

## SUPREME COURT

Case number: PN.II. 8/2015  
PKR 23/2015 Basic Court of Pristina  
PN 340/15 Court of Appeals

Date: 26 November 2015

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Dariusz Sielicki (Presiding and Reporting), EULEX Judge Elka Filcheva-Ermenkova and Supreme Court Judge Avdi Dinaj as Panel members, and EULEX Legal Officer Kerry Moyes as the Recording Officer, in the criminal case number PKR 23/2915 before the Basic Court of Pristina against;

A [REDACTED] S [REDACTED], father's name [REDACTED], born on [REDACTED]

A [REDACTED] P [REDACTED], father's name [REDACTED] born on [REDACTED]

X [REDACTED] V [REDACTED], father's name [REDACTED] born on [REDACTED]

K [REDACTED] K [REDACTED], father's name [REDACTED] born on [REDACTED]

R [REDACTED] B [REDACTED], father's name [REDACTED] born on [REDACTED]

suspected of the following criminal offences:

Count 1 - A [REDACTED] S [REDACTED], A [REDACTED] P [REDACTED], X [REDACTED] V [REDACTED], K [REDACTED] K [REDACTED] and R [REDACTED] B [REDACTED] **Organised Crime** in violation of Article 274 §1 and §3 of the previous Criminal Code (currently under Article 283 §1 and §2 of the Criminal Code of the Republic of Kosovo (CCRK));

Count 2 - A [REDACTED] S [REDACTED], A [REDACTED] P [REDACTED], X [REDACTED] V [REDACTED], K [REDACTED] K [REDACTED] and R [REDACTED] B [REDACTED] **Unauthorised Supply, Transport, Production, Exchange or Sale of Weapons** in violation of Article 327 §1 and §2, Article 23 of the previous Criminal Code (currently under Article 372 §1 and §2, Article 31 CCRK);

Count 3 A [REDACTED] S [REDACTED], A [REDACTED] P [REDACTED], X [REDACTED] V [REDACTED], K [REDACTED] K [REDACTED] and R [REDACTED] B [REDACTED]: **Fraud** in violation of Article 261 §1 and §2, Article 23 of the previous Criminal Code (currently under Article 335 §1 and §2 and Article 31 CCRK);

Count 4 - X [REDACTED] V [REDACTED], K [REDACTED] K [REDACTED] and R [REDACTED] B [REDACTED] **Abuse of Official Position or Authority** in violation of Article 339 §3, Article 23 of the previous Criminal Code (currently under Article 422 §1 and 2, Article 31 CCRK);

*acting upon the Appeal filed by the State Prosecutor on 11 September 2015 against the Ruling of the Court of Appeals PN No. 340/15 dated 19 August 2015 (the impugned Ruling), which rejected as unfounded the Appeal of the Special Prosecutor against the Ruling of the Basic Court of Pristina PKR 23/2015 dated 28 May 2015 dismissing Indictment PPS 108/2010 as belated.*

*having considered the Response to the Appeal filed by defense counsel [REDACTED] on behalf of A [REDACTED] P [REDACTED] on 28 September 2015 and the Response to the Appeal filed by defense counsel [REDACTED] on behalf of A [REDACTED] S [REDACTED] on 25 September 2015;*

*having deliberated and voted on 26 November 2015;*

*pursuant to Article 411 paragraphs 6 and 9 of the Criminal Procedure Code (CPC)*

*renders the following*

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## RULING

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1. **The Appeal filed by the State Prosecutor on 11 September 2015 against the Ruling of the Court of Appeals PN No. 340/15 dated 19 August 2015, which rejected as unfounded the Appeal of the Special Prosecutor dated 10 June 2015, against the Ruling of the Basic Court of Pristina PKR 23/2015 dated 28 May 2015 dismissing Indictment PPS 108/2010 as belated, is granted;**
2. **The Ruling of the Court of Appeals is modified to grant the Appeal of the Special Prosecutor filed against the Ruling of the Basic Court of Pristina, and to reject the objections to the Indictment related to its belatedness which were filed by the defense counsel on behalf of the defendants;**
3. **The case is returned to the Basic Court of Pristina for the Presiding Trial Judge to proceed accordingly.**

## REASONING

### 1. Procedural background

1.1 The investigation in this case began on 21 October 2010, firstly against A [REDACTED] S [REDACTED], X [REDACTED] V [REDACTED] and R [REDACTED] B [REDACTED] for allegedly committing the criminal offences of Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons, Organised Crime, Fraud, Abuse of Official Position or Authority, and Misuse of Economic Authorizations. The investigation for these criminal offences was subsequently extended by the Pre-Trial Judge pursuant to Article 225 §2 of the previous CPC on 6 May 2011 (extending the investigation until 21 October 2011) and 20 October 2011 (extending the

investigation until 21 April 2012). The investigation was extended for the final 6 months until 21 October 2012 by the Ruling of the Supreme Court dated 24 April 2012.

