

**SUPREME COURT OF KOSOVO**

**Pkl - Kzz 61/2011**

**10<sup>th</sup> October 2011**

**THE SUPREME COURT OF KOSOVO**, in a panel composed of EULEX Judge Dr. Horst Proetel as Presiding Judge and EULEX judge Martti Harsia and Supreme Court Judge Nesrin Lushta as panel members, assisted by Legal Officer Chiara Rojek as recording clerk,

In the criminal case against the Defendant Tomë Gashi, father's name Viktor, born on 14<sup>th</sup> August 1961, residing in Prishtinë/Priština, street Luan Haradinaj no. 15, Kosovar citizen of Albanian ethnicity,

Convicted in first instance by judgment P no. 514/09 of the Municipal Court of Prishtinë/Priština dated 28<sup>th</sup> May 2010 for the criminal offence of Attacking official person performing official duties pursuant to Article 317 Paragraph 2 in relation to Paragraph 1 of the Criminal Code of Kosovo (CCK), and to a suspended sentence of 6 (six)-month of imprisonment pursuant to Articles 43, 44 and 317 Paragraph 2 of the CCK,

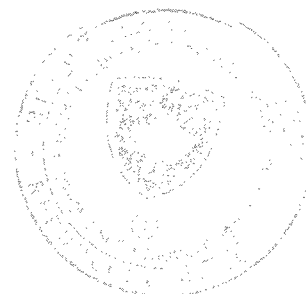
Confirmed by judgment AP no. 395/10 of the District Court of Prishtinë/Priština dated 9<sup>th</sup> December 2010 rejecting of the Defendant's appeal against the first instance judgment,

Acting upon the Request for Protection of Legality filed by the Defendant Tomë Gashi on 26<sup>th</sup> April 2011 against the judgment P no. 514/09 of the Municipal Court of Prishtinë/Priština dated 28<sup>th</sup> May 2010 and the judgment AP no. 395/10 of the District Court of Prishtinë/Priština dated 9<sup>th</sup> December 2010, and taking into consideration the Reply of the Office of the State Prosecutor of Kosovo (OSPK) on the Request filed with the Supreme Court of Kosovo on 1<sup>st</sup> August 2011,

After having held a session and deliberated on 10<sup>th</sup> October 2011, pursuant to Articles 454 Paragraph 1 and 456 of the Kosovo Code of Criminal Procedure (KCCP), issues the following

**JUDGMENT**

The Request for Protection of Legality filed by the Defendant Tomë Gashi on 26<sup>th</sup> April 2011 against the judgment P no. 514/09 of the Municipal Court of Prishtinë/Priština dated 28<sup>th</sup> May 2010 and the judgment AP no. 395/10 of the District Court of Prishtinë/Priština dated 9<sup>th</sup> December 2010 is hereby **REJECTED**.



## REASONING

### *I. Procedural history of the criminal proceeding*

On 19<sup>th</sup> January 2007, the Municipal Public Prosecutor of Prishtinë/Priština filed an Indictment PP no. 3695-14/06 charging the Defendant and three other individuals with the criminal offences of Attacking Official Persons Performing Official Duties contrary to Article 317 Paragraph 2 read together with Paragraph 1 of the CCK (as to Tomë Gashi), Obstructing Official Persons in Performing Official Duties contrary to Article 316 Paragraph 3, read together with Paragraph 1 and Article 23 of the CCK (as to the second and third Defendants); and Light Bodily Harm contrary to Article 153 Paragraph 2, read together with Paragraph 1, Item 4, of the CCK (as to the fourth Defendant).

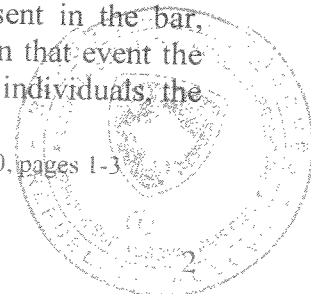
On 10<sup>th</sup> March 2008, following a hearing the indictment PP no. 3695-14/06 was confirmed in its entirety.

