

MUNICIPAL COURT OF KLINA

P.nr.36/2010

Date 25 March 2010

IN THE NAME OF THE PEOPLE

The EULEX Judge Francesco Florit, assisted by the court recorder Jacqueline Ryan

In the criminal case against

ABEDIN MUZLIJAJ, son of Muharrem Muzlijaj and Ajshe Pecaj, born on 22.12.976 in the village Banje e Pejes, Istog Municipality, residing in the same place, Personal ID number 1003239256, married, investigator in the Police Station in Peja – ID no. 1048, Kosovan-Albanian

Accused according to the summary indictment PPS.nr.2/2010 dated 28.01.2010, filed with the court on 01.02.2010, for the criminal offences of

1. Abuse of official position or authority, contrary to article 339 par. 2 in conjunction with par. 1 of CCK, and
2. Fraud, contrary to article 261 par. 1 of CCK

After having held the main trial on the 5th and 25th of March 2010, in the presence of

- Special Prosecutor Mr. Reshat Millaku
- The accused Mr. Abedin Muzlijaj
- Lawyers Orhan Basha and Ferid Gjokolli, defense counsels of the accused

After deliberating on the 25th March 2010, announces in public this

VERDICT

The defendant Abedin Muzlijaj is found not guilty of the commission of the criminal offence of fraud, contrary to article 261 para 1 CCK;

The defendant is found guilty of the charge of Abuse of official position or authority, contrary to article 339 par. 2 in conjunction with par. 1 of CCK because, in his capacity as a police investigator in the Police Station of Peja, charged of the investigation of the murder of _____, in 2006, with the intent to obtain unlawful benefit, he abused his official position – during February or March 2008 he went to the house of _____, father of the deceased, in _____ and in the presence of _____ he asked the sum of 10.000 euro to discover the author of the murder of _____, with the justification that he had to pay the information sources. So he did although he knew that he could pay informants from the designated budget for Kosovo Police. In this

way, he received the payment of 4.500,00 euro and 700 Swiss francs from and , in three different occasions.

Therefore, based on article 339.2 and article 43.3 CCK the accused is

CONVICTED

Of the mentioned offence and is sentenced to the term of one year and six months of imprisonment. The term of imprisonment is suspended on the condition that the accused compensates the damage caused to and , as determined below, within fifteen days after this judgment has become final.

Based on article 391.1 n.5) and 278 KCCP, the time spent in pretrial detention and in house detention will be counted as part of the punishment.

The house detention is immediately terminated. A separate ruling will be issued.

PROPERTY CLAIM

Based on article 112.2 KCCP, the Court orders Abedin Muzlijaj to pay the damages caused to and , determined in 4.500,00 euro and 700 Swiss Francs.

COSTS OF THE PROCEEDING

Based on article 100 KCCP, the accused is ordered to pay the costs of the proceeding, which is determined in 100,00 euro.

REASONING

Procedural History

On 15.01.2010 the Special Prosecution Office filed the ruling for initiation of investigation against the defendant Abedin Muzlijaj (Investigative Police Officer in Peja Regional Police Headquarters), for the criminal offences of *Abuse of Official Position or Authority*, pursuant article 339 par. 3 in conjunction with par. 1 of CCK and *Accepting Bribes*, pursuant article 343 of CCK. According to the ruling, the defendant, in his capacity of police officer in charge of the investigation of a murder case, asked 10,000.00 Euros from the relatives of the victim, with the justification that he needed the money to pay the informants in order to discover the name of the murderer. The money was partially given by the relatives in three different occasions, first 3,000.00 Euros, than 700 Swiss francs and finally 1,500.00 Euros.

On 19.01.2010 the defendant was arrested and on 20.01.2010 detention on remand was ordered by the District Court of Peja, for a period of one month.

