Supreme Court of Kosovo
23rd August 2011
Pkl-Zz 91/10

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Lars Dahlstedt as Presiding Judge and EULEX judge Francesco Florit, Supreme Court Judges Marije Ademi, Emine Mustafa and Gyltene Sylejmani as panel members, assisted by Legal Officer Chiara Rojek as recording clerk,

In the case against the Defendant Predrag Đorđević, nickname Đorđe, father's name Ljubodrag Đorđević, mother's maiden name Slavica Vuković, born on 10 April 1980 in Zemun, Republic of Serbia, of Serbian citizenship, last known residence at Skržuti village, Municipality of Užice, Republic of Serbia, single, education three (3) years of vocational school, unemployed,

Convicted in first instance by judgment P. No. 134/08 of the District Court of Mitrovica/ë dated 19th November 2009, for the criminal offences of Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance contrary to Article 115 Paragraph 1 of the Criminal code of Kosovo (CCK) (Count A), and Attempted Aggravated Murder contrary to Article 147 Item 10 of the CCK in conjunction with Article 20 Paragraph 1 of the CCK (Count B), and sentenced to an aggregated punishment of six (6) years and three (3) months pursuant to Article 71 Paragraphs 1 and 2 Item 2 of the CCK,

Further sentenced in second instance to twelve (12) years imprisonment for Count B and to an aggregated punishment of twelve (12) years and three (3) months of imprisonment by judgment Ap - Kž. No. 24/2010 of the Supreme Court of Kosovo dated 4th May 2010,

Acting upon the Request for Protection of Legality filed by Defence counsels Ljubomir Pantović and Miodrag Brkljač on the behalf of the Defendant Predrag Đorđević filed on 1st September 2010 against the second instance judgment Ap – Kž. No. 24/2010 of the Supreme Court of Kosovo dated 4th May 2010, and the Reply of the Office of the State Prosecutor of Kosovo (OSPK) to the Defendant's Request for Protection of Legality filed on 9th February 2011,

After having deliberated on 12th and 19th July and on 23rd August 2011, pursuant to Articles 454 Paragraph 1 and 456 of the Kosovo Code of Criminal Procedure (KCCP), issues the following

JUDGMENT

1. The Request for Protection of Legality filed by Defence counsels Ljubomir Pantović and Miodrag Brkljač on the behalf of the Defendant Predrag Đorđević on 1st September 2010 is timely filed pursuant to Article 452 Paragraph 1 of the KCCP.

2. The mentioned Request for Protection of Legality is hereby **REJECTED.**

REASONING

I. Procedural history

On 12th December 2008, an indictment was filed against Predrag Đorđević for the criminal offences of Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance contrary to Article 115 Paragraph 3 read with Paragraph 1 of the Provisional Criminal code of Kosovo (PCCK) and Commission of Terrorism contrary to Article 109 paragraph 1 Items 1, 7 and 10 of the PCCK.

The case was taken over by the Special Prosecution Office of the Republic of Kosovo (SPRK) on 16th April 2009. On 2nd July 2009, the SPRK filed an amended indictment charging the Defendant also with the criminal offence of Attempted Aggravated Murder, and confirmed by the District Court of Mitrovica/ë with Ruling dated 6th July 2009.

The main trial was held between 27th July and 19th November 2009. The charge of Commission of Terrorism was rejected pursuant to Article 389 Item 1 of the KCCP. On 19th November 2009, the District Court of Mitrovica/ë found the Defendant guilty of the criminal offences of Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance contrary to Article 115 Paragraph 1 of the CCK, and Attempted Aggravated Murder contrary to Article 147 Item 10 of the CCK in conjunction with Article 20 Paragraph 1 of the CCK. Single sentences of six (6) months for the criminal offence of Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance and six (6) years for the criminal offence of Attempted Aggravated Murder were imposed to the Defendant. The Court, taking into account mitigating circumstances outweigh the aggravating circumstances and, based upon Articles 66 and 67 of the CCK, imposed a lesser punishment than the minimum prescribed by law onto the Defendant of six (6) years and three (3) months pursuant to Article 71 Paragraphs 1 and 2 Item 2 of the CCK. On the same day the District Court of Mitrovica/ë issued a ruling imposing detention on remand of the Defendant until the judgment becomes final.

