

SUPREME COURT OF KOSOVO**PPL – KZZ 12/08****19 March 2009**

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Norbert Koster as Presiding Judge, with EULEX Judges Guy Van Craen and Emilio Gatti as members of the panel, and in the presence of Mircea Cristian Nicoara as recording clerk, in the criminal case K.A. No. 33/05 of the Municipal Court of Pejë/Peć against the defendants **Gani Kelmendi** and **Florim Zekaj**,

both defendants convicted for having committed the criminal act of extortion (Article 267 Paragraph 1 as read with Article 23 of the Provisional Criminal Code of Kosovo – hereinafter referred to as PCCK) and defendant Florim Zekaj also convicted for having committed the criminal act of attempted obstruction of evidence (Article 309 Paragraph 1 as read with Article 20 Paragraph 1 of the PCCK),

acting upon the Requests for the Protection of Legality filed by defence counsels Orhan Basha and Zivojin Jokanovic on behalf of defendant Gani Kelmendi and by defence counsel Adem Gorani on behalf of defendant Florim Zekaj, all three requests directed against the Verdict issued by the District Court of Pejë/Peć on 10 October 2007 (Ap. No. 62/2007),

issues the following:

JUDGMENT

The Requests for Protection of Legality dated 19 November, 26 November and 11 December 2007 against the Verdict issued by the District Court of Pejë/Peć on 10 October 2007 (Ap. No. 62/2007) are **rejected as unfounded**.

REASONING

I. Procedural Background

Gani Kelmendi was a judge at the Municipal Court in Istog/Istok. He was in charge with the execution of judgments. One of his cases was the execution of the judgment issued by the Municipal Court in Istog/Istok on 15 April 2002, by which the debtor Arif Haskaj was obliged to pay 23.000 Euro to the creditor Ismet Blakaj. In the course of the execution proceedings suspicion arose that Gani Kelmendi together with Florim Zekaj threatened Ismet Blakaj with the postponement of the execution if Ismet Blakaj refused to pay 1.000 EUR to Gani Kelmendi.

An investigation was initiated against Gani Kelmendi and Florim Zekaj, and on 14 January 2005, pursuant to Section 1.3 of UNMIK Regulation 2000/6, as amended by UNMIK Regulations 2000/34 and 2001/2, which authorizes international prosecutors to select and take responsibility for new and pending criminal investigations and proceedings, the International Prosecutor for the District of Pejë/Peć selected for investigation and prosecution the case against the defendants.

On 25 March 2005, after an investigative process, the International Prosecutor in Pejë/Peć filed an indictment with the District Court in Pejë/Peć against both defendants.

On 5 May 2005, acting upon a request of the Municipal Court in Istog/Istok, the District Court of Pejë/Peć designated the Municipal Court in Pejë/Peć as the court with subject matter jurisdiction in this case.

On 27 July 2005 the Municipal Court in Pejë/Peć held a confirmation hearing. Present were Confirmation Judge Sejdi Blakaj, Municipal Prosecutor Gezim Baloku and both defendants. After a short session Confirmation Judge Blakaj rejected the indictment against defendant Gani Kelmendi and confirmed the indictment against defendant Florim Zekaj.

The Office of the International Prosecutor in Pejë/Peć (or elsewhere) was neither informed of nor summoned to the confirmation hearing held on 27 July 2005. Further, the 27 July 2005 decision by Confirmation Judge Blakaj to reject the charges against defendant Gani Kelmendi was not delivered to the Office of the International Prosecutor in Pejë/Peć.

On 8 August 2005 an International Prosecutor filed an appeal against the Ruling that rejected the indictment against defendant Gani Kelmendi.

On 22 August 2005, pursuant to the decision by the Special Representative of the Secretary-General of the United Nations of 12 August 2005, the Director of the Department of Justice designated three (3) International Judges to serve on the Municipal Court of Pejë/Peć panel to decide upon the appeal of the International Prosecutor.

On 26 August 2005, the three-judge panel annulled the Ruling of the Municipal Court Pejë/Peć, PP Nr. 20/05, dated 27 July 2005, that had rejected the indictment against

defendant Gani Kelmendi. The panel returned the case for reconsideration and ordered that a new confirmation hearing be scheduled.