Deciding upon the appeal against the ruling of detention on remand the three-judge panel of the District Court of Peja with their ruling KP.nr.5/2010 dated 22.01.2010, considered that the actions of the defendant constituted the criminal offence *Abuse of Official Position or Authority*, pursuant article 339 par. 2 in conjunction with par. 1 of CCK, since the sum given to the defendant doesn't total 5,000.00 euro; the panel therefore amended the ruling and qualified the criminal offence as contrary to article 339 par. 2 of CCK and referred the case to the Municipal Court of Klina as a subject matter and territorial jurisdiction, since the criminal conduct was committed in the house of the injured party in the village _____, Klina Municipality.

On 01.02.2010 the Special Prosecutor filed the Summary Indictment against Abedin Muzlijaj for the criminal offence of *Abuse of Official Position or Authority*, pursuant to article 339 par. 2 in conjunction with par. 1 of CCK and *Fraud* pursuant article 261 par. 1 CCK.

On 02.02.2010 detention on remand was terminated and substituted with house detention for a period of one month; on 25.02.2010 house detention was extended for an additional month.

Competence of the Court

In accordance with article 21, paragraph 1 sub paragraph 1 of the KCCP, Municipal Courts shall have jurisdiction to adjudicate, at first instance, criminal offences punishable by a fine or by imprisonment of up to five years, unless the District Court has jurisdiction to adjudicate such criminal offence.

In the present case the defendant is accused with the criminal offence of *Abuse of Official Position or Authority*, pursuant article 339 par. 2 in conjunction with par. 1 of CCK, punishable by imprisonment of up to three years, and *Fraud* pursuant article 261 par. 1 CCK, punishable by fine or by imprisonment of up to three years. And since there is no special provision that grants authority to the District Court to adjudicate the case, the Municipal Court has the subject-matter to adjudicate the case.

The criminal offences, according to the indictment, were committed in the village of _____, which is within the territory of the Municipality of Klina. Therefore, in accordance with the Article 27, par. 1 of KCCP, the Municipal Court of Klina has the territorial jurisdiction to adjudicate the present case.

Pursuant to article 3 of the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, EULEX Judges assigned to criminal

proceedings will have the jurisdiction and competence over any case investigated or prosecuted by the Special Prosecutors of Republic of Kosovo.

Therefore, since the present case was investigated and indicted by the Special Prosecutor of Kosovo the Presiding Judge was assigned with the decision of the President of the Assembly of EULEX Judges, pursuant to article 22 paragraph 2 of KCCP.

It has to be added that *in limine litis* the parties had nothing to object at the assignment of the individual judge.

The Main Trial

The main trial was held on 5th and 25th of March 2010 in the presence of the Special Prosecutor Mr. Reshat Millaku, the defendant Mr. Abedin Muzlijaj, his defense counsels Mr. Orhan Basha and Mr. Ferid Gjikolli. The injured party Mr. _____ and Mr. _____ were present only on the 5th March 2010. In accordance with the article 15 of KCCP, international interpreters translated court proceedings and all court documents relevant to the trial from English into Albanian and vice-versa, as necessary.

Summary of the Evidence Presented

During the main trial the injured party – witnesses _____ and _____ gave their testimonies on the 5th March 2010 and on the 25th March 2010, the following documents where read:

- Copy of the criminal report supplement of the Regional Investigations Unit case number 2006-DI-432 dated 14.04.2008
- Transcript of the conversation between the defendant and the injured party
- CD of the monitoring the conversation
- Photographs of the building where the monitoring of the conversation was performed
- Photocopy of the photograph of a Kalashnikov
- A leaflet containing the name of _____ and bank account numbers of Raiffeisen Bank
- Amortization plan of the loan taken by the family of the defendant from Raiffeisen Bank.