On 11th January 2010 Defence Counsels Ljubomir Pantović and Miodrag Brkljač, on behalf of Predrag Đorđević, filed an appeal against the judgment. On 27th January 2010 Enver Pllana and Arjete Xhosha as Injured Parties filed an appeal against the judgment. The OSPK filed an opinion on both appeals against the impugned judgment with the Supreme Court on 30th March 2010.

On 4th May 2010, the Supreme Court of Kosovo, by judgment AP-Kž. No. 24/2010, rejected the appeal filed by Defence counsels Ljubomir Pantović and Miodrag Brkljač for the Defendant and dismissed the appeal filed by the Injured Party Arjeta Xhosha. The Court granted the appeal of the Injured Party Enver Pllana and partially modified the first instance judgment by sentencing the Accused to twelve (12) years of imprisonment as for Count B, thus to an aggregated sentence of twelve (12) years and three (3) months.

The Defence counsels filed a Request for Protection of Legality on the behalf of Predrag Đorđević on 1st September 2010. On 9th February 2011, the OSPK filed a Reply to the Defendant's Request for Protection of Legality. On 7th July 2011, the Defence counsels filed with the Supreme Court an additional submission. It was transmitted to the OSPK on the same day.

II. Issues raised in the Request for Protection of Legality and the Reply

The Defence counsels claim that the second instance judgment of the Supreme Court dated 4th May 2010 contains:

- Substantial violation of the provisions of the criminal procedure provided for in Article 403 Paragraph 2 of the KCCP as read with Article 400 Paragraphs 1, 2 and 4 and Article 404 Item 5 of the KCCP;
- Substantial violation of the provisions of the criminal procedure provided for in Article 403 Paragraph 1 Item 12 of the KCCP; and
- Violation of the criminal law.

Therefore they propose that the second instance judgment be amended by applying Article 457 Paragraph 1 Item 1 KCCP and that the appeal of the Injured Party Enver Pllana be declared inadmissible, or alternatively that the Supreme Court annuls the impugned verdict and returns the case back to the second instance.

1. Substantial violation of the provisions of the criminal procedure provided for in Article 403 Paragraph 2 Item 1 of the KCCP as read with Article 400 Paragraphs 1, 2 and 4 and Article 404, Item 5 of the KCCP

The Defence counsels allege a substantial violation of the provisions of the criminal procedure provided for in Article 403 Paragraph 2 Item 1 of the KCCP as read with Article 400 Paragraphs 1, 2 and 4 of the KCCP and with Article 3 Paragraph 2 of the CCK. On this matter the Defence counsels raise two issues: whether the Injured Party is obliged to announce an appeal; and what are the consequences if the Injured Party failed to do so.

In the Defence's view, it was the intent of the law makers to introduce order and legal certainty by imposing an obligation to announce an appeal and thus the paragraphs of Article 400 of the CCK are of imperative character and unambiguous. As for the limitations mentioned in Paragraphs 3 and 4, the Defence counsels claim them to be of pure technical character.

Further the reasoning in the challenged judgment is fully unacceptable and arbitrary because the second instance Court considered that the failure of the Injured Party to announce the appeal does not render the legal remedy inadmissible. Paragraph 4 of Article 400 of the KCCP would apply in the instance and therefore an appeal had not to be announced. This interpretation of the legal provisions by the appeal panel is detrimental to the accused. Further Paragraph 4 "does not resolve the issue of announcing

an appeal and the issue of the legal ramifications if the person, entitled to appeal, does not do so."

The Defence counsels claim that the second instance Court has violated the provisions of the criminal procedure as foreseen in Article 403 Paragraph 2 Item 1 read with Article 3 Paragraph 2 of the CCK on the principle *In dubio pro reo.*

Moreover, the second instance Court omitted to apply the provisions of Article 417 of the KCCP (*Reformation in peius*) and thus committed a violation of the criminal procedure under Article 403 Paragraph 2 Item 1 as read with Article 417 of the KCCP.

The Defence counsels finally allege that the second instance Court violated the provisions of the Code as the appeal of the Injured Party should have been dismissed under Article 407 Paragraph 2 of the KCCP.

