

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: Fidelma Donlon

Date: 26 March 2024

Filing Party: Specialist Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR
v.
PJETËR SHALA

**Public Redacted Version of Request for Leave to Appeal and/or Reconsideration
of the “Decision on the Defence Request for Leave to Reopen its Case”**

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law") and Rules 77 and 79 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), the Defence of Mr Pjetër Shala ("Defence" and "Accused", respectively) hereby files this Request seeking leave to appeal and/or reconsideration of the Trial Panel's "Decision on the Defence request for leave to reopen its case" ("Impugned Decision") issued on 19 March 2024.
2. In the Impugned Decision, the Panel rejected the "Defence Motion Requesting Leave to Reopen its Case to Present Exculpatory Evidence Recently Disclosed in Breach of the Prosecution's Disclosure Obligations" ("Request").¹
3. The Defence submits that the Panel erred by declining to provide a remedy to the Defence despite the acknowledged breach of the Prosecution's disclosure obligations by refusing to allow the Defence to call one witness, W02540, [REDACTED] to testify,² in violation of the Accused's fair trial rights.
4. The Defence proposes the following issues for certification to appeal:

(1) Whether the Panel erred in fact and in law by declining to provide a remedy to the Accused for the serious violation of the disclosure obligations of the Prosecution; and

(2) Whether the Panel erred in fact and in law by refusing to allow the Defence to reopen its case to call one witness who could provide exculpatory evidence and whose evidence only became known to the Defence at the present stage because of the Prosecution's disclosure obligations.

¹ 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 (confidential), 29 February 2024.

² Impugned Decision, para. 23(a).

5. In the alternative, the Defence requests reconsideration of the findings in the Impugned Decision concerning the violation of disclosure obligations of the Prosecution and the reopening of the Defence case to allow for the testimony of Witness W02540 to be heard by the Panel. Reconsideration is required to avoid injustice.

II. APPLICABLE LAW

6. Firstly, Article 45(2) of the KSC Law and Rule 77 of the Rules provide that the party seeking certification for interim appeal must demonstrate the existence of an issue that would: (i) significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial; and for which (ii) the immediate resolution by a Court of Appeals Panel may materially advance the proceedings.
7. If a discretionary decision is being challenged, “a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel’s discretion.³ The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight to relevant considerations in reaching its decision”.⁴
8. Rule 110 of the Rules provides that:

[t]he Panel may decide, upon request by a Party or *proprio motu*, on measures to be taken as a result of the non-compliance with disclosure obligations

³ KSC-BC-2020-07, IA001, F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020, para. 14.

⁴ KSC-BC-2020-07, IA001, F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020, para. 14.

pursuant to the Rules, including a stay of proceedings and the exclusion of evidence, except for exculpatory evidence.

9. Rule 127(1) of the Rules provides that “[e]ach Party is entitled to present evidence relevant to the case”.
10. Rule 141(1) of the Rules provides that “[t]he testimony of a witness at trial shall be given in person, except to the extent provided under Rule 100”.
11. Thirdly, the Rules provide guidance regarding any supplement to the evidentiary proceedings and the reopening of a closed case, such as Rule 133 of the Rules:

After the closing of the Defence case pursuant to Rule 131 or after hearing the evidence called by the Panel pursuant to Rule 132, the Presiding Judge shall ask the Parties if they have any motions for rebuttal or rejoinder evidence under Rule 127. Leave to call such evidence shall only be granted in the interests of justice and on an exceptional basis.

12. Rule 134 provides that:

After ruling on motions pursuant to Rule 133 and hearing such evidence, if any, the Panel shall: (a) announce that the evidentiary proceedings are closed; (b) invite the Specialist Prosecutor and the Defence to file Final Trial Briefs within thirty (30) days; (c) invite Victims’ Counsel to file a statement on the impact of the alleged crimes on victims participating in the proceedings within thirty (30) days; and (d) schedule a hearing for closing statements which shall take place within twenty one (21) days of the filing of the briefs and statement(s) referred to in (b) and (c).