Summary of the testimony of the witnesses

- The witness _____ during the hearing of 5th March 2010 stated that on 8th October 2006 his brother got murdered by an unknown shooter while he was driving together with their father. In charge for the investigation of the case were the Officers of the Investigation Unit of Kosovo Police of Peja Regional Headquarters; amongst them was Mr. Abedin Muzlijaj. Sometime around March 2008 the defendant went to his home

in the village as a part of the investigative routine. There, he asked for € 10,000.00 from the injured party in order to pay informants who could reveal who was the murderer of his brother. Present with them was also his father . He gave € 3,000.00 to Abedin, since he didn't have more money and promised that he would give him the rest of the money later. In another occasion he gave 700 Swiss Franks as part of the money he had promised. The third time he gave 1.500 € in a restaurant "Astro" in village Zllakuqan, where Abedin was together with another person named . Apart from Abedin Muzlijaj, the witness also contacted Lieutenant , the Chief of the Investigations and Mayor the Deputy Head of Peja Regional Headquarters. The witness explained that in the meeting he had with the two Senior Officials of Abedin Muzlijaj, he had told them that he gave money to Abedin in order to find out the perpetrator of the murder of his brother. In the end of his examination he explained that while he was in Switzerland, the defendant had called him on the phone asking him for money as he has a friend in prison, but the witness replied him that he had no money to send to him.

- The witness during the hearing of 5th March 2010 stated that on 8th October 2006 his son got shot in his car. He was together with him. As he was told, in charge of investigation of this case was Abedin Muzlijaj. Abedin visited his house in the village several times accompanied by another investigator named . On one occasion the defendant visited his house on his own. As far as he remembers the defendant came with a white car. In the guest room of the witness's house there was also , the son of . The witness stated that Abedin Muzlijaj asked for 10.000 € in order to unveil the murder case. So, the witness told his son to give the money to the defendant and gave € 3,000.00 on the spot. On another occasion in the guest room of the witness's house they gave to Abedin 700 Swiss Franks. On a third occasion, they gave money to Abedin while they were in the restaurant "Astro" in the village Zllakuqan, where gave the accused € 1,500.00 in an envelope. The witness didn't see when gave the money, but later told him about it. The witness together with his son went to meet the superiors of Abedin, Mr. and Mr. , to whom they told they gave money to Abedin in order to unveil the case. The last time the witness and his son met with Abedin it was in a café near the village Ilixha.

The testimony of the defendant Abedin Muzlijaj

The defendant on the hearing of 25th March 2010 stated that he was working as an Investigative Officer for Serious Crimes within the Kosovo Police in Peja Regional Headquarters. He was charged with the murder of case on December 2006 by his superior Lieutenant , together with Sergeant as their team leader and Investigators and . He went to and 's house often during the investigations, but he also went there for private matter, because he got befriended with them during the year 2007. He visited and 's house once in the beginning of 2008. The purpose of the visit was a private matter; he had asked for 10.000 € as a loan from and as he needed the

money to pay the installments of the loan which was taken by his family from Raiffeisen Bank. He denies to have asked the money in order to unveil the case of the murder of . He states that his family had taken a loan from Raiffeisen Bank in an amount of 120.000,00 € to buy some land in Peja, with the monthly installment of approximately 2.500 to 2.600 €. The family business was going good until the beginning of 2008. At that time they couldn't reach to pay the installments, so after he consulted with his father and brothers, he decided to ask for a loan from and , since he became much close to them. On that occasion in their house, gave him 3000 €, since he didn't have more. On the second occasion he received 700 Swiss Franks at the house of and . In another occasion, at a restaurant "Astro" in the village Zllakuqan he received 1.500 €, but argues that the money was given as a loan. Some days before he was arrested, exactly on 17 January 2010, he was at a restaurant "Te Arrat" celebrating the birthday of his brother when he received a call from asking him to meet and have a coffee together. So, he left the birthday party and went there immediately. He confirms the conversation he had with and that day, but he argues that he was a little drunk, since he came from a birthday party and doesn't remember everything that was discussed.

The defendant presented to the court a leaflet with the name of in it and some numbers, allegedly of 's bank account. The defendant said that the leaflet was given to him by in the restaurant in Zllakuqan in order to return the loan to him in Switzerland.