1.2 On 9 June 2011, the Special Prosecutor issued a Ruling to expand the investigation against two additional suspects, A [REDACTED] P [REDACTED] and K [REDACTED] K [REDACTED] for the charges of Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons, Organized Crime, Fraud, Abuse of Official Position or Authority, and Misuse of Economic Authorizations. This part of the investigation against both defendants was extended twice by the Pre-Trial Judge pursuant to Article 225 §2 of the previous CPC, on 31 January 2011 and on 03 July 2012. The authorized extension of investigation expired on 09 December 2012. No further extension was sought by the Special Prosecutor.

1.3 On 11 August 2011 the Special Prosecutor issued a Ruling on expansion of investigation against A [REDACTED] S [REDACTED] and A [REDACTED] R [REDACTED] adding the charge of Giving Bribes pursuant to Article 344 §1 CCRK. On 27 April 2011 the Pre-Trial Judge authorized extension of investigation for a further 6 months until 11 August 2012 pursuant to Article 225 §2 of the previous CPC. On 10 October 2012 the Special Prosecutor filed a motion for extension of investigation, which was rejected by a Ruling of the Pre-Trial Judge dated 2 November 2012, reasoning that the previous CPC did not foresee a second extension of investigation for criminal offences not punishable with at least 5 years of imprisonment.

1.4 Also on 11 August 2011 the Special Prosecutor expanded the investigation against X [REDACTED] V [REDACTED] K [REDACTED] K [REDACTED] and R [REDACTED] B [REDACTED] for the criminal offence of Accepting Bribes pursuant to Article 343 §1 CCRK. The investigation for this criminal offence was further extended with the Ruling on extension dated 2 February 2012, as amended on 20 April 2012. Thereafter the investigation was extended once more by a Ruling of the Pre-Trial Judge dated 30 November 2012 for an additional six months until 11 February 2013.

1.5 On 7 June 2013 and 19 July 2013 the Special Prosecutor issued Rulings on suspension of investigation. On 19 January 2015 the Special Prosecutor filed a Ruling to resume investigations, and subsequently filed Indictment PPS 108/2010 on 19 January 2015.

1.6 On 28 May 2015 the Basic Court issued a Ruling granting the objections of the defense counsel against the Indictment and dismissed it as belated. The ruling did not refer to any objections raised by defence counsel other than the one based on the belatedness of the Indictment.

1.7. On 10 June 2015 the Special Prosecutor filed an Appeal against the Ruling. Responses to the Appeal were filed on 18 June 2015 by defense counsel [REDACTED] on behalf of the defendant A [REDACTED] R [REDACTED], and on 19 June 2015 by defense counsel [REDACTED] on behalf of the defendant X [REDACTED] V [REDACTED] and on 19 June 2015 by defense counsel [REDACTED] on behalf of the defendant A [REDACTED] S [REDACTED]. On 10 July 2015 the Appellate Prosecutor filed a motion endorsing the Appeal of the Special Prosecutor. The Court of Appeals, by Ruling PN Np. 340/15 dated 19 August 2015, rejected as unfounded the Appeal of the Special Prosecutor.

## 2. Submissions by the Parties

2.1 The State Prosecutor submits that the Ruling is in violation of Article 415 (1) subparagraphs 1.1 to 1.4 of the CPC. She submits that it violates a right provided to a party under Article 109 (1) of the Constitution of the Republic of Kosovo, Article 4 (2) and Article 7 (1) items 1.7 and 1.8 of the Law on State Prosecutor, and Article 49 and Article 415 of the CPC. The Ruling, if affirmed, would cause irreparable harm to the prosecution to prosecute the defendants for the criminal offences because, based on Article 4 (1) and (2) of the CPC, no further prosecution will be legally possible against them for the same criminal acts. The Ruling therefore prevents the State Prosecutor from exercising the authority and responsibility to prosecute the persons charged of committing the criminal offences as per the Indictment. The State Prosecutor moves the Supreme Court to modify the impugned Ruling and grant the Appeal of the Special Prosecutor filed against the Ruling of the Presiding Trial Judge of the Basic Court, and reject the objections of the defense counsels against the Indictment.

