

Supreme Court of Kosovo
Ap.-Kž. No. 394/2007
2 July 2009
Prishtinë/Priština

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel constituted in compliance with Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (“KCCP”), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (“Law on Jurisdiction”), and composed of:

- Guy Van Craen, EULEX Judge, presiding and reporting judge,
- Maria Giuliana Civinini, EULEX Judge, panel member,
- Salih Mekaj, Supreme Court Judges, panel member,
- Miftar Jasiqi, Supreme Court Judges, panel member and
- Fejzullah Hasani, Supreme Court Judges, panel member;

Assisted by Judit Eva Tatrai, EULEX Legal Officer, as recording officer, Robert Abercrombie, EULEX court recorder, Leken Nimani, Vegim Rugova, Naser Syla and Mentor Osmani, EULEX Interpreters;

In the presence of the Public Prosecutors, Anette Milk EULEX Prosecutor, Besim Kelmendi Public Prosecutor, the defendants Nexhmedin Gashi and Hajrë Gashi, the Defence Counsels Naser Peci for the Nexhmedin Gashi and Destan Rukiqi for Hajrë Gashi;

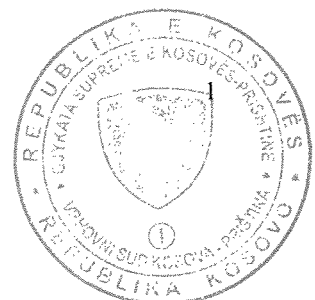
In the session held on 30 June 2009, following the deliberation of the panel concluded on 30 June and 2 July 2009;

In the criminal case against:

Nexhmedin Gashi: nickname Nexh, Kosovar Albanian, born on 24 March 1971 in Vërboc/Vrbovac, father’s name Hajredin, mother’s maiden name Zahide Shabani, residing in Drenas, Kosovo, married, of average economic status, completed high-school, carpenter, previous convictions not known, in detention on these charges since 4 July 2005, currently held at Dubrava Prison; and

Hajrë Gashi: Kosovar Albanian, born on 10 January 1966 in Vërboc/Vrbovac, Kosovo, father’s name Adem, mother’s maiden name Hata Kukaj, residing in Drenas Block 2, Entrance 2, 4th floor, flat # 10 and in the village of Vushtrri/Vucitrn, Arsim Musaqi St 94 and the village of Vërboc/Vrbovac, married, of average economic status, completed high-school, chemistry and physics technician, previous convictions not known, in detention on these charges since 1 July 2005, currently held at Dubrava Prison;

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Deciding on the appeal of the Public Prosecutor filed on the detriment of the defendants Nexhmedin Gashi and Hajrë Gashi on 9 July 2007;

Deciding on the appeal of the Defence Counsel Destan Rukiqi filed in favour of the defendant Hajrë Gashi on 12 July 2007, and also on the appeal of Defence Counsel Naser Peci filed in favour of the defendant Nexhmedin Gashi on 16 July 2007;

All filed against the verdict of the District Court of Prishtinë/Priština, P. No. 740/2005, dated 27 April 2007;

Having reviewed the court records, heard the arguments of the Public Prosecutor and that of the Defence Counsels, and having analysed the relevant laws;

Pursuant to Article 426 paragraph (1) of the KCCP, the Supreme Court of Kosovo renders the following:

JUDGMENT

The appeal of the Public Prosecutor filed on the detriment of defendants Nexhmedin Gashi and Hajrë Gashi on 9 July 2007 is **PARTLY GRANTED**;

The appeal of the Defence Counsel Destan Rukiqi filed in favour of the defendant Hajrë Gashi on 12 July 2007 is **REJECTED** as **UNFOUNDED**;

The appeal of Defence Counsel Naser Peci filed in favour of the defendant Nexhmedin Gashi on 16 July 2007 is **PARTLY GRANTED**;

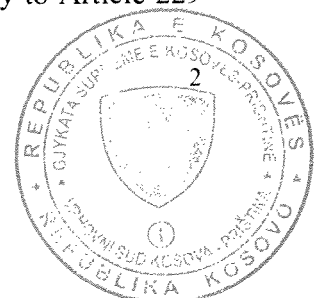
The verdict of the District Court of Prishtinë/Priština, P. No. 740/2005, dated 27 April 2007, is **MODIFIED**:

