

1 Thursday, 16 February 2023

2 [Pre-Appeal Conference]

3 [Open session]

4 [The appellant appeared via videolink]

5 --- Upon commencing at 9.59 a.m.

6 PRESIDING JUDGE PICARD: Good morning and welcome, everyone.

7 I'm Judge Picard, Presiding Judge, in this case.

8 Court Officer, could you please call the case.

9 THE COURT OFFICER: Your Honour, this is file KSC-CA-2023-02,

10 The Specialist Prosecutor versus Salih Mustafa.

11 Thank you, Your Honour.

12 PRESIDING JUDGE PICARD: Thank you.

13 I will ask the parties and Counsel for Victims to introduce  
14 themselves and their teams, starting with the Specialist Prosecutor's  
15 Office.

16 MR. MICHALCZUK: Good morning, Your Honour. Good morning,  
17 everybody in and outside of the courtroom. The SPO is represented  
18 today by Mr. Nathan Quick, legal officer and team leader; Julie Mann,  
19 our case manager; and myself, Cezary Michalczuk, SPO Prosecutor.

20 Thank you.

21 PRESIDING JUDGE PICARD: Thank you.

22 Now I turn to the Defence.

23 MR. VON BONE: Good morning, Your Honour. My name is  
24 Julius von Bone. The Defence is represented by myself  
25 Julius von Bone and co-counsel Jonathan Rees. And joining us today

1 is Mr. Mustafa via remote, and the waiver has been earlier sent to  
2 the CMU. Thank you very much, Your Honour.

3 PRESIDING JUDGE PICARD: Thank you.

4 Next, Counsel for Victims. Please introduce yourselves.

5 MS. PUES: Good morning, Your Honours. Good morning, everybody.  
6 The participating victims are today represented by my co-counsel  
7 Brechtje Vossenbergh and myself, Anni Pues as counsel.

8 PRESIDING JUDGE PICARD: Thank you.

9 Now I turn to the Registry.

10 MR. ROCHE: Good morning, Your Honour. I'm Ralph Roche from  
11 Judicial Services Division on behalf of the Registry. Thank you.

12 PRESIDING JUDGE PICARD: Thank you.

13 I note that Mr. Mustafa is not physically present in the  
14 courtroom but he is attending this hearing via video-conference.

15 Before we start, I would like to recall that will Judge Ambos,  
16 Judge Jorgensen, and myself have been assigned to the Court of Appeal  
17 Panel to decide on the appeal against the trial judgment issued in  
18 this case on 16 December 2022. In accordance with Rule 178 of the  
19 Rules, the purpose of this Pre-Appeal Conference is to give the  
20 accused the opportunity to raise issues in relation to his detention,  
21 including his mental and physical condition. To this end, on 9  
22 February 2023, I issued an order on behalf of the Panel to convene  
23 this Pre-Appeal Conference and to set out the agenda to be followed  
24 during this hearing.

25 For today's session, I would like to remind everyone that a few

1 rules must be observed at all times in order to have effective  
2 courtroom proceedings with an accurate record.

3 Bear in mind the necessity of an accurate interpretation, which  
4 requires a bit of additional time sometimes after you have finished  
5 speaking. Please rise to ask permission to speak and do not forget  
6 to use your microphone.

7 This hearing is transcribed in real time and will be reflected  
8 in a transcript available to the public.

9 I remind counsel to give prior notice should any submission  
10 require the disclosure of confidential information so that we can go  
11 into private or closed session.

12 As per the Scheduling Order setting out the agenda for today, I  
13 will first hear submissions related to the accused's detention. I  
14 also inform the Registrar that I would invite submissions on the  
15 progress made on the translation of the trial judgment into Albanian  
16 and its expected finalisation.