2. Substantial violation of the provisions of the criminal procedure provided for in Article 403 Paragraph 1 Item 12 of the KCCP

The Defence counsels claim that the judgment does not contain the reasons of the respective facts and the reasoning is "totally slack, and thus, unclear and unintelligible" in regard to the application of Article 400 of the KCCP.

3. Violation of the criminal law as to the sentencing contrary to Article 404 Item 5 of the KCCP

The Defence counsels contend that the second instance Court committed a violation of the criminal law as it exceeded its authority under the law by admitting the appeal of the Injured Party and sentencing the Defendant to a more lengthy punishment.

Finally the Defence counsels filed a Supplement to the Request for Protection of Legality on 7th July 2011. The Defence counsels referred to the case Radivoje Virijević (Ap-Kž. No. 238/2010) of the Supreme Court of Kosovo. In the mentioned case, on 28th June 2011, the Supreme Court took the stand that the appeal of the Injured Party was not admissible because it has not been previously announced.

4. Reply to the Defendant's Request for Protection of Legality

In its Reply, the OSPK proposes the Supreme Court to reject the Defendant's Request for Protection of Legality.

The OSPK concur with the second instance verdict regarding the combined reading of Article 400 Paragraphs 1, 2 and 4 of the KCCP. It submits that no announcement has to be made in case of imprisonment and that Paragraph 4 of Article 400, through paragraph 2, provides an exception to the time limit under paragraph 1 of this Article.

Furthermore the OSPK claims that as no announcement of the appeal was necessary in

this case, there was no violation of Article 3 Paragraph 2 of the CCK. Further the principle *Reformation in Pieus* is not applicable in the instance since the appeal of the Injured Party was filed to the detriment of the Defendant.

The OSPK claims that the enacting clause of the second instance judgment is clear and consistent with the grounds of the judgment.

In the OSPK's view, the second instance Court was in a position to increase the imposed punishment without exceeding its authority as the appeal filed by the Injured Party was admissible.

Finally the OSPK addresses the issue of the sentencing. After having considered the second instance judgment, the OSPK believes that the mitigating circumstances of the case do not meet the requirements of Article 66 Paragraph 2 of the CCK to impose a punishment below the limits provided for by the law.

III. Findings of the Supreme Court of Kosovo

1. Competence of the Supreme Court of Kosovo and Admissibility of the Request for Protection of Legality

The Supreme Court of Kosovo is competent to decide on the Request of Protection of Legality pursuant to Articles 454 and 26 Paragraph 3 of the KCCP. The Supreme Court panel has been constituted in accordance with Article 3 Paragraph 7 of the Law No. 03/L-53 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo.

The Request for Protection of Legality is admissible. The Request was timely filed with the competent Court pursuant to Articles 452 Paragraph 3 and 453 of the KCCP.

2. Proceeding before the Supreme Court of Kosovo

The Supreme Court of Kosovo decided on the Request for Protection of Legality in a session as foreseen in Article 454 Paragraph 1 of the KCCP. The Supreme Court panel held deliberations on 12th and 19th July and on 23rd August 2011. The parties have not been notified of the sessions.

3. Merits of the Request for Protection of Legality

Substantial violation of the provisions of the criminal procedure provided for in Article 403 Paragraph 2 Item 1 of the KCCP as read with Article 400 Paragraphs 1, 2 and 4 and Article 404 Item 5 of the KCCP

The Defence counsels stress that Article 400 of the KCCP related to the announcement of an appeal within eight (8) days, is a provision of mandatory character and the limitations

mentioned in Paragraphs 3 and 4 are of pure technical character. Thus the second instance Court has violated the provisions of the criminal procedure, namely Article 403 Paragraph 2 Item 1 of the KCCP read with Article 3 Paragraph 2 of the CCK. The Appeal Court also omitted to apply the provisions of Article 417 of the KCCP. Consequently the appeal of the Injured Party should have been dismissed pursuant to Article 407 Paragraph 2 KCCP.

The OSPK claim that no announcement has to be made in case of imprisonment and that Paragraph 4 of Article 400 is an exception to the time limit under Paragraph 1.

