

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 March 2024

Language: English

Classification: Public

**Public Redacted Version of 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**

Specialist Prosecutor
Kimberly P. West

Counsel for the Accused
Jean-Louis Gilissen

Counsel for Victims
Simon Laws

I. INTRODUCTION

1. Pursuant to the directions of Trial Panel I¹ and Rule 114(4) of the Rules, Victims' Counsel responds to the Defence Motion Requesting Leave to Reopen its Case to Present Exculpatory Evidence Recently Disclosed in Breach of the Prosecution's Disclosure Obligations ("Request" or "Defence Request").²
2. Victims' Counsel makes no submissions as to the alleged breach of the Prosecution's disclosure obligations.
3. Victims' Counsel submits that the Request fails to present any proper basis for reopening the case and should either be dismissed or granted to the extent that the evidence is admitted in writing.

II. CLASSIFICATION

4. 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

5. On 9 February 2024, the Trial Panel closed the evidence in this case.³
6. On 20 February 2024, 21 February 2024, 22 February 2024, and 26 February 2024, the Prosecution disclosed items pursuant Rule 102(3) relating to W02540.⁴
7. On 29 February 2024, the Defence filed its Request.

¹ *Prosecutor v. Pjetër Shala*, KSC-BC-2020-04, Email from Trial Panel I to the Parties and Victims' Counsel, Directions on Defence Motion F00803, 1 March 2024 at 15:14.

² KSC-BC-2020-04/F00803, 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 ("Defence Request").

³ KSC-BC-2020-04/F00795, 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.

⁴ See Disclosure Packages 213-216.

IV. SUBMISSIONS

8. The Defence seeks to reopen the case in order to call witness W02540. The essence of the Defence argument is that W02540's anticipated testimony would be relevant for the Panel's assessment of TW4-01's credibility and understanding of [REDACTED].⁵
9. Victims' Counsel takes issue with this submission.
10. The discrepancies relied upon between the evidence of TW4-01 and W02540:
 - are either wholly irrelevant, or have such marginal relevance as to provide no proper basis for the case to be re-opened;
 - relate to an aspect of the case, namely [REDACTED], which is, in itself, also of marginal relevance to the case as a whole.
11. Although the Request asserts that "[m]any discrepancies arise between W02540's evidence and TW4-01's testimony in relation to TW4-01's [REDACTED]",⁶ only five are developed.⁷
12. The first concerns the date of [REDACTED]. There is no dispute about the correct date⁸ and the Panel does not need the testimony of W02540 to provide it. Nor, it is submitted, could TW4-01's error as to this date have any significant bearing on his credibility or reliability.
13. The second concerns the number of [REDACTED]. TW4-01's proficiency in [REDACTED] is not a relevant issue in this case. The further reference to W02540 stating that [REDACTED] is similarly irrelevant. TW4-01 did not say that [REDACTED], but rather that that was the number "[REDACTED]."⁹ TW4-01 said that "[REDACTED]."¹⁰

⁵ Defence Request, para. 34.

⁶ Defence Request, para. 25.

⁷ [REDACTED].

⁸ T. 24 August 2023, 2378:13-15.

⁹ T. 5 June 2023, 1734:21-23.

¹⁰ T. 5 June 2023, 1734:23.

14. The third concerns the number of detainees [REDACTED]. Again, there is no need for W02540 to attend to confirm the discrepancy between TW4-01's [REDACTED] statement and his testimony at the trial: that is already part of the record. [REDACTED]. Bearing in mind the fact that TW4-01 was not in a position to conduct an inventory of the detainees [REDACTED], the difference between the witness' estimate and [REDACTED] has no bearing on the issue of TW4-01's credibility.
15. The fourth highlights the discrepancy in the description of [REDACTED]. This is of very little significance. Victims' Counsel observes that [REDACTED]. The Request highlights TW4-01's apparent view that there were [REDACTED], although in fairness, he was less than emphatic about this conclusion in his testimony.¹¹ [REDACTED].¹²
16. Finally, a similar argument is made about TW4-01's recollection [REDACTED]. Victims' Counsel submits that the fact that [REDACTED]. Given the mental and physical state of TW4-01 at the time [REDACTED], given the distressing circumstances, and given that [REDACTED] by the KLA and [REDACTED], it is submitted that the Panel could give little to no weight to this discrepancy. The alleged inconsistency is as consistent with imperfect recall or subjective perception, or with previous and unconnected [REDACTED], as it is with a tendency to lie or exaggerate.
17. For all these reasons, the Defence submission that the differences between the evidence of TW4-01 and W02540 are significant to the Panel's assessment should be rejected.
18. There is no Rule governing applications to re-open a case after the closing of the evidentiary phase. The *Prosecutor v. Delalić et al.* decision cited in the Request¹³ dealt with an application to re-open the prosecution case rather than the defence case.

¹¹ T. 2 June 2023, 1710:16-24 ("[REDACTED].").

¹² SITF00189121-SITF00189140-ET Revised.

¹³ Request, para. 31.

Nevertheless, it is submitted that the ICTY Appeals Chamber's focus on the probative value of the evidence and fairness to the accused are relevant considerations here. The largely irrelevant, and at best marginal matters raised in the Request, have such low probative value that their admission, and the calling of W02450, could not advance the Defence case in any meaningful way.

V. CONCLUSION

19. There is no unfairness to the Accused W02540 not being called to testify. Granting the Request would bring nothing to the case but delay.
20. Alternatively, Victims' Counsel would not oppose the admission in writing of those parts of the evidence of W02540 relied on by the Defence.

VI. RELIEF

21. For the foregoing reasons, Victims' Counsel respectfully requests that the Trial Panel rejects the Defence Request or, in the alternative, admits in writing the parts of W02540's evidence relied on by the Defence.

Word count: 1322



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8 March 2024

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