17 I note that Counsel for Victims requested to discuss at the  
18 Pre-Appeal Conference the scope of submissions she may make during  
19 the appellate proceedings. The Defence has also filed a motion on  
20 the same subject. In light of the Panel's decision issued yesterday,  
21 setting out the modalities on victim participation during appellate  
22 proceedings, no further submissions are warranted.

23 I hope everyone had time to read this decision.

24 The Defence team for Mr. Mustafa has not informed the Panel of  
25 any additional matters to be addressed today. I also note that the

1 SPO does not wish to raise additional issues. Today's hearing will  
2 be conducted in compliance with this agenda.

3 Accordingly, I will invite the Defence now to raise any issues  
4 related to the detention of the accused. I remind counsel to request  
5 that we go into private session should they wish to refer to any  
6 confidential information related to the health or any medical  
7 condition of the accused.

8 Now, counsel for Mr. Mustafa, you may proceed.

9 MR. VON BONE: Thank you very much, Your Honour. Obviously the  
10 appeal proceedings are simply because the accused and the Defence is  
11 challenging the judgment of 16 December.

12 As far as the agenda for today regarding the detention pending  
13 appeal, we do not wish to raise any issue at this point, at this  
14 moment. If we do that, we will do that by a separate motion along  
15 the proceedings, but not as for this hearing today.

16 So there is no pending issues regarding that.

17 Thank you very much.

18 PRESIDING JUDGE PICARD: Thank you. [Microphone not activated].

19 MR. MICHALCZUK: Your Honour, with regard to detention, our  
20 position is that pending the appeal proceedings and post-conviction,  
21 the accused -- the convicted person should remain in detention.  
22 There is a grounded suspicion and it's -- the threshold is even  
23 higher after the conviction, for Article 41(6)(a). There are also  
24 risks, not only obstruction of criminal proceedings before this  
25 Chambers but also the risk of flight. Because after the conviction

1 for 26 years of Mr. Mustafa, for murder, torture and arbitrary  
2 detention, we believe that, apart from the risks confirmed by the  
3 Trial Panel, the risk of flight is also present here in this case.

4 Your Honours, we believe that according to Article 46(8) of the  
5 Law on Specialist Chambers and the Specialist Prosecutor's Office,  
6 the detention on remand pending appeal is a rule rather than the  
7 exception. And indeed in the Appeals Panel decision against  
8 Hysni Gucati and Nasim Haradinaj, and the decision was dated 28 July  
9 2022, they -- it was confirmed that indeed there is a presumption of  
10 detention pending appeal where release is the exception and detention  
11 is the rule.

12 So this is our position, Your Honours, that Mr. Salih Mustafa  
13 should remain in detention pending the appeals proceedings.

14 Thank you.

15 PRESIDING JUDGE PICARD: Thank you. In fact, I was coming to  
16 this point.

17 On behalf of the Panel, I recall that pursuant to Article 46(8)  
18 of the Law, unless the Trial or Court of Appeals Panel orders  
19 otherwise, a convicted person shall remain in custody pending in  
20 appeal. I further recall the Panel's finding, as you mention, in the  
21 case 2022-01, that contrary to the phase prior to conviction in the  
22 first instance where a Pre-Trial Judge or Trial Panel are required to  
23 conduct a bimonthly review of the detention according to the Rules of  
24 Procedure and Evidence and the Law, this is no longer required during  
25 the appellate proceedings post-conviction.

1           The next item on today's agenda pertains to the progress made on  
2 the translation of the trial judgment into Albanian.

3           Could the representative of the Registrar's Office take the  
4 floor.

5           MR. ROCHE: Thank you, Your Honour. The draft translation is  
6 being distributed today, and we are working intensively on preparing  
7 a final version which will be ready by the end of March. We will  
8 distribute with the final version a version showing any differences  
9 between the draft distributed today and the final version for ease of  
10 readers.