The rules applicable to the procedure in appeal prescribe that the persons entitled to appeal have to announce their appeal. The wording of Paragraph 1 of Article 400 KCCP makes the announcement of an appeal of mandatory nature, as rightly pointed out by the Defence counsel. Further a deadline of "no later than eight days after the date of the announcement of the judgment" is provided. The intent of the law maker was to ensure a relative certainty and economy of the criminal proceeding in certain instances.

The Supreme Court concedes that the requirement to announce an appeal seems a bit unusual compared to other judicial systems. The persons entitled to appeal have to announce the appeal against a judgment that has been neither issued nor served yet. Under Paragraph 2 the failure to announce an appeal is considered as the person deemed to have waived the right to appeal. One exception is to be found in Paragraph 4: even in case of failure to announce an appeal, the written judgment shall nevertheless contain a statement of the grounds and the transcription of the audio-record of the main trial be made.

The Supreme Court notes that during the first instance proceeding, after the announcement of the verdict the Presiding judge clearly instructed the parties of the obligation to announce the appeal within 8 days from the pronouncement of this verdict.[1] The Injured Parties attended the court session. The Defence counsel Ljubomir Pantović announced his appeal in writing on 26 November 2009.

In the judgment dated 4th May 2010, the Appeal Court found the appeal of the Injured Party to be admissible, though not announced within the time limit provided by law. The Appeal panel considered that "Article 400 Paragraph 2 of the KCCP states that if a person entitled to appeal fails to announce an appeal, he or she shall be deemed to have waived the right to appeal, except in instances from Paragraph 4 of Article 400. Paragraph 4 of this provision refers to cases in which the accused has been punished by imprisonment." The second instance Court concluded that given the accused has been sentenced to six (6) years and three (3) months imprisonment, Paragraph 4 of Article 400 of the KCCP applied with the consequence that an appeal had not to be announced. [2]

In their Request, the Defence counsels refer to the case Radivoje Virijević (Ap-Kž. No. 238/2010) of the Supreme Court of Kosovo dated 28th June 2011, in which the Supreme

[1] District Court of Mitrovica/ë, Minutes of main trial P. No. 134 08 dated 19th November 2009, page 4.
[2] Supreme Court of Kosovo, Judgment Ap – Kž. No. 21/2010, 4th May 2010, page 6, English version.

Court dismissed the appeal of the Injured Party as it was not announced. In this case, the panel concludes that the exception of Article 400 Paragraph 4 of the KCCP is only applicable to the Defendant and hence the Injured Party deemed to have waived its right to appeal under Paragraph 2 of this provision.

This panel admits that the provisions of Article 400 of the KCCP may be subject to clarification. Confusion is further disturbing since discrepancies exist between the English and Albanian versions of Article 400. While Paragraph 4, in its English version, states "[i]f the accused has been punished by imprisonment and no appeal has been announced", the Albanian version reads "and the Accused does not announces the appeal".[3]

The Supreme Court holds that the authentic version of the Code, the English one, shall prevail. This version does not specify which person is entitled to announce. This lack of specification of the law should be interpreted in the manner as to ensure the fair treatment of the parties to the proceeding. Despite the misleading writing and the incongruity of the translation, Paragraph 4 is to be applied as a general exception to the obligation to announce an appeal to the benefit of all persons entitled to appeal, not only to the Defendant. If the Accused is sentenced to imprisonment, there is no need to announce the appeal and such failure to announce the appeal does not exclude the possibility to file an appeal. Such appeal filed by a person entitled to appeal should be declared admissible unless provided otherwise by law. The application of Paragraph 2 on the waiver of the right to appeal is thus negated by Paragraph 4 of the KCCP, as clearly mentioned in the law. This interpretation is substantiated by a constant jurisprudence of the Supreme Court of Kosovo.[4] The Defence wrongly contends that there is no connection between Paragraphs 1 and 2 and Paragraphs 3 and 4 of Article 400.

In the case at hand, the Defendant has been sentenced to imprisonment and the Injured party has not announced the appeal. The exception provided in Paragraph 4 of Article 400 of the KCCP was applicable in the instance. Therefore the second instance Court has correctly declared the appeal of the Injured party admissible.

To the submission of the Defence regarding the application of the principle *In dubio pro reo* to the instance, the Supreme Court panel wishes to clarify that Article 3 Paragraph 2 of the KCCP is only applicable in case of doubts regarding the existence of facts relevant to the case or regarding the implementation of a certain criminal law provision. That is not the case in question as it relates to the interpretation of the procedural law.

