.³¹ Lastly, it adds that the SPO should be ordered to thoroughly review its evidentiary databases, disclose without any delay any additional exculpatory material and confirm that, to date, it has properly fulfilled its disclosure obligations.³²

²⁷ Victims' Counsel Response, paras 18-19.

²⁸ Victims' Counsel Response, paras 3, 20-21.

²⁹ [REDACTED].

³⁰ Reply, paras 5-6.

³¹ Reply, para. 5.

³² Reply, para. 9.

III. APPLICABLE LAW

14. The Panel notes Articles 21(4)(d), (f) and 40(2), (6)(b) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rules 102(3), 103, 112, 131-134 and 136 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (Rules).

IV. ANALYSIS

A. LEGAL TEST

15. The Panel notes that the Rules do not expressly regulate the reopening of the evidentiary proceedings once closed pursuant to Rule 134 of the Rules. Nonetheless, Rule 133 of the Rules – which applies at an earlier stage of the proceedings and *before* the evidentiary proceedings are closed – provides that motions to present supplementary evidence after the closing of the Defence case or after any evidence called by the Panel shall only be granted “in the interests of justice and on an exceptional basis”. Rule 136(3) of the Rules, which applies *after* the closing of the case, similarly provides that the Panel may hear additional evidence only in “exceptional circumstances”. Therefore, the Panel finds that, while the evidentiary proceedings may be reopened,³³ this may only be done on an exceptional basis.

16. The Rules do not further regulate what constitutes exceptional circumstances. It is therefore for the Panel to determine, on a case-by-case basis, whether reopening the evidentiary proceedings is warranted in the circumstances of the case. In doing so, the Panel will consider various factors, including: (i) whether the evidence is

³³ See e.g. KSC-BC-2020-07, F00578, Trial Panel II, [Decision on Sentencing Evidence](#), 16 March 2022, public, para. 21.

necessary to the determination of the truth and to ensure the fairness of the trial;³⁴ (ii) whether the evidence could have been identified, obtained and presented, with reasonable diligence, earlier in the proceedings;³⁵ (iii) any prejudice caused by allowing or not the evidence to be presented;³⁶ and (iv) the advanced stage of the trial and any impact on the expeditiousness of the proceedings and the Accused's right to be tried without undue delay.³⁷ Importantly, it is not sufficient for the requesting Party or participant to show that the evidence is relevant to the case. If this were the case, the closing of the evidentiary proceedings would have no meaning. The existence of a disclosure violation is also, in and of itself, not a decisive factor.³⁸

B. DETERMINATION

17. The Panel finds, at the outset, that the W02540 Material is relevant for [REDACTED] evaluating the credibility of TW4-01. The SPO has been in possession of the W02540 Material since at least 2019 and should have disclosed it under Rule 102(3) and/or Rule 103 of the Rules earlier in the proceedings.

³⁴ See Articles 21(4)(d) and 40(2) of the Law. Similarly ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1935, Trial Chamber VII, [Decision on Arido Defence Request to Formally Submit CAR-D24-0002-0003](#) (*Bemba et al.* 20 June 2016 Decision), 20 June 2016, para. 5; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-3279-tENG, Trial Chamber II, [Decision on the request by the Defence for Germain Katanga seeking to admit excerpts from the judgment rendered in Lubanga](#) (*Katanga and Ngudjolo Chui* Decision), 26 April 2012, para. 14.

³⁵ Similarly ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Chamber, [Judgement](#), 20 February 2001, para. 283; ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1978, Trial Chamber VII, [Decision on Arido Defence Request to Admit an Item into Evidence](#), 1 September 2016, para. 10; [Katanga and Ngudjolo Chui Decision](#), para. 14.

³⁶ [Bemba et al. 20 June 2016 Decision](#), para. 5.

³⁷ See Article 40(2) of the Law. Similarly, ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber II, [Decision on Motion to Reopen the Prosecution Case](#), 9 May 2008, para. 25.