On 19<sup>th</sup> March 2009 the President of Prishtinë/Priština Municipal Court requested the President of Prishtinë/Priština District Court that the trial against the Defendant be transferred to another court as Tome Gashi was a judge in this Municipal Court and was currently a lawyer in this court. The case was delegated to the Municipal Court of Ferizaj/Uroševac on 27<sup>th</sup> April 2009. On 26<sup>th</sup> June 2009, the President of the Municipal Court of Ferizaj/Uroševac requested the President of the Assembly of EULEX Judges (PAEJ) to assign EULEX judges on the case, given the current position of Tomë Gashi as advisor to the Office of the Prime Minister and a potential miscarriage of justice. On 17<sup>th</sup> September 2009, the PAEJ decided the case be assigned to the EULEX judges.

The trial commenced on 14<sup>th</sup> May. On 28<sup>th</sup> May 2010 the Municipal Public Prosecutor amended the qualification of the criminal offence of Attacking Official Persons Performing Official Duties pursuant to Article 376 Paragraph 1 of the KCCP. He modified the referenced Paragraphs 1 and 2 of Article 317 by adding Paragraph 4 of the same article. Following a recess, the Defendant pleaded guilty for Attacking Official Persons Performing Official Duties under the new qualification of the criminal offence submitted by the Prosecutor.<sup>1</sup>

On 28<sup>th</sup> May 2010, the Municipal Court of Prishtinë/Priština found the Defendant Tomë Gashi guilty for the criminal offence of Attacking official person performing official duties pursuant to the Article 317 Paragraph 2 read with Paragraph 1 of the CCK, with the exclusion of the circumstance of Paragraph 4. Because on 26<sup>th</sup> October 2006, at around 03:30 in Prishtinë/Priština, at Dardania neighborhood, Bill Clinton Street, at the hotel-bar "Route 66", he attacked a Kosovo Police officer, the injured party Lulzim Borovci, while the latter was performing his official duties of maintaining public security, in such a manner that, after the Defendant Tomë Gashi and two others entered the above-mentioned bar and due to their misconduct towards other clients present in the bar, initially an altercation and then a physical quarrel started among them. In that event the police intervened and while they were attempting to separate and stop the individuals, the

<sup>1</sup> See Judgment P. No. 514/09 of the Municipal Court of Prishtinë/Priština, 28<sup>th</sup> May 2010, pages 1-3.



Defendant reacted in a rude manner shouting swear, threatening and insulting words and he attacked Lulzim Borovci physically, grasped the upper part of his uniform and hit him with his right hand in the face near the left eye, and the Defendant resisted the handcuffing by clutching and pushing the officers with his hands, and during these acts they fell on the ground, as a result of which Lulzim Borovci suffered injuries qualified as light bodily injuries resulting in a temporary impairment of health. The Municipal Court of Prishtinë/Priština convicted the Defendant to a suspended sentence of six (6)-month imprisonment pursuant to Articles 317 Paragraph 2, 43 and 44 of the CCK, provided that the punishment shall not be executed if Tomë Gashi does not commit another criminal offence for a period of 1 (one) year. The trial panel also ordered the Defendant to pay the costs of the proceedings determined to 50.00 euro, pursuant to Article 102 Paragraph 1 of the KCCP.

On 9<sup>th</sup> December 2010, the District Court of Prishtinë/Priština, by judgment AP no. 395/10, rejected the Appeal filed by Tomë Gashi on 30<sup>th</sup> September as ungrounded and affirmed the first instance judgment.

On 26<sup>th</sup> April 2011, the Defendant Tomë Gashi filed a Request for Protection of Legality against the judgment P No. 514/09 of the Municipal Court of Prishtinë/Priština dated 28<sup>th</sup> May 2010 and the judgment AP no. 395/10 of the District Court of Prishtinë/Priština dated 9<sup>th</sup> December 2010. On 1<sup>st</sup> August 2011, the OSPK filed a Reply to the Request for Protection of Legality.