On 7 October 2005, defendant Gani Kelmendi filed the Request for Protection of Legality against the Ruling of the Municipal Court in Pejë/Peć KA. Nr. 33/05, dated 26 August 2005.

On 3 October 2005, the Municipal Court in Pejë/Peć held the new confirmation hearing, in public, before an International Judge. The indictment against both defendants was confirmed on 14 October 2005.

On 29 November 2005, the Supreme Court of Kosovo rejected the request for protection of legality, filed by defendant Gani Kelmendi.

With Verdict of the Municipal Court of Pejë/Peć, dated 24 March 2006, both defendants were found guilty of having committed the criminal act of extortion (Article 267 Paragraph 1 as read with Article 23 of the PCCK). Defendant Florim Zekaj was also convicted for having committed the criminal act of attempted obstruction of evidence (Article 309 Paragraph 1 as read with Article 20 Paragraph 1 of the PCCK). Both defendants were sentenced to three (3) years of imprisonment. In addition defendant Gani Kelmendi was debarred from exercising his profession as a judge for a period of five (5) years, after having served his full sentence.

Both defendants appealed the Verdict. The District Court of Pejë/Peć with Verdict, dated 10 October 2007, rejected the appeals and affirmed the Verdict of the court of first instance.

The Verdict of District Court of Pejë/Peć, dated 10 October 2007, was served on the defendants and their defence counsels on 17 October 2007.

On 22 November 2007, defence counsel Orhan Basha on behalf of defendant Gani Kelmendi filed with the Municipal Court of Pejë/Peć a request for protection of legality, dated 19 November 2007, against the Verdict of the District Court of Pejë/Peć.

On 26 November 2007, defence counsel Zivojin Jokanovic on behalf of defendant Gani Kelmendi filed with the Municipal Court of Pejë/Peć a request for protection of legality, dated 26 November 2007, against the said Verdict.

On 11 December 2007, defence counsel Adem Gorani on behalf of defendant Florim Zekaj filed with the Municipal Court of Pejë/Peć a request for protection of legality, dated 11 December 2007, against the said Verdict.

The requests were forwarded to the Supreme Court of Kosovo on 13 February 2008. The case was sent to the OPPK which submitted its opinion, dated 16 January 2009, on 20 January 2009.

Appeal Issues raised in the Request for Protection of Legality by defence counsel Orhan Basha

The Request for Protection of Legality filed by defence counsel Orhan Basha alleges a violation of criminal law, an essential violation of the Law on Criminal Procedure and other violations of the criminal procedure law.

He contends:

1. That both the Municipal Court of Pejë/Peć and the District Court of Pejë/Peć failed to establish that the act for which defendant Gani Kelmendi was convicted was a criminal act. Counsel Basha asserts that defendant Gani Kelmendi had not delayed the execution of the civil judgment which to date has not been executed. In addition he had not used force. In this context defence counsel Basha complains about an alleged lack of reasoning in the Verdict. Furthermore he claims that the criminal offence could only have been qualified as attempt of extortion.
2. That the Verdict was based on inadmissible evidence. The interception and recording inside and outside a coffee shop on 15 January 2005 were obtained through an illegal order. There had not been grounded suspicion that defendant Gani Kelmendi had committed a criminal act which was punishable with at least four years imprisonment.
3. That the enacting clause of the Verdict of first instance is incomprehensible and that the Verdict lacks a reasoning concerning the decisive facts.
4. That the proceedings had been completed with the decision of the Municipal Court of Pejë/Peć, dated 27 August 2005, rejecting the indictment.

In conclusion, defence counsel Orhan Basha requests the Supreme Court of Kosovo to alter the final Verdict and to acquit defendant Gani Kelmendi or to annul the Verdict and send the case back for retrial.

Appeal Issues raised in the Request for Protection of Legality by defence counsel Zivojin Jokanovic

The Request for Protection of Legality filed by defence counsel Zivojin Jokanovic alleges violations of criminal law, essential violations of the Law on Criminal Procedure and other violations of the criminal procedure law.