13. Lastly, Rule 136 of the Rules provides that:

- (1) After the closing statements, the Presiding Judge shall declare that the case is closed.
- (2) At this stage, no further submissions may be made to the Panel, unless in exceptional circumstances and on showing of good cause.
- (3) At this stage, the Panel may not receive further submissions or hear evidence, unless exceptional circumstances require otherwise.

14. Rule 79 of the Rules provides for the power to reconsider decisions. It states that, in exceptional circumstances and where a clear error of reasoning has been

demonstrated or where reconsideration is necessary to avoid injustice, a Panel may, upon request by a party, reconsider its own decisions.

III. SUBMISSIONS

A. The issues are appealable

15. The Defence seeks certification to appeal the two issues set forth in paragraph 4 above.
16. The proposed issues, which arise directly from the Impugned Decision, are sufficiently concrete and precise.

Whether the Panel erred in fact and in law by declining to provide a remedy to the Accused for the serious violation of the disclosure obligations of the Prosecution

17. The late disclosure of items relating to W02540 has caused serious prejudice to the Defence.
18. In the Impugned Decision, the Panel states that “[t]he 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”⁵.
19. However, by rejecting the Defence’s request to reopen its case and for W02540 to testify, the Panel does not provide any effective remedy to the violation.
20. This disclosure violation further comes after several other disclosure violations from the Prosecution, breaching its continuing disclosure obligations under Rule 112 of the Rules.⁶
21. As stated in the Request and as further explained below, the prejudice suffered by the Defence from this disclosure violation has resulted in real and tangible

⁵ Impugned Decision, para. 16.

⁶ See paras 19 and 20 of the Request.

unfairness, which merits immediate redress. The Panel did not address or provide any alternate effective remedy for the Defence. Failure to do so will render the prejudice caused to the Defence irreparable.

22. As provided in European Human Rights jurisprudence, to be effective, a remedy must be capable of directly providing redress for the impugned situation.⁷
23. As such, the remedy requested by the Defence must be granted to avoid a miscarriage of justice.

Whether the Panel erred in fact and in law by refusing to allow the Defence to reopen its case to call one witness who could provide exculpatory evidence and whose evidence only became known to the Defence at the present stage because of the Prosecution's disclosure obligations

24. As stated in the Request, the evidence of W02540 is clearly exculpatory as it "affect[s] the credibility or reliability of the Specialist Prosecutor's evidence", specifically the credibility and reliability of central Prosecution Witness TW4-01.⁸
25. The ICTR has found that the obligation for the Prosecution to disclose exculpatory material must be broadly interpreted and the judge needs only to examine whether the material is potentially – rather than in fact – exculpatory.⁹
26. The Panel mentioned in the Impugned Decision that whether reopening a party's case is warranted in the circumstances of the case, it will:

"consider various factors, including: (i) whether the evidence is 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; (iii) any prejudice caused by allowing or not the evidence to be presented; 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. 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

⁷ European Commission, *Pine Valley Developments Ltd and Others v. Ireland*, Commission Decision, 1989.

⁸ Request, para. 21.

⁹ MICT, *Prosecutor v. Kamuhanda*, Case No. MICT-13-33, Decision on Third Motion to Compel Disclosure of Witness GEK Material, 21 March 2007, p. 3

the evidentiary proceedings would have no meaning. The existence of a disclosure violation is also, in and of itself, not a decisive factor.”¹⁰

27. As stated previously, the Defence highlights that the Panel found that “the W02540 Material is relevant for understanding the [REDACTED] and evaluating the credibility of TW4-01.”¹¹ Furthermore, the Panel found “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”.¹²
28. The Panel further found that the Prosecution should have disclosed the evidence to the Defence earlier in the proceedings.¹³
29. The Defence respectfully submits that the Panel erred in reviewing the probative value of W02540’s evidence. As stated in the Request, “W02540 was [REDACTED].”¹⁴ His evidence not only provides information on this event, including the number and location of [REDACTED], but also contradicts the testimony of central Prosecution witness TW4-01 and highlights many discrepancies arise between his evidence and TW4-01’s testimony in relation to TW4-01’s [REDACTED].¹⁵
30. The late disclosure of exculpatory material has caused prejudice to the Accused as the new material is of significance. The Accused was not allowed an opportunity to review that material to be used during the trial as it was disclosed after the closing of the trial, and the disclosure was made after TW4-01 already testified, and therefore the Defence could not use this information in cross-

¹⁰ Impugned Decision, para. 16.