Final Speech

- Special Prosecutor

In his final speech the Special Prosecutor supported his summary indictment as to all its charges. According to him from the evidence administered during the main trial it is undisputed that the defendant has committed the criminal offences of *Abuse of Official Position or Authority* contrary to article 339 par. 2 in conjunction with par. 1 of CCK and *Fraud*, contrary to article 261 par. 1 of CCK. In fact from the testimony of the witnesses and the monitored conversation it was very clear that the defendant working as an investigative police officer asked for 10.000 € to unveil the perpetrator of the murder of , the son and brother of and , justifying that he has to pay the informants. Therefore the defendant used his position as an investigative officer to obtain an unlawful benefit for himself.

Moreover, the defendant, even after he had filed the criminal report to the District Prosecutors Office in Peja, still he accepted the money which was promised to him by and without informing them that he had filed the criminal report. Therefore, by this action the defendant deceived the injured party in order to obtain the unlawful benefit for himself.

In conclusion, the Prosecutor asked the Court to find the accused guilty for the criminal offences he is charged with and sentence him in accordance with the law in order for the sentence to have an effect on the accused, so he will not repeat criminal offences in the future and in general, so other officials would not commit similar offences.

- Defense Counsel Orhan Basha

The defense counsel *Orhan Basha* in his final speech put forth some points. As first point he argued that the unlawful material benefit can be obtained in three forms; the first by abusing the official position, the second to exceed his authorization and the third the failure to execute his official duties. In this regard, it was said by the defence counsel, the prosecutor has mixed these forms, saying that the defendant has abused his position by exceeding his authorizations.

As the second point, he argued that the two criminal offences aim the protection of two different protected values. The criminal offence of abuse of official position or authority is against the official duty while the criminal offence of fraud is against property; therefore, a single action can not violate two different protected values (and the respective provisions which purport to protect them).

As to the request of money by the defendant, the defense counsel argues that even though there was no written contract between the defendant and _____ and _____, there was an oral contract between them for the loan and the money given to the defendant was just a part of the loan requested by him. In the end the defense counsel asked the court to pronounce the defendant not guilty and acquit him from all the charges.

- Defense Counsel Ferid Gjikolli

The defense counsel *Ferid Gjikolli* in his final speech stated that in the evidence administered during the main trial, specifically the testimony of _____ and _____ on one side and the testimony of the defendant, on the other side, the only difference is that _____'s stated that the money was given in order to "discover things" while for the defendant the money was given as a loan. According to the defense counsel the money was only asked once in the beginning of 2008. So, the second and the third time they gave money to the defendant, it was only the execution of the promise given earlier. According to the defense, based on the administered evidence Abedin Muzlijaj's version is the truth while the reason for the accuse lies in the extortion perpetrated by defendant's supervisors at the damage of the _____.

Moreover, in support of the defendant's version there is the leaflet with the name and the details of _____'s bank account in Switzerland. The bank account number was allegedly given to the defendant in order to return the money which was taken as a loan. In addition there is a bank document that confirms that the defendant's family had taken a loan in the bank, which corroborates the version that the money which was asked by the defendant from _____ and _____ was only a loan in order to pay the family debt. As to the criminal offence of fraud, his client didn't deceive anybody nor did lie in order to obtain illegal material benefit nor did the defendant conceal any facts from the injured party. Thus, he didn't defraud anybody.

Therefore, he proposed to the court to acquit the defendant of both charges of the summary indictment. In subordinate instance, should the Court reject his request of

acquittal, he asked the court to consider the actions of the defendant as referred to article 339 par. 1 of KCCP and to consider the mitigating circumstances in the decision, such as his clean background, absence of previous convictions, his positive behavior during trial, his economical and social situation (living in a family of 20 members with wife and two children).

- The defendant Abedin Muzlijaj

The defendant in his closing speech stated that he feels sorry about what happened. He was a trustful person while he worked in the Police Force and for ten years of his service he had no complains. He also added that the copy of the criminal report which was handed to the District Public Prosecutor in Peja was given to _____ and _____ on 16 April 2008 in his presence, by Mayor _____, where there was also _____. So, the injured party was aware that the case was handed over to the Prosecutors Office.

Legal and factual findings

Assessing all the administered evidence, the Judge considers that the defendant has committed the criminal offence of *Abuse of Official Position or Authority* (art. 339 par. 2 in conjunction with par. 1 CCK).

