

SUPREME COURT OF KOSOVO

PKL-KZZ-65/10

Date: 25 October 2011

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Martti Harsia as Presiding Judge, with EULEX Judge Anne Kerber and Kosovo Judges of the Supreme Court of Kosovo, Erdogan Haxhibeqiri, Marije Ademi and Salih Toplica as members of the panel, in the presence of Adnan Isufi EULEX Legal Advisor, acting in capacity of a recording clerk, in the criminal case of the District Court of Prishtine/Prishtina, P nr 570/07 against the defendants:

Bekim RASHITI, born on _____, in _____ village, Municipality of _____, _____, father's name _____, mother's name _____, maiden name _____, citizen of the Republic of Kosovo;

Visar AHMETI, born on _____ in _____ village, Municipality of _____, _____, father's name _____, mother's name _____, maiden name _____ citizen of the Republic of Kosovo;

Valon VLLASA, born on _____ in _____, Address " _____ " Street, _____, father's name _____, mother's name _____, maiden name _____, citizen of the Republic of Kosovo;

Visar SFISHTA, born on _____ in _____, address " _____ " Street, _____, father's name _____, mother's name _____, citizen of the Republic of Kosovo;

Charged with the criminal offences of kidnapping, in co-perpetration, contrary to Article 159, paragraph 2 and 23 of the Criminal Code of Kosovo (*hereafter "CCK"*),

Deciding upon the Requests for Protection of Legality filed by defense counsel Av Nike Lumezi on behalf of defendant Visar Ahmeti, against the judgment of the District Court of Prishtine/Prishtina P nr 570/07 dated 27 May 2009, and against the judgment of the Supreme Court of Kosovo, Ap 282/09, dated 31 March,

Pursuant to Article 454 paragraph 1 of the Kosovo Code on the Criminal Procedure Code (*hereafter "KCCP"*), after a session on deliberation and voting held on 25 October 2011, the Supreme Court of Kosovo issues the following:

JUDGMENT

To reject the Requests for Protection of Legality, dated 01 June 2010, filed by defense counsel Av Nike Lumezi on behalf of defendant Visar Ahmeti, against the Judgment of the District Court of Prishtine/ Prishtina P nr 570/07 dated 27 May 2009, and against the Judgment of the Supreme Court of Kosovo, Ap 282/09, dated 31 March, as unfounded and to confirm the Judgment of the Supreme Court according to Art 456 of KCCP.

REASONING

I. Procedural Background

1. On 31 October 2007, the Public Prosecutor filed an Indictment against the accused Bekim Rashiti, Arben Sfishta, Visar Ahmeti, Valon Vllasa and a Proposal for Punishment against the juvenile Visar Sfishta, charging them for having committed in co-perpetration, the criminal offence of Kidnapping, in violation of Article 159 paragraph 2, in conjunction to Article 23 of the CCK.
2. The prosecution alleged that on 10 December 2005, at around 00:30, in _____, neighborhood, the defendants, in co-perpetration, intentionally and pursuant to a prior agreement, kidnapped the victim D _____ S _____, hiding him in the house of S. _____ S _____, in _____ Street, in _____, until the defendants released the victim, only on 13 December 2005 at around 02:00, after the father of the victim G _____ S _____ had paid, on a dirty road near B _____ village, the ransom of 230.000,00 Euros.
3. On 1 April 2009, the main trial started at the District Court of Prishtina, in a closed session, without the presence of the public, in accordance to Article 69 of the Juvenile Justice Code of Kosovo (*hereafter "JJCK"*).
4. On 27 April 2009, one of the defendants, Arben Sfishta, did not show up before the court and his defense counsel claimed that his client had undergone a medical eye-surgery in Norway and would have come back to Kosovo in two or three weeks time. The court considered that neither defense counsel nor the defendant submitted any documentation in support of the existence of an urgent medical operation. The court concluded that the absence of the defendant Arben Sfishta was not justified, therefore an arrest order for the defendant was issued. The court consequently ruled on the severance of the proceedings and continued with the trial proceedings against other defendants.
5. On 27 May 2009, the District Court of Prishtina pronounced the judgment. All the four defendants; Bekim Rashiti, Visar Ahmeti, Valon Vllasa and Visar Sfishta were found guilty of having committed in co-perpetration the criminal offence of Kidnapping, in violation of Article 159 paragraph 2 in conjunction to Article 23 of CCK.