11           So thank you, Your Honour.

12           PRESIDING JUDGE PICARD: Thank you.

13           Any comments or observations of the parties or the Counsel for  
14 Victims on that point?

15           MR. VON BONE: Yes, Your Honour.

16           PRESIDING JUDGE PICARD: Yes.

17           MR. VON BONE: Yes, Your Honour. I hear that it is distributed  
18 today. However, I believe I received it Wednesday. That is an  
19 unrevised, for this moment, with the yellow thing going through it,  
20 and I hear that is the end of March -- at the end of March, I  
21 understand, that there will be a finalised version.

22           It is it important to have a good and finalised version, also  
23 especially for the accused, because I think that our accused  
24 certainly wants to contribute to the appeal grounds. And we have  
25 filed nine grounds of appeal. Mr. Mustafa has not been able to go

1 through the English version of that judgment, simply because it is  
2 not his native language. And we do believe that it is important that  
3 an accused himself can also formulate grounds of appeal and,  
4 therefore, it is for us and for the accused, in particular, important  
5 that the - what is it - the final version will be forthcoming soon.

6 And having said that, we do certainly not exclude at that time  
7 when that has been done, that finalised version, that we might file  
8 additional grounds of appeal, simply because up to this moment the  
9 accused has not been able to go through it himself, rather than  
10 having an English version.

11 So that's why I think it is for the accused important that --  
12 that that finalised version will be forthcoming. End of March, I  
13 hear, or preferably at any time earlier. The judgment was already in  
14 December, so I truly hope that that will be forthcoming a little bit  
15 earlier than the end of March.

16 That's the submissions for this moment.

17 Thank you very much, Your Honour.

18 PRESIDING JUDGE PICARD: Thank you. Yes, we take note and we  
19 understand that the timing will be very short between the time you  
20 receive the Albanian version and the time where you have to file your  
21 appeal brief. But if so, you can ask -- you can file submissions in  
22 writing to ask the Panel to extend the delay between the -- the date  
23 to file your -- your appeal brief.

24 MR. VON BONE: Yes, we were certainly considering that because  
25 of this issue. That's why I want to --

1           PRESIDING JUDGE PICARD: I understood, yes.

2           MR. VON BONE: Okay. Thank you very much.

3           PRESIDING JUDGE PICARD: Regarding the filing of the appeal  
4           briefs, responses or replies, I, on behalf of the Panel, would like  
5           to remind the parties and the Counsel for Victims that the appeal  
6           briefs, responses or replies must comply with the word limit as  
7           indicated in the Practice Direction on files and filings, or  
8           otherwise duly authorised in advance by the Panel.

9           Article 48(3) of the Practice Direction provides that the limit,  
10          the word limits for appeal brief in this case is 30.000 words.

11          Unless anyone has --

12          MR. VON BONE: Your Honour.

13          PRESIDING JUDGE PICARD: Hmm.

14          MR. VON BONE: May I?

15          PRESIDING JUDGE PICARD: Yes, please.

16          MR. VON BONE: Yes. You just calculated the word count. We  
17          have, of course, taken notice of that. We have filed nine grounds of  
18          appeal but in it there is roughly 59, 60 subgrounds, so I expect that  
19          we might be short of words in our final appeal brief. So I envisage  
20          and I foresee that most probably we will ask for an extension of the  
21          word counts, and if it is granted to the Defence, then obviously that  
22          would -- could be granted to other parties as well, as the Court  
23          deems that necessary.

24          PRESIDING JUDGE PICARD: Thank you. So you will probably file a  
25          motion on this subject, I understand?

1 MR. VON BONE: I think so, Your Honour, yes.

2 PRESIDING JUDGE PICARD: So the Panel will decide.

3 Unless anyone has something further to add, this concludes  
4 today's hearing. I thank the parties, Counsel for Victims, and the  
5 Registry for their attendance and contributions. And I also thank  
6 the interpreters, stenographers, audiovisual technicians and security  
7 personnel for their assistance.

8 The hearing is adjourned.

9 --- Whereupon the hearing adjourned at 10.15 a.m.

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