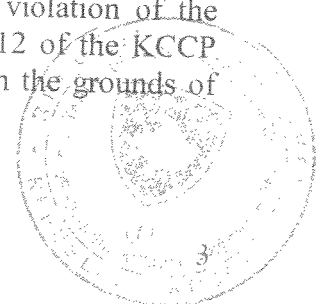
## *II. Submissions of the parties*

### *Request for Protection of Legality filed by the Defendant Tomë Gashi*

The Defendant alleges a substantial violation of the provisions of criminal procedure under Article 403 Paragraph 1 of the KCCP and under Article 451 Paragraph 1 item 3 of the KCCP and a violation of the criminal law. For these reasons, he proposes the Supreme Court of Kosovo to annul both challenged judgments and to return the case to the first or second instance for a retrial or a new decision.

He alleges that the first and second instance courts committed a violation of the provisions of criminal procedure under Article 403 Paragraph 1 Item 10 of the KCCP because the challenged judgments exceeded the accusation of the prosecution. This should be read in conjunction with Article 386 Paragraph 1 of the KCCP. He opinions that the indictment had been amended in his favour during the trial session and this circumstance should have been taken into account by the first instance court. Furthermore the Defendant claims that doubts regarding the existence of a fact relevant to the case should be interpreted in favor of the Accused pursuant to Article 3 of the KCCP.

He also avers that the first instance judgment contains a substantial violation of the provisions of criminal procedure under Article 403 Paragraph 1 Item 12 of the KCCP since the enacting clause were incomprehensible and contradictory with the grounds of



the judgment. Moreover the reasoning lacked mentioning of the decisive facts and a contradiction exists between the reasoning and the content of the case file.

The Defendant alleges that the Municipal Court 'has invented a hotel-bar Route 66' and left unclear whether the injuries of the injured party were caused by him. He also contends that a series of witness statements mentioned in the enacting clause were taken in contradiction with Article 156 Paragraph 2 of the KCCP as he had never been given the opportunity to challenge these statements.

The Defendant claims that the first instance court has committed a substantial violation of the provisions of criminal procedure under Article 403 Paragraph 2 Items 1 and 2 of the KCCP by not allowing the Defendant to state his case.

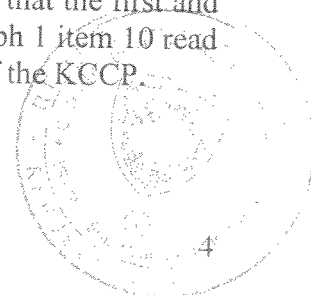
He finally claims that the court failed to take into account verifiable facts: The expertise related to the injuries of the police officer Lulzim Borovci was not accurate and should not have been used as evidence by the court (violation of Article 403 Paragraph 2 Item 1 of the KCCP); Lulzim Borovci had gone to the Emergency clinic at 10.30 on 26<sup>th</sup> October 2006, although the attack allegedly occurred at 3.30; the latter had stated that Tomë Gashi broke his spectacles during the attack, whereas a picture of him with the same glasses, undamaged, was taken by the police and the Prosecutor and the court unlawfully rejected the Defence's motion to have the glasses examined; the police officer allegedly was wearing a summer uniform at the end of October 2011; Tomë Gashi contests his alcoholic state at the relevant time and points out that the police officers did not perform any alcohol test; he further argues that his clothes did not suffer any damage although he supposedly entered into a hand-to-hand fight with the police officer; finally the court unlawfully had issued an individual opinion of the Defendant's psycho-social profile.

He alleges that the incomplete determination of the factual situation resulted in a violation of the criminal law.

#### *Reply of the OSPK to the Request for Protection of Legality*

In its Reply, the OSPK proposes to the Supreme Court of Kosovo to grant the Request for protection of legality against both challenged judgments. He alleges that the first instance court did not comply with the legal qualification of the criminal offense contained in the amended indictment and found the Defendant guilty for the criminal offence pursuant to Article 317 Paragraph 2 of the CCK, thus for a more severe criminal offence.