6. Against the Judgment rendered in the first instance, appeals have been filed by the public Prosecutor and the defense counsels; Av Vahide Braha on behalf of the defendant Visar Sfishta, Av Haxhi Millaku on behalf of the defendant Valon Vllasa, Av Nike Lumezi on behalf of the defendant Visar Ahmeti and Av Mahmut Halimi on behalf of the defendant Bekim Rashiti.

7. On 31 March 2010, the Supreme Court of Kosovo rejected all the appeals filed by the defense counsels as unfounded. The appeal of the public prosecutor was partly granted with regard to the length of punishment.

8. On 1 June 2010, defense counsel Av Nike Lumezi on behalf of the defendant Visar Ahmeti filed a Request for Protection of Legality against the Judgment of the District Court of Prishtine/ Prishtina P nr 570/07 dated 27 May 2009, and against judgment of the Supreme Court of Kosovo, Ap-Kz 282/09, dated 31 March, due to violation of the criminal law, essential violation of provisions of the criminal procedure and other violations of the provisions of the criminal procedure.

9. Defense counsel requested the modification of the challenged judgments; to acquit the defendant of having committed the criminal offence of Kidnapping in co-perpetration with the accused Bekim Rashiti et alia, or to annul the challenged judgments and to return the case for reconsideration to the court of the first instance, or to modify the challenged judgments with regard to qualification of the criminal offence as providing Assistance to Perpetrators after Commission of Criminal Offence pursuant to Article 305 and to impose a more lenient punishment against the defendant.

10. By submission KMLP. II. Nr 65/10 dated 20 July 2010 the Office of State Prosecutor filed a reply and proposed that the request for protection of legality be rejected as ungrounded. The OSPK submitted that the first and second instance courts have described the actions of the defendant and rightfully treated these as co-perpetration and not as assistance. According to OSPK's assessment the defendant Visar Ahmeti had decided to join in co-perpetration of a very serious criminal activity and later on according to this agreement had undertaken those actions mentioned in the enacting clause. These actions cannot be considered as separate actions but represent essential contribution for co-perpetration.

II. Supreme Court findings

11. In assessing the Request for Protection of Legality, the Supreme Court of Kosovo established the following:

a. The Request for Protection of Legality is admissible. The request is filed with the competent court pursuant to Article 453 par 1 and within the deadline pursuant to Article 452 par 3 of KCCP.

b. The Supreme Court of Kosovo decided in a session as prescribed by Article 454 paragraph 1 of KCCP. The parties' notification of this session was not required.

c. The request for Protection of Legality is ungrounded.

12. Defense counsel alleges a number of violations some of which had been also raised and submitted during the course of proceedings in the second instance. Parts of the request for protection of legality mainly refer to the factual situation. The Supreme Court of Kosovo however is confined in its assessment by Article 451 and Article 455 of KCCP. The defense counsel may not file a request for protection of legality on the ground of an erroneous or incomplete determination of the factual situation. Consequently contestation of the factual situation at this stage of the procedure is inadmissible.

The Supreme Court of Kosovo after examination of the file records finds that appealed judgments rendered in previous instances do not warrant an *ex officio* intervention. Accordingly, pursuant to Article 455 of KCCP, the Supreme Court of Kosovo shall confine itself to examining those violations of law which the requesting party alleges in his request for protection of the legality.

In the request for protection of legality defense counsel contended the following:

A. Violation of the Criminal Law (Art 404 paragraph 1 item 4)/Art 451 paragraph (1) item 1 of KCCP)

13. Defense counsel argues that the provisions of Article 23 as read with article 159 paragraph 2 of CCK in conjunction with Article 404 paragraph 1 , item 4 of KCCP were violated when Visar Ahmeti was qualified as co-perpetrator although his only actions were described in District Court Judgment (p. 17 Engl vers) that he “*..picked up Bekim Rashiti from the place where the ransom had been collected..*” and that he “*..also kept contacts with an unknown person who borrowed the weapons used during the criminal activities*”. Such factual situation as determined by the courts does not attribute to the convicted person Visar Ahmeti any participation in commission of the criminal offence in question nor in deciding to commit kidnapping or to prepare kidnapping or participation in any agreement as a group member with regard to kidnapping. According to the defense counsel, the courts have also failed to interpret accurately Article 23 of CCK with regard “*....by **substantially contributing** to its commission in any other way ...*”.

The Supreme Court of Kosovo finds that part of this question, refers to the establishment and determination of the factual situation. The request of protection of legality however may not be filed under the provisions of KCCP.

The respective Article 451 (2) of KCCP reads:

(2) A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation...