He contends:

1. That defendant Gani Kelmendi did not commit the criminal offence of extortion because it is not possible to use force or threat in an indirect manner.
2. That defendant Gani Kelmendi was found guilty with the completed act of extortion, although the Public Prosecutor had amended the charges and re-qualified the act as a mere attempt of extortion.
3. That the Verdict was based on inadmissible evidence, because defendant Gani Kelmendi was found guilty of a criminal offence which did not allow cover measures.
4. That the proceedings continued although the indictment had been dismissed by a final decision of the Confirmation Judge.

In conclusion, defence counsel Zivojin Jokanovic requests the Supreme Court of Kosovo to alter the final Verdict and to acquit defendant Gani Kelmend or to annul the Verdict and send the case back for retrial.

Appeal Issues raised in the Request for Protection of Legality by defence counsel Adem Gorani

The Request for Protection of Legality filed by defence counsel Adem Gorani alleges violations of criminal law, essential violations of the Law on Criminal Procedure and other violations of the criminal procedure law. His request in almost its entirety reflects the request filed by defence counsel Orhan Basha. Hence reference is made to the request file by counsel Orhan Basha in order to avoid mere repetitions.

Noteworthy are only the following additional allegations:

1. That defendant Florim Zekaj did not commit the criminal offence of extortion because he neither used threat nor force. On the contrary his intention was to help Ismet Blakaj.
2. That the attempt of obstruction of evidence does not exist, because according to "Article 20 Paragraph 2" (counsel fails to mention which law he refers to) the minimum sentence foreseen by the law has to be three (3) years.

In conclusion, defence counsel Adem Gorani requests the Supreme Court of Kosovo to alter the final Verdict and to acquit defendant Gani Kelmend or to annul the Verdict and send the case back for retrial.

Opinion of the Office of The Public Prosecutor of Kosovo (OPPK), dated 16 January 2009

The OPPK, specifically referring to the requests filed on behalf of defendant Gani Kelmendi, opines that the requests for the Protection of Legality are unfounded on the basis that the issues raised in the requests are primarily the same as those which were raised during the main trial. The arguments submitted by the defence counsels had previously been considered and rejected. Persuasive legal authorities that would result in changes to previously established findings are not presented.

II. Supreme Court Findings

1.

The requests for protection of legality are admissible.

All three (3) requests were filed with the competent court pursuant to Article 453 Paragraph 1 of the Kosovo Code of Criminal Procedure (KCCP) and within the deadline of Article 452 Paragraph 3 of the KCCP.

2.

The Supreme Court panel has decided in a session, as prescribed by Article 454 Paragraph 1 of the KCCP. The parties' notification of this session, as requested by defence counsel Zivojin Jokanovic, was not required. The provisions of Article 451 through 460 of the KCCP do not contain a rule which would oblige the Supreme Court to notify the parties. The panel underlines that no reference to Article 410 Paragraph 1 of the KCCP is made by the law concerning requests for protection of legality. In addition pursuant to Article 455 of the KCCP the Supreme Court of Kosovo is in its assessment confined by the arguments raised by the requesting parties in their requests.

The panel did not have to decide if in extraordinary cases the parties might have the

right to be present although the law does not provide for such presence. The case in question is anything but extraordinary. The reasons submitted by the defence counsels are entirely the same which had been presented and discussed at length during the two (2) instances of the main trial. It is obvious that there is no need for further oral discussion and hence no need to assess whether and under which conditions an extraordinary right of the parties to be present in the session of the panel might exist.

3.

The requests for protection of legality are unfounded.

a. Alleged violations of criminal law

The submitted argument the courts of first and second instance had failed to establish the facts, for which the defendants were convicted, as criminal offences is not understandable.

The legal questions are addressed in both verdicts in an exhaustive and convincing manner. The allegations of the defence counsels that these court findings are in contradiction with the evidence are at this stage not admissible pursuant to Article 451 Paragraph 2 of the KCCP.

The assertion that the announced delay in the execution of the judgment cannot be considered as a threat is not valid. Ismet Blakaj was dependant on defendant Gani Kelmendi's work on the execution of the civil judgment. In this situation the announced delay of the execution was an abuse of office with the - successful - intention to trigger Blakaj's fear not to get the money he was entitled to. This is clearly and without any question a serious threat. In this context the assertion that the execution of the civil judgment was not concluded even two and a half years after defendant Kelmendi had been removed from office is based on an erroneous understanding of the law. Notwithstanding the question why the successful execution of the civil judgment had not been possible it is not required by the law that the perpetrator is able to realize the threat. It only matters that the perpetrator makes the victim believe that he has the power to make the threat come true.