The OPSK is of the opinion that the discretion of the court as regard to the legal qualification based on Article 386 Paragraph 2 of the KCCP may only apply in favor of the accused but not to his/her disadvantage. The OSPK hence concludes that the first and second instance courts violated the provisions under Article 403 Paragraph 1 item 10 read in conjunction with Article 386 Paragraph 1 and Article 3 Paragraph 2 of the KCCP.



### III. Findings of the Supreme Court of Kosovo

#### III. A. Admissibility of the Request for Protection of Legality

The Request is admissible.

It is assumed that it has been filed within the three-month time frame required by Article 452, Paragraph 3 of the KCCP though the file does not contain the receipts attesting the service of the challenged judgment of the District Court Prishtinë/Priština. To avoid procedural disadvantages for the Defendant the lack of proof has to be interpreted to his benefit, asserting he had received the judgment on 27<sup>th</sup> January 2011.

The Request is related to a final judicial decision in the sense of Article 451, Paragraph 1 of the KCCP. The District Court acted as a second-instance court and there are no further regular remedies available.

#### III. B. Merits of the Request for Protection of Legality

##### *Alleged violation of the provisions of criminal procedure under Article 403 Paragraph 1 Item 10 of the KCCP and other alleged violations*

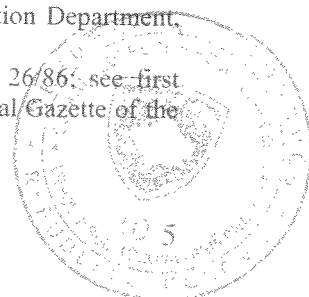
The request of the Defendant supported by the State Prosecutor has to be rejected as unfounded (Article 456 Paragraph 1 KCCP). Contrary to their opinion, the first instance judgment and the judgment on appeal do not infringe Article 403 Paragraph 1, Item 10 of the KCCP.

The courts rightfully did not base their decision on the amended indictment because they deemed that the asserted mitigating circumstance had not been proven. They applied correctly Article 386 Paragraph 2 of the KCCP expressing that the court shall not be bound by the motions of the prosecutor regarding the legal classification of the act. That means that the court - and not the prosecutor - has the dutiful discretion to evaluate if mitigating or aggravating circumstances have been established. This applies particularly when the description of the act and the legal qualification mentioned in the indictment are discordant. The trial panel has to reflect the factual description in the most accurate manner.<sup>2</sup> This was properly done.

The rights of the Defendant as regard to the change of legal qualification leading to his possible detriment were respected during the first and second instance proceedings. Such respect was already required by the jurisprudence under the old law.<sup>3</sup> But this applies as well to the treatment of the Defendant according to the current applicable law. The

<sup>2</sup> See *inter alia* Article 346 Paragraph 2 of the Law on Criminal Proceedings, Official Gazette No. 26/86; see also Second Commentary on the Law on criminal proceedings OSCE, Democratization Department, Sarajevo 1999, Authors Dr. Hajrija Sjercic-Colic, Drasko Vuleta and Malik Hadziomeragic

<sup>3</sup> Article 346 Paragraph 2 of the Law on Criminal Proceedings, Official Gazette No. 26/86; see first Commentary on the Law on criminal proceedings, Branko Petric, 1986, 2<sup>nd</sup> edition, Official Gazette of the SFRY, Belgrade, Part IV, paras 1 and 4



Accused shall have the right to be informed of the charges against him/her and to have adequate time to prepare his/her defence. Though these guarantees are not clearly stated under Article 386 of the KCCP, they transpire from several provisions of the Code (e.g. Article 12 etc). Furthermore, they are enshrined in Article 6 of the European Convention of Human Rights<sup>4</sup> and mentioned in Article 30 of the Constitution of Kosovo. The necessity for procedural guarantees in case of change of legal designation was affirmed by the European Court of Human Rights (ECtHR). In the case *Pelissier and Sassi v. France*, the ECtHR held that “Article 6 § 3 (a) of the Convention affords the Defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterization given to those acts.”<sup>5</sup> The ECtHR considers that the rights of the Defendant are not infringed when assessing the fairness of the proceedings as a whole (including the appeal stage and the review exercised at this stage) the Accused had the opportunity to advance his/her defence in respect of the modified legal designation.<sup>6</sup>

The Defendant has not been surprised by the decisions of the Municipal and District courts acting in a transparent foreseeable manner.