Furthermore, Article 456 of KCCP states:

The Supreme Court of Kosovo shall, by a judgment, reject a request for protection of legality as unfounded if it determines that the violation of law alleged by the requesting party does not exist or that a request for protection of legality is filed on grounds of an erroneous or incomplete determination of factual situation (Article 405 and Article 451 paragraph 2 of the present Code).

Based on above reasons, the Supreme Court of Kosovo considers that part of question related to factual situation falls outside the scope of review at this stage of the procedure, therefore it is inadmissible.

As far as the following dealing with Article 23 of CCK is concerned, “*the court failed to interpret by **substantially contributing** to its commission in any other way ...*”, the Supreme Court of Kosovo shall elaborate this question in the coming points when addressing the defense counsel’s allegation regarding qualification of the criminal offence.

14. Defense counsel contends violation of Article 458 of KCCP since there was no evidence to conclude as it was the case in the challenged judgments that the convicted is involved in any manner, let alone as a member of a group in commission of the criminal offence of Kidnapping, from Article 159 par 2 of CCK. According to the defense counsel, the district court erroneously concluded that actions of the defendant can be legally qualified as co-perpetration. Such interpretation represents an expansive interpretation of this legal concept that is not only against the theory of criminal law but also against the judicial practice in Kosovo and elsewhere. Defense counsel submits that criminal offence of kidnapping is fulfilled when somebody is abducted/unlawful deprived from liberty and kept in custody on motives prescribed by the law.

In addressing such allegation, the Supreme Court of Kosovo finds that this point to a large extent relates to determination of factual situation. As it mentioned above, the request for protection of legality may not be filed on this legal ground. According to the respective provisions of KCCP, the Supreme Court is not obliged to assess the factual situation as established in previous instances at this stage of the procedure, unless there is any clear new evidence which had not been presented, addressed and/or administered in previous instances that certainly shows that the challenged judgments have been rendered in an obviously unfair and inaccurate manner. In the case at hand, the Supreme Court of Kosovo finds however that defense counsel does not state or argue any other new facts but those correctly addressed and dealt with in previous instances. Therefore the Supreme Court of Kosovo finds this allegation of the defense counsel ungrounded.

As far as the possible motives of defendant are concerned, which the defense alleges not to have been established, this panel notes that the motive of the crime is not part of the crime itself as it is defined in the law. The motives although being relevant for determination of factual situation, and for purpose of imposition of the restrictive measures and length of punishment, nevertheless are not a constitutive part of the criminal offence. There is no legal

obligation whatsoever for the court to establish the motives that drove defendant to committing a criminal offence.

Based on above reasons, the Supreme Court of Kosovo considers that on this part the request for protection of legality is unfounded.

15. Defense counsel maintains that the action of offering to take the perpetrator to the place where the crime was committed and getting in contact with the person who borrowed the weapon to the perpetrators are typical actions of providing assistance to the perpetrators of the criminal offence which is defined punishable under article 305 of CCK. This point as indicated earlier is related with previous allegation in which the defense counsel pretends that the lowers courts failed to provide adequate reasons as to how the defendant jointly committed a criminal offence by participating in the commission of a criminal offence or by substantially contributing to its commission in any other way. According to the defense counsel Visar Ahmeti's actions cannot fall under the provision of article 23 of CCK since this article requires both joint commission of kidnapping and also the awareness for joint collaboration which is not the case. According to the defense counsel, at most unfavorable situation, Ahmeti could be found guilty of criminal offence of providing assistance to perpetrators after the commission of criminal offences pursuant to article 305 paragraph 1 of CCK.

The Supreme Court of Kosovo respectfully disagrees with the defense counsel that the courts in previous instances had erroneously concluded that the defendant in co-perpetration committed the criminal offence for which he was found guilty.

In elaboration of the co-perpetration, the Supreme Court finds it important to refer to a commentary that although related to the previous applicable law in Kosovo, may still be relevant in addressing this legal matter from current Criminal Code of Kosovo since there are no substantial changes with regard to concept of co-perpetration. The referred commentary (Article 22 of the Criminal Code of Federal Republic of Yugoslavia, Ljubisa Lararevic, 1995, 5th Edition) reads:

"Co-perpetration (complicity) is a conscious and willing act of associating with other participants with intent of jointly accomplishing a certain deed. Such a situation exists when several people who meet all the requirements pertaining to the main actor of a particular deed and jointly agree to act as accomplices. An accomplice is that participant who together with others, on the basis of distributed roles, acts towards a certain criminal act and its realisation on the principle of one common goal. An accomplice is every person who on a previously agreed basis takes part in the distribution of roles, which together move towards a certain criminal deed and subsequently delivers his part in the process of committing a crime; in doing so, performing a single allocated segment he considers both as his own and that of the group. By any type of activity a single participant becomes an accomplice, if the deed comes as a result and within a framework of mutual and joint performance, and if such a participant exhibits the will for committing a certain deed".