The further assertion that threat cannot be exercised in an indirect way fails to notice that the law does not require a direct threat.

Furthermore the District Court of Pejë/Peć elaborated extensively on the legal finding that the defendants committed the completed offence of extortion and not just an attempt (see 5.3.4. of the Verdict). The reasoning of the District Court is correct and does not constitute a violation of the criminal law.

The assertion of defence counsel Orhan Basha, the District Court had to this regard exceeded the indictment, is based on facts which do not respect the real events. Unlike

the description of procedural events, as submitted by counsels Basha and Jokanovic, the indictment had not been amended accordingly during the second instance. In response to the appeals against the first instance Verdict the International Prosecutor with her submission, dated 29 August 2007, had expressed only her opinion that the criminal offence of extortion had not been completed by the defendants. This opinion, however, did not have any binding character for the Court of second instance.

b. Alleged violations of criminal procedure law

As to the allegation that the conviction of the defendants had been based on inadmissible evidence, the District Court in its Verdict elaborated extensively and exhaustively on the subject matter. The legal findings of the District Court panel are correct and do not allow any allegation of a violation of the procedure law. In this context it has to be stressed that the allegation of defence counsel Orhan Bashsa, the Court of second instance had refused to rule on the admissibility of evidence, is simply wrong. The Court of second instance elaborated under 5.2.1. over two (2) pages (English version) on the admissibility of evidence. Hence the "professional review" counsel Basha believes he has to insist upon had been made indeed, what is easily detectable from the Verdict of the Court of second instance itself.

The question whether the proceedings against Gani Kelmendi had come to an end after the indictment against him had been dismissed by a local judge, cannot be raised again. This question was subject of the request for protection of legality, filed by defendant Gani Kelmendi on 7 October 2005. The Supreme Court of Kosovo rejected this request with decision, dated 29 November 2005. Hence the matter is settled and cannot be subject of another request for protection of legality (see Article 451 Paragraph 2 of the KCCP).

The allegation of counsel Gorani that the attempt of obstruction of evidence is not a criminal offence is without merits. Pursuant to Article 20 Paragraph 2 of the Criminal Code of Kosovo (CCK) an attempt to commit a criminal offence shall be punishable if the criminal offence is punishable by at least three years. Pursuant to Article 309 Paragraph 1 of the CCK obstruction of evidence shall be punished by imprisonment of six (6) months to five (5) years.

Finally the panel points out that the general allegation the Verdicts of first and second instance would not give sufficient reasoning is not understandable. In particular the Verdict of the Court of second instance elaborates meticulously and exhaustively on each single matter of the procedure and the substantive law.

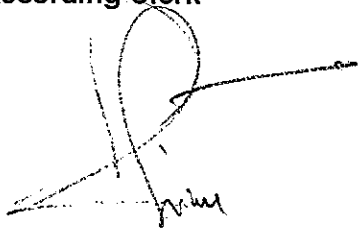
III. Conclusion of the Supreme Court of Kosovo

For the above-mentioned reasons, the Supreme Court of Kosovo concludes that the Requests for Protection of Legality are unfounded and, therefore, rejected.

Based on Article 456 of the KCCP the Supreme Court of Kosovo decides as in the enacting clause.

SUPREME COURT OF KOSOVO IN PRISHTINË/PRIŠTINA
PPL - Kzz 12/2008, 19 MARCH 2009

Recording Clerk



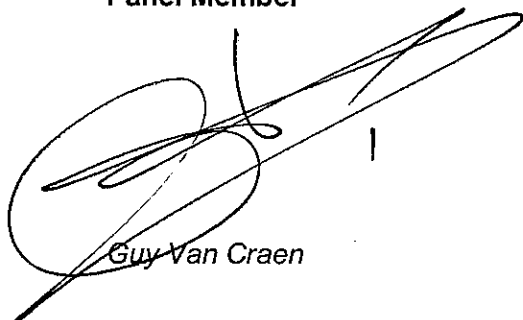
Mircea Cristian Nicoara

Presiding Judge



Norbert Koster

Panel Member



Guy Van Craen

Panel Member

Emilio Gatti