The Supreme Court notes that the Municipal court panel assessed whether the requirements of the necessary defense under Article 8 of the CCK and the waiver of punishment under Article 317 Paragraph 4 of the CCK were met in the instance, and concluded that they were not. The Defendant was then convicted under Article 317 Paragraph 2 in relation to Paragraph 1 of the CCK. By doing so, the first instance court proceeded to a minor change to the legal qualification as foreseen in Article 386 Paragraph 2 of the KCCP. The trial panel modified the qualification that, in its view, reflected the factual description at stake, but preserved the *identity* of the facts in the indictment and in the verdict.

Moreover Tomë Gashi was initially charged with the mentioned criminal offence under Article 317 Paragraph 2 read with Paragraph 1 of the CCK and therefore pleaded his case under this legal qualification, until the Prosecutor amended the indictment at the last trial session. When the verdict was announced, the Defendant was informed of the change of the legal qualification and had the possibility to submit a contention in this regard during the appeal procedure. He also explained this ground of appeal during the session on appeal on 7<sup>th</sup> December 2010.<sup>7</sup>

Finally there was no violation of Article 3 of the KCCP, since there is no doubt in the case at hand regarding the existence of facts relevant to the case or the implementation of a certain criminal law provision.

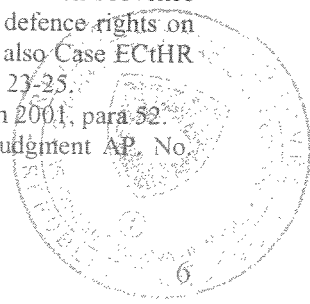
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<sup>4</sup> Convention for the Protection of Human Rights and Fundamental Freedoms dated 4<sup>th</sup> November 1950

<sup>5</sup> Case ECtHR *Pelissier and Sassi v. France*, Application no. 25444/94, judgment dated 25<sup>th</sup> March 1999, para 51 al fine; see also Para 62. “The Court accordingly considers that in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Aix-en-Provence Court of Appeal should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time. [...]”; see also Case ECtHR *Aldoshkina v. Russia*, Application no. 66041/01, judgment dated 12<sup>th</sup> January 2007, paras 23-25.

<sup>6</sup> Case ECtHR *Dallos v. Hungary*, Application Ap no. 29082/95, judgment dated 1<sup>st</sup> March 2001, para 52.

<sup>7</sup> See Appeal P no. 514/09 of Defendant Tomë Gashi, 30<sup>th</sup> September 2010, page 1; Judgment AP No. 395/10 of the District Court of Prishtinë/Priština, 9<sup>th</sup> December 2010, page 3



The Defense rights were fully respected during the criminal proceeding against Tomë Gashi, in particular at the time of change of legal designation, and no violation of the provisions of criminal procedure was committed by the first and/or second instance courts.

*Alleged violation of the provisions of criminal procedure under Article 403 Paragraph 1 Item 12 of the KCCP*

The challenged judgments are not affected by other procedural failures asserted by the Defendant.

Contrary to the opinion of the Defendant, the enacting clause of the first instance judgment is not incomprehensible and contradictory with the grounds of the judgment.