In the case at hand, evidently the defendant had not been at the place where the ransom had been collected only by coincidence. It is clear that the defendant in accordance to previous agreed plan picked up the other defendant Bekim Rashiti from the place where the ransom had been collected. That is well established based on the evidence that were properly obtained and administered during the trial. It is evident that the defendant kept contacts with an unknown person who borrowed the weapons used during the criminal activities. The roles of the defendant are limited to the performance of divided activities, which in their totality contribute to the successful completion of the mission; precisely that kind of distribution of activities in respect to a performance of an act in question. Therefore the argument of the defence that in the actions of the defendant at worst scenario could constitute the elements of the criminal act of assistance to perpetrator after committing a criminal act could be fulfilled, is without merit.

16. Defense counsel submitted that the court erroneously considered the elements of criminal offence ("*..offered to pick up Rashiti from the ransom place and to contact the person from whom they had borrowed the weapon.*") also as elements which are taken as circumstance pursuant to article 64 of CCK when assessing the punishment. (p 25 of the District Court Judgment). According to the defense counsel, the erroneous legal qualification has led to an extraordinary high punishment against him.

The Supreme Court of Kosovo disagrees with the view of the defense counsel with regard to length of the sentence. This crime was particularly serious and therefore demanded a serious sentence. Taking into account the circumstances related to the case, the manner in which the crime was committed – *modus operandi* as well as the intensity of the social risk of the criminal offence, this court concludes that the imposed punishment is fair and lawful, i.e. in compliance with the purpose of punishment, as foreseen by the law.

Therefore the Supreme Court finds that the court of second instance has fully and correctly examined all relevant circumstances when increasing length of the punishment.

B. Substantial violation of the provisions of criminal procedure (Art 403 paragraph 1 item 12)/ Art 451 paragraph (1) item 2) of KCCP)

17. Defense counsel argues that the enacting clause of the judgment of the first instance court is in contradiction with the reasoning since the enacting clause states that Visar Ahmeti together with other defendants kidnapped the victim "*... pursuant to a prior agreement ..*" whereas in the reasoning there is stated that he "*...decided to join the co-perpetrators...*"

The Supreme Court assesses that this allegation is not grounded. No contradictions and/or discrepancies could be found in the enacting clause of the judgment or between enacting clause and the reasoning. Indeed, the court of first instance, in the reasoning of the challenged judgment presented the facts which were established and gave the clear and convincing reasons. It stands the fact that that the enacting clause of the judgment of the first instance court states that Visar Ahmeti together with other defendants kidnapped the victim "*...*"

pursuant to a prior agreement ..” whereas in the reasoning there is stated that he “*...decided to join the co-perpetrators...*”.

However, the Supreme Court of Kosovo notes that rather than being contradictory, the reasoning is complementary and explanatory to the enacting clause. The reasoning of the judgment does not contradict the enacting clause but rather provides further explanations just as it is required by the provisions of the criminal procedure. In reviewing this point the Supreme Court of Kosovo could not establish any substantial deficiency as regards to the enacting clause of the appealed judgments. The Supreme Court of Kosovo finds that in this case the enacting clauses of the challenged judgments are sufficiently clear while in the reasoning part, the court provided in depth reasons that drove the court to such a conclusion.

Therefore the Supreme Court of Kosovo finds that the reading of the judgment in its entirety shows that there is no discrepancy and/or inconsistency between the enacting clause and reasoning of the challenged judgments.

For this reasons, allegation of the defense counsel about the inconsistency of the judgments is ungrounded.

18. Defense counsel contends that the decisive facts were not presented in the reasoning of the judgment of the first instance court the way which is relevant when establishing the existence of the criminal offence and assessing the punishment. In the reasoning were the actions of the defendant described sometimes “*...offering to pick up Bekim Rashiti ..”* and sometimes “*...picked up Bekim Rashiti...*” which are two different type of actions.