From the testimony of the injured party _____ and _____ and of the defendant, it is established that on October 2006 _____ (son and brother of the injured party) was murdered by an unknown shooter. Investigations on this event were commenced by the Investigative Police of Peja, competent for the territory where the crime had taken place. The defendant, police officer Abedin Muzlijaj, was in charge for the investigation since December 2006, together with three other colleagues. During the investigation, the defendant had several contacts with _____ and _____.

In this contest, in March 2008 the defendant visited the injured party _____ and _____ at their home in order to ask a sum of money _____.

It is undisputed that the request was made and that the money (in different amounts and in three occasions) was given.

However, the modalities of the request are described in opposing manners by _____ and _____, on one side and by the defendant, on the other.

As illustrated before, the two _____ declared that Muzlijaj said that the money was needed in order to unveil the murder of their family member, since the defendant had purportedly to pay informants who would tell who was the perpetrator. On the contrary, the defendant stated that he simply requested a loan.

Given the nature of the facts (a simple oral request of money), there are no direct element of confirmation of the version given by the two injured parties. There was no recording or written documentation of the agreement reached by the defendant and the injured parties.

The statements of _____ and _____ are at the base of the investigation. They have been confirmed in Court coherently by the two witnesses and do not offer any substantial element of contestation. In the contest of Kosovo, it appeared to be normal or at least acceptable for the witnesses, that an informant be paid making recourse to the money of the members of the family of the victim.

To add more, the father, seeing the hesitation of his son to the request of the defendant, invited his son to take the money that was immediately available at home.

_____ declared he would have been eager to sell all his property and to liquidate all his wealth if this was necessary to discover the circumstances surrounding the death of his son _____ and in particular the identity of the perpetrator.

In the course of the cross-examination, the defendant and his defence counsels have not even tried to contest the statements of the witnesses.

Only when all the evidentiary material was collected against the defendant, a disculpatory version of the facts was offered.

In the course of the examination, the defendant himself finally explained that he, indeed, had asked money to _____ and _____, but that had done it in order to address the needs of his family, strangled from the payments of a mortgage with a local bank.

The version of Abedin Muslijaj is not credible and is not supported by sufficient evidence.

More, the attempt to disqualify the witnesses by stating that they were extorted to denunciate the defendant by the defendant's superiors, was short lived.

Let us consider the following points:

1) the version of the defendant is not credible. Abedin Muslijaj has waited until the very last opportunity to state that he simply requested a loan to _____ and _____, not money for the investigation. He had never mentioned this before. The point was not made before the pre-trial judge, where a suspected has the first opportunity to defend himself and would naturally defend himself from such an infamous denunciation (to ask money for an office duty). The point was not raised in the course of the cross examination of the witnesses, when it would have been very easy and logical to confute their statements before the Court recalling the exact terms of the agreement, mentioning that _____ had furnished the details of his bank account for the repayment of the loan and so on so forth. It is clear to everybody and could not escape to a police officers, who says (in the last session) to have earned through time the respect and trust of many judges and prosecutors, that an early contestation of a defamatory denunciation would have been more credible. So, in conclusion, why to wait until the end to tell the story and why to

show the piece of paper with the numbers of the bank accounts of _____ only at the very last moment?

Such defensive technique make sense and is generally adopted in civil cases, where the best arguments are reserved for the final motions, in order to prevent the opposing party from elaborating on them or confuting them. But in the criminal trial it is unknown and it leaves the impression that it was adopted to prevent the accusers from replying. In fact, it was known and clear to everybody, from the start of the case, that _____ and _____ would have come to Court only to give their evidence and would have not be present to other stages of the trial.

Keeping the defensive version for the end of the trial, the defendant and the defence counsels avoided the possibility of a confrontation with _____ and _____ on the crucial point of the case.

This, of course, does not weigh in favour of the credibility of the defensive version.

2) the version of the defendant is not supported by sufficient corroborating evidence.