³⁸ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Accused's Seventh Motion to Re-open Defence Case](#), 20 April 2015, para. 13.

18. For this reason, the Panel finds that the SPO has not complied with its disclosure obligations in relation to the W02540 Material. As a result, the Defence could also not have identified and presented W02540's evidence, with reasonable diligence, during the presentation of its case.³⁹

19. On the other hand, the Panel notes that W02540's evidence is cumulative of other evidence on the record concerning [REDACTED]. Such evidence comprises, most notably: (i) the written statements of witness W03881, who – like W02540 – [REDACTED];⁴⁰ (ii) W03881's personal diary, [REDACTED];⁴¹ and (iii) [REDACTED].⁴² This evidence has been available to the Defence since 2022,⁴³ has been admitted into the case record,⁴⁴ and may be used by the Defence to challenge and by the Panel to evaluate the credibility of TW4-01.

20. Further, the Panel observes that – contrary to the Defence's submissions – the inconsistencies between W02540's evidence and TW4-01's testimony are minor and that, in essence, W02540's evidence largely corroborates TW4-01's account. According to W02540, [REDACTED].⁴⁵ TW4-01 testified that [REDACTED].⁴⁶

21. In light of the above, the Panel finds that, although the W02540 Material was disclosed belatedly, W02540's evidence is not necessary for the determination of the truth and no prejudice was caused to the Defence. In this regard, the Panel also underlines that W02540's evidence is of limited relevance as the events [REDACTED]

³⁹ See para. 16 above.

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ Disclosure Packages 59, 74 and 90.

⁴⁴ See KSC-BC-2020-04, F00703, Trial Panel I, *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)*, 1 November 2023, confidential. A public redacted version was issued on 13 December 2023, [F00703/RED](#).

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

are outside the geographical and temporal scope of the charges in this case. Considering furthermore the exceptional nature of the remedy sought and the fact that the inconsistencies raised by the Defence are minor, the Panel is of the view that reopening the evidentiary proceedings in order to call W02540 to testify or to admit his evidence in writing, at this final stage of the trial, is not warranted and would unnecessarily prolong the proceedings and affect the Accused's right to be tried without undue delay. Accordingly, the Panel rejects the Defence request to reopen its case and to suspend the deadline for the submission of the Final Trial Briefs and Impact Statement. The same applies to the SPO's proposal to admit the material pertaining to W02560.

22. Noting that the SPO has already conducted additional searches in its evidence database in order to comply with its duties under Rule 112 of the Rules,⁴⁷ the Panel does not find it necessary to order the SPO to carry out any further review of its evidence, as requested by the Defence in its Reply.⁴⁸

V. DISPOSITION

23. For the above-mentioned reasons, the Panel hereby:

- a. **REJECTS** the reopening of the Defence case, as specified in paragraph 21 of the present decision;
- b. **REJECTS** the application to suspend the deadline for the Final Trial Briefs and Impact Statement;
- c. **REJECTS** the application to admit the W02540 Material in writing and **DECLINES** to admit the material pertaining to W02560; and

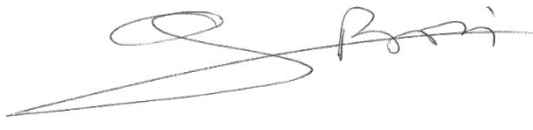
⁴⁷ SPO Response, para. 17.

⁴⁸ See Reply, para. 9.

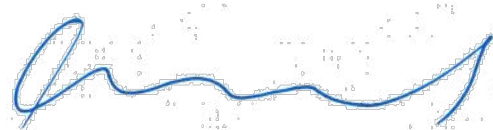
- d. **ORDERS** Victims' Counsel to file a public redacted version of filing F00807 by **Thursday, 28 March 2024**, or make submissions on the record whether the filing can be reclassified as public.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Tuesday, 19 March 2024

At The Hague, the Netherlands.