The Supreme Court of Kosovo notes that defense counsel incorrectly makes reference to differences in the reasoning part of the challenged judgments. It is worth noting that the judgment is a uniform document consisted of parts which are required by the law and as such the judgment has to be read as one. The enacting clause and reasoning are organic and indivisible parts of a judgment and as such the judgment must be read in its entire context. A selective reading of judgment and extracting sentences out of general context makes an argument without merit. The Supreme Court of Kosovo finds that the judgments rendered in previous instances, subject of this request for protection of legality are free from legal error. The defense counsel refers to selective phrases and put them out of the context to make an argument. The Supreme Court of Kosovo finds the argument regarding inconsistency, ungrounded.

19. Defense counsel submits that there were considerable contradictions in the reasoning of the judgment of the first instance court also regarding the telephone conversations between Bekim Rashiti and Visar Ahmeti. These contradictions make the mentioned judgment unclear and incomprehensible. According to the defense counsel, the Supreme Court has admitted the existence of this contradiction but in spite of that concluded that “*...the indicated irregularities did not in any way mislead the first instance court in assessing the facts and ...”*. Consequently the need to modify the reasoning of the judgment of the first instance court demonstrates the

fact that the judgment is not clear regarding the decisive facts which should lead to quashing the judgment. The practice to make formal modifications is contrary to Article 403 paragraph 1 item 12 since this legal provision does not provide such an authorization.

In addressing this point the Supreme Court of Kosovo respectfully shares different view with that of the defense counsel. As matter of fact the Supreme Court of Kosovo in the second instance deciding on the appeal, acknowledged the fact that the first instance court had by mistake in an inaccurate manner misplaced the names of the defendants Bekim Rashiti and Visar Ahmeti. The documentation in the case file though leaves no doubts as who had called whom. Such telephone conversations between the defendant Bekim Rashiti and Visar Ahmeti was never disputed and never brought into question at any phase of the trial. This issue appears only after the first instance court by mistake misplaced the names in the judgment.

The inspection of the case file allows finding out that the defense counsels just as same as the trial panel had into possession sufficient material evidences that clarify this question. This is not a contested point since it can well be established in the documentary material of the case file. Consequently it does not carry that level of relevance that make the judgment unclear regarding decisive facts. The first instance court reference is rather an ordinary clerical-typing mistake which was properly rectified by the Supreme Court during the appellate procedure. It is not required by the law that an appellate court remands the case back for retrial due to clerical errors. In fact such a practice could not be justified; in contrary it would be conflicting with various procedural principles.

Therefore the Supreme Court of Kosovo considers this point as ungrounded.

C. Other violation of the provisions of criminal procedure (Art 396 paragraph 4 read with art 391 paragraph 1 item 1)/ Art 451 paragraph (1) item 3) of KCCP)

20. Defense counsel states in the request for protection of the legality that the enacting clause of the judgment of the first instance court does not provide the description of the facts and circumstances for each defendant separately which is necessary for evaluation of the existence of the criminal act, manner of collaboration and assessing the punishment. Supreme Court has violated article 427 paragraph 1 of KCCP too by neglecting this evaluation too. The Supreme Court did not evaluate the actions of each defendant individually but in general which violation has influenced the legality of the judgment.

The Supreme Court of Kosovo considers that the previous instance courts in the reasoning part had correctly and thoroughly provided in details descriptions of the facts, circumstances and contribution of each of the defendants to commission of the criminal act. They make an adequate reference to provisions of the criminal law, so clarifying what form of culpability was determined by court for each of the defendants.

Therefore the Supreme Court of Kosovo considers this point as ungrounded.

III. Conclusion of the Supreme Court of Kosovo

For the reasons above, the Supreme Court of Kosovo concludes:

The Requests for Protection of Legality filed by defense counsel Av Nike Lumezi on behalf of defendant Visar Ahmeti, against the Judgment of the District Court of Prishtine/ Prishtina P nr 570/07 dated 27 May 2009, and against judgment of the Supreme Court of Kosovo, Ap 282/09, dated 31 March, is unfounded.

In light of the above, the Supreme Court of Kosovo has decided as in the enacting clause of this judgment.


SUPREME COURT OF KOSOVO
PKL-KZZ 65/10, date 25 October 2011

Presiding judge:




Martti Harsia
EULEX Judge

Recording clerk:



Adnan Isuff
Legal Advisor

Members of the panel:



Salih Toplica
Supreme Court Judge




Marije Ademi
Supreme Court Judge



Erdogan Haxhibeqiri
Supreme Court Judge





Anne Kerber
EULEX Judge

Legal Remedy: No request for protection of legality may be filed against a decision of the Supreme Court of Kosovo in which a request for protection of legality was decided upon (Article 451 paragraph (2) of KCCP).