Again, why has the defendant waited until after the departure of his accusers to discover the piece of paper on which, allegedly, _____ had written the details of his bank accounts? He said the detail came to his mind only at the last moment. Credible? Actually not, if we consider that the entire case against the defendant was turning around the nature and the reasons of the request of money. Again, as a police officer, as an experienced investigator, all these aspects had to be present in the defendant's understanding of the case.

In relation to the documents handed over by the defendant in the course of the last hearing (bank statements and payment plan of a loan asked by the defendant's family), it is not contested that the family of the defendant at the beginning of the year 2008 was short of liquidity and was therefore not in the condition to pay back a loan got from the bank to buy a plot of land. However, this is not relevant evidence since it may, at most, give an indication of the real reasons of the abuse committed, but not confute the witnesses' reconstruction of the facts.

3) _____ and _____ were not forced to denunciate the defendant: if the supposed extortion of _____ and _____ at the damage of the defendant by Lieutenant _____ and Mayor _____ there is no evidence whatsoever. In the statement given to the investigators and, later, in their examination in Court, the witnesses have only confirmed that, probably tired by the inconclusive investigation of the case of their relative's death and of the promises of Abedin Muzlijaj, they contacted and met Lieutenant _____, the Chief of the Investigations and Mayor _____, the Deputy Head of Peja Regional Headquarters, to whom they confessed of the payment of a sum to the defendant. *Only at that point*, it is clearly understood from the words used by the witnesses, they were invited by the superiors of Muslijaj, to denunciate the subordinate. If they were 'forced' to denunciate after their initial refusal, it is not possible to establish.

But it is quite obvious from the context that neither nor had any intention to cover what perceived as the misbehaviour of their subordinate.

On the other hand, is not clear, it is was not said explicitly and it was not proven why Lieutenant and Mayor should have forced and to falsely denunciate Muzlijaj. While it appears from the registration of the conversation held between Abedin Muzlijaj and the that the defendant blamed his two superiors for taking the murder case away from him, this is not enough to prove that they also aimed to falsely denunciate him.

In the end, this was an excuse, an allegation which came out at the end of the trial as well and which was only favoured by a speculative and partial interpretation of the witnesses' words.

Further and final corroborating evidence of the facts alleged by the prosecutor is found in the conversation between and the defendant (at the presence and with episodic intervention of), conversation registered, based on the order for covered measure issued on 15 January 2010.

The legality of the measure and of its outcome has already been assessed in the decision issued in the course of the first hearing of the trial.

Now, turning to the content of the conversation, it emerges that the issue of the money given to Muzlijaj from the is mentioned in two passages.

The first one is as follows:

: What did I promise you, I like to move things further, you know, five thousands I gave you, the rest I was planning to give you but...

Abedin: I lost wings.... They promised me...

: But I was relying on you so much, I am telling you...

Abedin: you will rely on me again , forever, try to understand me..... what do you think I have betrayed you or something like that....

: But you did not tell me all the persons, this is the problem.

Abedin: , I can't tell you before knowing 100%...

In the second passage we read:

Abedin: I swear on my children that I have, I have pushed myself and got quite deep in trouble... I had offers from people, you know that, but I gave my word to this uncle , with no one I have dealt because of the murdered and others, if you have the smallest suspicion, Abedin will get the money and give you back one by one...

: No, it is not a problem.

In neither of the quotation the money given is referred to as a loan, nor words or expressions let understand that the money has been borrowed and must therefore be given back at a time. On the contrary, when the parties refer to the money, the receiver of the money Muzlijaj declares his availability, his intention to give it back in case he is not in the condition to keep a promise that he had made previously, as a condition for receiving the money.