The enacting clause contains the necessary data as required by Article 396 of the KCCP, notably the decision by which the accused is pronounced guilty, a description of the act for which he was pronounced guilty and a statement on the sentencing. The Municipal court proceeded to a detailed assessment of the factual situation and examined the different versions of the sequence of events. The judgment contains the trial panel's findings as well as the reasons on sentencing. Furthermore, the first instance court clearly elaborated on the injuries of the injured party as a consequence of the Defendant's action in the enacting clause, unlike the Defence counsel alleges.<sup>8</sup>

The argument of the Defence that the Municipal Court trial panel had invented a Hotel-bar Route 66 is not supported by any explanation and is therefore rejected. On the other hand, the admissibility of the witness statements by the first instance court and their conformity to Article 156 Paragraph 2 of the KCCP, already submitted before the appeal panel, do not fall under the scope of Article 403 Paragraph 1 Item 12 of the KCCP.

*Alleged violation of the provisions of criminal procedure under Article 403 Paragraph 2 Items 1 and 2 of the KCCP*

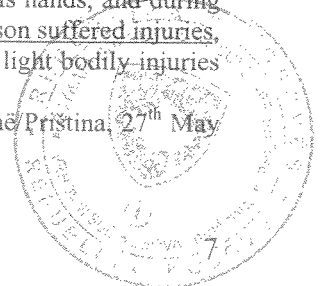
As to the alleged violation of the right to plead his case the Defendant did not give any reasonable explanation. No remark was provided on this contention by the OSPK.

The Supreme Court notes that the Defendant extensively expressed himself during the court sessions in the criminal proceeding P no. 514/09. The Presiding judge allowed him to plead his case and only attempted to limit the Defendant's comments and motions to the essential ones related to the case at stake.<sup>9</sup>

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<sup>8</sup> See Judgment P. No. 514/09 of the Municipal Court of Prishtinë/Priština, 28<sup>th</sup> May 2010, page 2: "and the defendant Tome resisted the handcuffing by clutching and pushing the officers with his hands, and during these acts they fell on the ground, as a result of which the above-mentioned injured person suffered injuries, such as a hematoma on the left arm, contusion in the head and left knee, qualified as light bodily injuries resulting in a temporary impairment of health;" - emphasis added -

<sup>9</sup> See *inter alia* Minutes of Main trial P. No. 514/09 of the Municipal Court of Prishtinë/Priština, 27<sup>th</sup> May 2010, page 4



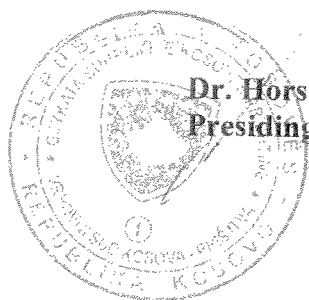
As far as the Presiding judge refused the Defendant to put an additional question to the witnesses he only exercised his discretion to lead the criminal proceeding as prescribed in Article 332 and following of the KCCP, without preventing the Defendant to exercise his rights. Tomë Gashi lengthy proceeded to the cross-examination of the injured party and confronted him with his previous statement. He had the opportunity to cross-examine three other police officers and another witness. Tomë Gashi and the other Defendants consented to have the statements of other witnesses considered as read out in court.<sup>10</sup> This procedure fully complied with Article 165 Paragraph 1 of the KCCP according to which “each party shall be given the opportunity to examine the witness who has been examined by the other party”. Both courts granted to the Defendant a fair trial within a reasonable time.

*Alleged violation of the criminal law*

The Defendant claims that a violation of the criminal law occurred due to the incomplete determination of the factual situation. This submission was not commented by the OSPK.

The Supreme Court panel notes that the incomplete determination of the factual situation was already raised at the appeal stage by the Defendant. The second instance court examined this count and rejected it as ungrounded. But even when this would not have occurred, it could not justify the present Request. Article 451 Paragraph 2 of the KCCP provides that a Request for Protection may not be filed on the ground of an erroneous or incomplete determination of the factual situation.

The Supreme Court decided as per in the enacting clause.



**Dr. Horst Proetel**  
**Presiding Judge**

*[Handwritten signature]*

<sup>10</sup> See Minutes of Main trial P. No. 514/09 of the Municipal Court of Prishtinë/Priština, 14<sup>th</sup> May 2010, pages 9-13; and page 16 and fol.; 27<sup>th</sup> May 2010, pages 2-3.