1) as to the qualification of the criminal offences for which Nexhmedin Gashi was found guilty:

- a) in COUNT 1 of the verdict is Unauthorized Production and Sale of Narcotics, contrary to Article 245 paragraph (2) of the Criminal Code of the Socialist Federal Republic of Yugoslavia ("CC SFRY");
- b) in COUNT 2 of the verdict is Unauthorised Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances, contrary to Article 229 paragraph (3) of the Criminal Code of Kosovo ("CCK");
- c) in COUNT 3 sub-count (vii) of the verdict is Unauthorized Production and Sale of Narcotics, contrary to Article 245 paragraph (2) of the CC SFRY;

2) as to the qualification of the criminal offence for which Hajrë Gashi was found guilty in COUNT 2 of the verdict is Unauthorised Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances, contrary to Article 229 paragraph (3) of the CCK;

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3) Nexhmedin Gashi is found not guilty and acquitted from six (6) counts of Unauthorized Production and Sale of Narcotics, as per Article 245 paragraph (2) of the CC SFRY as described in COUNT 3 sub-counts (i)-(vi) of the verdict;

4) Nexhmedin Gashi is found guilty of one (1) count of Organized Crime, contrary to Article 274 paragraph (3) of the CCK as described in COUNTS 1, 2 and 3 (vii) of the verdict;

5) Hajrë Gashi is guilty of Organized Crime, contrary to Article 274 paragraph (2) of the CCK as described in COUNT 2 of the verdict with the distinction that he was a member and not a leader of the organized criminal group;

The remaining part of the verdict of the District Court of Prishtinë/Priština, P. No. 740/2005, dated 27 April 2007, is **AFFIRMED**;

The defendant shall pay the costs of the criminal proceedings.

Reasoning

1. Procedure:

- The timely appeals of the Public Prosecutor, of the defence counsel on behalf of Hajrë Gashi and of the defence counsel on behalf of Nexhmedin Gashi are admissible.

2. Qualification of the crimes:

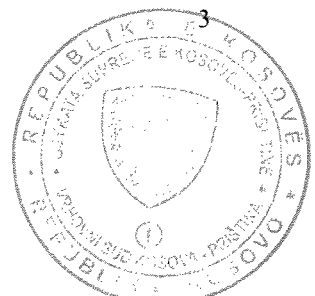
- The Supreme Court panel reminds that the counts/qualifications which legally describe the crimes allegedly perpetrated by the defendant should be precise and clear as to the time, the material elements of the crime and the circumstances in which these crimes were perpetrated. This clearness and precision is prescribed in order to the Court to be able to understand and find the truth about facts which feed the allegations and to the defendant to be able to defend his case in an appropriate and proper way. Count 3 sub-counts i)-vi) (six sub counts) of Unauthorized Production and Sale of Narcotics do not comply with the minimum criteria of precision and clearness so that the Supreme Court, due to the vagueness and doubts it raise, has to acquit the defendant Nexhmedin Gashi of these charges (see enacting clause).

- The Supreme Court for the sake of clarity corrects the other counts by precisising the qualifications as follows:

COUNT 1: Unauthorized Production and Sale of Narcotics, contrary to Article 245 paragraph (2) of the Criminal Code of the SFRY CC, as the criminal code in effect at the time when the offence was committed is more favourable to the accused compared to Article 229 paragraph (3) of the CCK because it foresees a lower minimum of the sentence;

COUNT 2: Unauthorised Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances, as per Article 229 paragraph (3) of

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the CCK, because the criminal offence was committed in June 2004, after the CCK came into effect;

COUNT 3 sub-count (vii): Unauthorized Production and Sale of Narcotics, contrary to Article 245 paragraph (2) of the SFRY CC, as the criminal code in effect at the time when the offence was committed is more favourable to the accused compared to Article 229 paragraph (3) of the CCK because it foresees a lower minimum of the sentence.