Especially in the second passage, the issue of the promise done to ‘this uncle ’ is patent as well as the fear, expressed by the defendant, that his counterparts (the) have lost their trust in him (“if you have the smallest suspicion”). By expressing his intention to give the money back if he didn’t manage to achieve what he had promised to the , it is the same Abedin Muslijaj to confute the defense he used in the trial. If the justification of the transfer of the sum of money was the performance of an activity in favour of the , this means that the money given was not a loan, since the justification, in the two contracts, is radically different. In the case of a loan, the justification of the transfer of money to the receiver is his obligation to pay back the loan, generally (but not necessarily) with the addition of an interest. In the case at trial, the justification of the transfer of money is not the restitution of the sum given (restitution which is never requested and that, when offered, is refused –“... *if you have the smallest suspicion, Abedin will get the money and give you back one by one...* : *No, it is not a problem*”) but the execution of an obligation by Muslijaj in favour of the two .

This conclusion confirms the version of the witnesses, when they say that the money was asked and given for a specific task promised by the defendant.

What was this task? What did Muslijaj had to do in order to keep his promise with the ?

Also these questions find an easy answer in the conversation between Muslijaj and , specifically in that passage of the first quotation where expresses his disappointment for the fact that, despite the payment and the promise, he had not yet come to know the identity and the names of those involved in the murder of his brother.

For its clarity, the passage does not leave much to interpretation:

 : *But I was relying on you so much, I am telling you...*
...
 : *But you did not tell me all the persons, this is the problem.*
Abedin: , *I can’t tell you before knowing 100%...*

The request of money of the police officer in order to shed light on the murder of the relative of the two accused constitutes the criminal violation committed by the defendant.

According to the witnesses, who have been found reliable and can therefore be given credibility also on this aspect, the money was requested to pay informants in order to discover the author of the murder of

The reconstruction of the events is reflected in the legal qualification of the facts. The justification for asking money results in an abuse of the duties of an officer since it creates a distortion, a perturbation of the function implicit in the office and in this manner it affects or interferes with the performance of the official duties.

Under this profile, it is important to remark that the abuse of the position of power and trust of the officer is already created when the request is made, prospecting an use of the money which does not correspond to a possible lawful option.

Once the crime is integrated, it becomes obviously irrelevant the use made of the money afterwards. If also the money is later used by the abusive officer for a personal need (for example it is used, as claimed, for paying a family debt), the crime is already committed at the time of the request. When it can be established (as it is obvious in the current case) that the intention of the perpetrator is to obtain an unlawful material benefit for himself, the distortion of the public function constitute the crime foresee in article 339 CCK.

All these elements are present in the conduct of Abedin Muslijaj in the house of and at the beginning of 2008. His request of money, for the need of the investigation (in order to pay informants) is inherently abusive since it introduces in the performance of an official duty a potential element of extortion and conditioning, i.e. an unlawful interference of the public function. It is significant that of this perturbation, the same victims of the crime where aware at the moment of the request. When asked by the presiding judge if an analogous request is conceivable from a German police officer or from a Swiss one, for the execution of an official function (investigate a crime) admitted that, obviously, this could not happen in those Countries.

A last point on the reconstruction of the facts.

There is no risk of time of limitation, as prospected by the defence counsels of the defendant: the unlawful conduct was initiated by the request of money but its unlawfulness was protracted until the last payment, which undisputedly was made after the filing of the report, in mid April 2008. The permanence of the violation was not terminate until the last payment, therefore rendering futile any issue on the point of the time of limitation.

The legal classification of the criminal offence has to be further specified pointing out that the conduct of the defendant falls under article 339 par. 2 in conjunction with par. 1 CCK, since the amount that was paid exceeded € 2.500,00 but was lower than € 5.000,00.

The defense counsel objected that the legal qualification of the crime should have been under the general provision of article 339 par. 1 CCK and not in relation to the provision of paragraph 2 of the same article, since paragraph 2 refers to the "damage" caused by the

perpetrator, while reference should be made to "material benefit" he had gained through the commission of the crime.

On this point, suffice it to say that article 339 CCK foresees different degrees of gravity of the basic violation which all have a common core (the abuse, the excess of limits or the omission of a duty, plus the intention to gain a profit or cause a damage) but then differentiate for some profiles that give a different severity to the commission of the crime. Based on that, the legislator has chosen to refer to different indicators of gravity of the abusive behaviour of the officer. In the case under examination, it is believed that the request of money and the relative payments has caused a correspondent damage to _____ and _____, who, in fact, have appeared before the judge as injured parties, explicitly asking their money back (on this aspect, there was a question by the judge to _____).