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[3] Article 400 Paragraph 4 of the KCCP, Albanian version: "(4) Kur i akuzuari dënohet me burgim dhe nuk paralajmëron ankesë, aktgjykimi i shkruar duhet të përfshijë arsyetimin dhe duhet bërë transkribimin e audioincizimit."

[4] See *inter alia* Supreme Court of Kosovo, Ruling Ap. No. 3/2011, 13th July 2011: in this case the appeal panel rejected the appeal of the Public Prosecutor as inadmissible pursuant to Article 422 of the KCCP because according to Article 400 paragraph 1 of the KCCP, persons entitled to appeal shall be obliged to announce an appeal. In the case in question the District Public Prosecutor did not announce an appeal and Article 400 paragraph 4 of the KCCP is not applicable as a suspended sentence was imposed; see also Supreme Court of Kosovo, Ruling Ap. No. 9/2010, 8th July 2011.

The Supreme Court of Kosovo finds no violation of Article 403 Paragraph 2 Item 1 read with Article 400 Paragraphs 1, 2 and 4 of the KCCP. Consequently, the Supreme Court needs not to decide upon the additional submissions of the Defence in respect to the alleged violations of Article 403 Paragraph 2 Item 1 read in conjunction with Article 417 of the KCCP (*Reformation in peius*) and Article 407 Paragraph 2 of the KCCP.

Substantial violation of the provisions of the criminal procedure provided for in Article 403 Paragraph 1 Item 12 of the KCCP

The Defence counsels claim that "the verdict does not even contain the reasons of the respective facts" and that the reasoning lacks of clarity. The OSPK claims that the enacting clause of the second instance judgment is clear and consistent with the grounds of the judgment.

In this regard the Supreme Court does not find any lack of reasoning or clarity in the enacting clause or in the core of the challenged judgment. The verdict contains a part related to the Findings of the Supreme Court that comprises a clear and understandable reasoning on each ground of appeal. The Supreme Court thus finds this argument ungrounded.

Violation of the criminal law as to the sentencing contrary to Article 404 Item 5 of the KCCP

The Defence counsels allege that the Supreme Court committed a violation of the criminal law as it admitted the appeal of the Injured Party, and, upon deciding on this appeal, sentenced the Defendant to a harsher punishment.

The OSPK reply that the second instance Court was in a position to increase the imposed punishment without exceeding its authority since the appeal filed by the Injured Party was admissible. The OSPK also claim that the mitigating circumstances of the case do not meet the requirements of Article 66 Paragraph 2 of the CCK to impose a punishment below the limits provided for by the law.

As regard to the sentencing, the second instance Court found that the first instance sentence imposed to the Defendant for the criminal offence of Attempted Aggravated Murder (count B) was too lenient. The appeal panel took into account all aggravating (the fact that the bullet is still inside the body of the victim and is unlikely to be removed) and mitigating (particular weight to the mental state of the accused; no previous criminal record of the Accused) circumstances as listed in the verdict. In the appeal panel's view, "not even the combination of these three factors is so extraordinary that the requirements of Article 66 Paragraph 2 of the KCCP would be met". The second instance Court determined the punishment from a possible minimum sentence of ten (10) years up to thirty (30) years of imprisonment, in accordance with Article 65 Paragraph 2 of the KCCP. The Appeal Court thus imposed a sentence of twelve (12) years of imprisonment as for Count B.

The Appeal Court proceeded to an assessment of the circumstances of the case and exercised a judicial review of the first instance decision on sentencing. The second instance concluded that the provisions of Articles 66 and 67 were not applicable in the instance. The Appeal panel did not exceed its authority by applying the range of possible punishment deriving from Article 147 of the PCCK as mitigated in accordance with Article 65 Paragraph 2 of the KCCP.

It has therefore been decided as in the enacting clause.

Presiding judge
Lars Dahlstedt
EULEX Judge

Members of the panel

Marije Ademi
Supreme Court Judge

Francesco Florit
EULEX Judge

Emine Mustafa
Supreme Court Judge

Gyltene Sylejmani
Supreme Court Judge