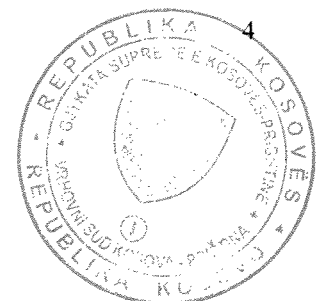
- As to the separate crime of Organized Crime (Article 274 CCK) related to the crimes of Counts 1, 2, 3(vii), the Supreme Court makes the precision that defendant Nexhmedin Gashi is charged as the organizer (Article 274 paragraph (3) CCK) and Hajrë Gashi as an active member of the criminal organization (Article 274 paragraph (2) CCK). The Supreme Court is determined according to the law provisions, that the conditions of Article 274 (7) CCK are fulfilled. Indeed in this case it is obvious, also considering the huge amount of money and drugs involved, the international import, export and transport of the heroin and the organizational capacity of the criminal group, the necessary leading, coordination and management of the international activities, are more than enough reasons to determine *in casu* - as the evidence in the file and the evidence through the witnesses during the trial obtained, indicates clearly - that the defendant Nexhmedin Gashi headed this group in order to gain enormous illegal profit through the drugs traffics mostly from Kosovo to Italy. Hajrë Gashi, amongst others, is to be considered, as an important member and right hand of Nexhmedin Gashi in particular with regard to the facts described in Count 2.

- These criminal drugs traffics (Counts 1, 2, 3vii) are to be considered, contrary to the first instance judgement, as “serious crimes” because they are punishable by imprisonment of “at least four years” (Article 274 (7) 3) CCK). Indeed the imprisonment of 4 years is in the range of the imprisonment foreseen by the Article 245(2) CC SFRY and Article 229(3) CCK. Finally, it has been observed by the Supreme Court that next to the organizer and his immediate staff a bunch of drug-couriers were involved, some of them are convicted, in relation with the above mentioned drugs traffics by foreign Criminal Courts (Slovenia, Germany).

3. Facts:

- The First Instance Court determined legally and accurately, on the basis of the witness statements, on the basis of the findings of police officers and not in the least on the basis of the legally executed covert measures by competent police officers, that the defendant Nexhmedin Gashi organized and supervised - during the whole period as indicated in Counts 1, 2, 3 vii - several drugs (heroin) traffics from his base in Kosovo using a staff of criminals, foreign couriers and foreign cars which he found in Germany. It is obvious, as it was proven by the case file and the trial proceedings in first instance, that doing so Nexhmedin Gashi could count on a credible, disciplined and well structured group of companions in crime who earned illegally, by performing this dangerous drug traffics (total of at least 40,5 kg of dangerous heroin), a lot of money in a very short period of time. This very profiting illegal business was the sole purpose of this criminal organization headed by Nexhmedin Gashi (Counts 1, 2, 3vii).

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- The First Instance Court established in the same accurate and legal way the active involvement in this drugs traffic (Count 2) of Hajrë Gashi and specified his role, next to the leading role of Nexhmedin Gashi, as an important active member of the criminal organization. Although important, Hajrë Gashi can not be considered as having the kind of role foreseen in Article 274(3) CCK.

- Therefore, the Supreme Court, determining that the First Instance Court established the material facts properly, refers to the first instance judgment as the answer to the factual (unfounded) grounds of the appeals of both the defendants regarding the Counts mentioned above, and modifies the first instance judgment solely regarding the application of the law pursuant to Article 426(1) KCCP as specified in the enacting clause.

4. Penalty:

- Although the Supreme Court found the defendants also guilty on the Count of "Organized Crime" (organizer/active member) their penalty could not be raised because of the absence of an appeal of the Prosecutor on the penalty as such. Therefore, it is decided as foreseen in the enacting clause; the penalty is affirmed.

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2 July 2009

Prishtinë/Priština

Members of the panel:



Maria Giuliana Civinini
EULEX Judge



Fejzullah Hasani
Supreme Court Judge



Salih Mekaj
Supreme Court Judge




Miftar Jasiqi
Supreme Court Judge

Presiding Judge:



Guy Van Craen
EULEX Judge

Recording officer:



Judit Eva Tatrai
EULEX Legal Officer