As to the criminal offence of *Fraud* (article 261 par. 1 CCK), the Presiding Judge firstly refers to the Ruling of the Three-Judges Panel of the District Court of Peja KP.nr.5/2010 dated 22.01.2010 by which considering the general principle of specialty the graver criminal offence absorbs the more lenient one therefore, in the present case, since Fraud is punished more leniently than Abusing Official Position, the latter should be considered as the only criminal offence committed by the defendant.

Moreover, the prosecutor argues that the defendant even though he knew that he filed the criminal report to the District Prosecutors Office (regarding the murder case of _____) he didn't tell this to _____ and _____ at the time _____ gave to the defendant € 1.500,00

In the opinion of the court the criminal offence was committed the day the defendant asked for the money (the € 10.000,00) and received € 3.000,00. In the following months, the money which was given on the second and the third occasion was only the execution of the promise given on the day the money was asked by the defendant. Therefore, the fraud can not be recognized and the defendant is acquitted from this charge.

Determination of the punishment

In the present case the defendant was found guilty for the criminal offence of *Abuse of Official Position or Authority*, contrary to article 339 par. 2 in conjunction with par. 1 CCK, which foresees the punishment of imprisonment of up to three years.

Considering the circumstances of the case, it appears appropriate to determine the punishment in half of the maximum foreseen by the law. The defendant substantially prospected to _____ and _____ false circumstances in order to induce them to give him money. He did not committed repeated violations nor has exceeded his functions or has refused the execution of an official duty, which are seen as potentially more dangerous violations of the same provision.

The judge does not think that there are specific factors which can be counted as diminishing circumstances in favour of the defendant. The fact that he has not previous convictions or that he behaved in the course of the trial or that he is a father of family and that he lives in a large family, are all irrelevant. These circumstances have not prevented Abedin Muzlijaj from committing the crime for which he is held responsible and can not be given any added value in the determination of the punishment.

On the other hand, one of the conditions for the suspension of the punishment does exist, pursuant to article 44.3 CCK, namely to give the possibility to Abedin Muzlijaj the possibility to have a new start in his life, after he fell so miserably in the execution of his official duties.

The suspended sentence of imprisonment for one year and six months is granted at the condition that the defendant will compensate the damages caused to the injured parties, as determined below, within 15 days after this judgment has become final.

The faculty for the judge to impose such condition is foreseen in article 43 par. 3 of CCK which states that *"within a suspended sentence the court may order that the punishment be executed if, within a determined time, the convicted person does not return the material benefit acquired from the commission of the criminal offence, does not compensate the damage caused by the criminal offence..."*.

Eventually, based on article 391.1 n.5) and 278 KCCP, the time spent in pretrial detention and in house detention by the defendant will be counted as part of the punishment.

Property Claim

It is uncontested that there was a passage of money between and and Abedin Muzlijaj on the other. The amount of money (4.500,00 euro and 700 Swiss Francs) is uncontroverted as well.

As concluded in this decision, there was not a lawful cause of the passage of money, which was justified exclusively by the abuse of official authority committed by the defendant.

The money must therefore be paid back by the defendant to and , who have asked so in the course of the hearing, on request of the Prosecutor and of the judge.

Therefore, based on article 112.2 KCCP, Abedin Muzlijaj is ordered to pay the damages caused to and , determined in 4.500,00 euro and 700 Swiss Francs.

Cost

As the accused Abedin Muzlijaj was pronounced guilty, he has to reimburse the costs of criminal proceedings with the exception of interpretation. Based on article 100 KCCP,

the accused is ordered to pay the costs of the proceeding, which is determined in € 100,00.

Court Recorder



Jacqueline Ryan



Presiding Judge



Francesco Florit

LEGAL REMEDY:

Based on article 473.3 KCCP an appeal against this judgment may be file within eight days from the day of the service of the copy of the judgment. The appeal must be addressed to the District Court of Peja.