¹¹ Impugned Decision, para. 17.

¹² Impugned Decision, para. 18.

¹³ Impugned Decision, para. 16.

¹⁴ Request, para. 24. See 069539-TR-ET Part 1 Revised 1 RED, pp. 13, 19, 20.

¹⁵ Impugned Decision, para. 21.

examining him nor could the Defence present the evidence of W02540 that appears to contradict that of TW4-01 at trial.¹⁶

31. The Defence further submits that the Panel has erred in its assessment of the evidence of W02540 and considering that “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.”¹⁷ This error is particularly prejudicial for the Defence as it was not allowed to identify and present the major inconsistencies in the evidence of the two witnesses to the Panel as well as to explore them further using material that the Panel may not necessarily be aware of.
32. The Panel further “underline[d] that W02540’s evidence is of limited relevance as the events concerning [REDACTED] are outside the geographical and temporal scope of the charges in this case”.¹⁸ The Defence submits that these considerations are quite relevant for the Defence as they show at its core the inconsistencies in the testimonies and the unreliability of the most important Prosecution witness in this case.
33. The Defence submits that while this Request comes at a very late stage of the proceedings, this is not the Defence’s own making, but it is exclusively due to the Prosecution’s violation of its disclosure obligations.
34. Furthermore, the Defence submits that the Accused’s right to be tried without undue delay is not violated by reopening of the case, the testifying of an additional witness and the delay of a case by a few days. However, his rights are violated by not granting the Defence’s motion and allowing him to present exculpatory evidence in his case.

¹⁶ MICT, *Prosecutor v Karadzic*, Judgement, Case No. MICT-13-55-A, 20 March 2019, para. 93.

¹⁷ Impugned Decision, para. 20.

¹⁸ Impugned Decision, para. 21.

B. The issues significantly affect the fair conduct of the proceedings as well as the outcome of the trial

35. The issues identified in paragraph 4 of this Request directly affect the right of the Accused to a fair trial and the potential outcome of the trial.
36. As stated by the ICTY, “[t]he Chamber has limited itself to assessing whether the newly disclosed material [...] warrants re-opening and does not consider that the issue of whether or not there was a disclosure violation by the Prosecution is relevant to that assessment”.¹⁹
37. In this case, the Defence reiterates that the issue is the lack of remedy for the Accused and his inability to present a fulsome defence in his case in the event that he is prevented from examining W02540.

C. An immediate resolution by an Appeals Panel will materially advance the proceedings

38. A prompt determination by an Appeals Panel would provide certainty on whether the proceedings are continuing in compliance with the fundamental guarantees of fairness.
39. For these reasons, the Defence respectfully requests the Panel to grant the Request and certify the issues proposed in paragraph 4 above. In the alternative, the Defence invites the Panel to reconsider its decision as mentioned above.

CONCLUSION

40. For these reasons, the Defence respectfully requests the Panel to grant the Request and certify the issues proposed in paragraph 4 above. In the alternative,

¹⁹ ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Seventh Motion To Re-Open Defence Case, 20 April 2015, para. 13.

the Defence invites the Panel to reconsider its findings concerning the reopening of the case and to allow for witness W02540 to testify.

IV. CLASSIFICATION

41. Pursuant to Rules 82(3) and 82(4) of the Rules, this Request is filed as confidential as it relates to confidential filings and contains confidential information. The Defence seeks leave to file a public redacted version of this Request in due course.

V. RELIEF REQUESTED

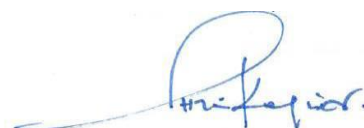
42. In view of the above, the Defence respectfully requests the Panel to grant the Request and certify the proposed issues or, in the alternative, reconsider its decision concerning the Defence motion and allow the Defence to reopen its case to call W02540, [REDACTED], to testify live.

Word count: 2555

Respectfully submitted,



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Tuesday, 26 March 2024
The Hague, the Netherlands