2.2 Regarding the admissibility of the Appeal, the State Prosecutor respectfully disagrees with the reasoning and decision in the Ruling of the Supreme Court PN 2.1/2015 dated 16 March 2015, which is that an Appeal filed by the State Prosecutor against a Ruling of the Court of Appeals is inadmissible. The Supreme Court stated that, firstly, that Article 408 (2) of the CPC prohibiting the Appeal against the Ruling of the Review Panel applies to the Rulings of the Court of Appeals, and secondly, that since an Appeal against the Ruling of the Court of Appeals is not listed in Article 374 of the CPC it is not admissible. The State Prosecutor submits that a 'Review Panel' is a forum to adjudicate on objections against orders of a Pre-Trial Judge, and therefore is distinguished in the CPC from the Panel of the Court of Appeals. Further, the current case is no longer in the investigative stage, and therefore Article 408 (2) of the CPC does not apply by analogy to prohibit an Appeal against the Ruling of the Court of Appeals in this case. Regarding Article 374 of the CPC, the State Prosecutor submits that the Supreme Court did not note that this provision does not provide an exhaustive list of legal remedies that may be exercised in the course of criminal proceedings, as Article 374 (1) states 'unless otherwise provided for in the present code...'. Article 411 (6) provides 'otherwise'. She concludes by submitting that the current Appeal is permitted by the CPC.

2.3 Regarding the merits of the Appeal, the State Prosecutor submits as follows:

- the impugned Ruling lacks reasoning on the decisive matter as per Article 404 (1) of the CPC.
- the CPC does not prescribe an explicit time for the filing of an Indictment, but it is not correct that the systematic reading of the CPC is that an Indictment must follow immediately after the investigation has been concluded, as stated by the Court of Appeals. If the CPC does not prescribe an explicit timeframe for filing the Indictment then there is no legal basis for the Court of Appeals to conclude that the Indictment was belated. The Indictment may only be dismissed by the Presiding Trial Judge at the 'Indictment and Plea Stage' based on

the grounds in Article 253 (1) of the CPC. This Article does not foresee belated filing of the Indictment as a ground for dismissal.

- The Court of Appeals quotes from a previous Court of Appeals Ruling (PN 543/2015 dated 15 August 2013) to support the reasoning, but does not quote from it fully. Paragraph 69 of that Ruling states that 'Filing the Indictment is not an investigatory action, it is a separate prosecutorial action, one marking the beginning of a new stage of the criminal proceeding. Accordingly, Article 159 (1) CPC could not be construed to read that no Indictment is permissible if not filed within 2 years from the initiation of investigation'.

- The Ruling of 15 August 2013 also states at paragraph 71 that '...the Indictment could be filed with some delays, as long as such delay is reasonable. What delay is permissible in terms of fairness of proceedings and respect for human rights of the defendant will have to be decided by the respective Basic Court on a case by case basis...'. Neither the Basic Court nor the Court of Appeals assessed or established whether the delay in filing the Indictment was unreasonable and contrary to the right to a fair trial within a reasonable time. Any delay in obtaining the necessary evidence was due to delays in the process of international legal assistance, obtaining witness statements which entailed the lifting of the immunity regime, and awaiting financial expertise.

- The European Court of Human Rights has stated that the 'reasonableness' of the length of proceedings must be assessed in the light of the circumstances of the case...' and gives a criteria<sup>1</sup>. This assessment was not carried out by the Court of Appeals.

- Article 4 (1) of the CPC states that only a final court decision prevents the prosecution from prosecuting the same individual for the same criminal offence. Therefore no provision of the law hinders the Prosecutor where the evidence supports a well-grounded suspicion.

2.4 Defense counsel [REDACTED] on behalf of A [REDACTED] R [REDACTED] proposes that the Appeal is dismissed as inadmissible and that the appealed decision is verified. He submits that:

- the right of filing an Appeal against the Ruling of the second instance Court of Appeals does not meet the legal grounds according to Article 408 (1) of the CPC.

- Strong reasoning has been provided by both the Basic Court and the Court of Appeals, thus ensuring that no violations of the parties' rights have occurred.

- the Appeal violates the legal and constitutional rights of the defendant (and other defendants) by, in procrastination, violating the rights and freedom granted by the Constitution of the Republic of Kosovo.

2.5 Defense counsel [REDACTED] on behalf of A [REDACTED] S [REDACTED] requests that the Supreme Court dismiss the Appeal as inadmissible. He submits that:

- the Law on State Prosecutor (Law No. 05/L-034) Article 11.4 only gives competence to the State Prosecutor to submit legal remedies when the Supreme Court acts as a third instance

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<sup>1</sup> *Frylender v. France* [GC], 27 June 2000, paragraph 43.

court. The Supreme Court acts as third instance court only in cases when the extraordinary legal remedy is submitted, such as the request for protection of legality. The Supreme Court does not act as a third instance court when an ordinary legal remedy is filed against the decisions of the Court of Appeals.

- there is no violation of Article 109 of the Constitution of the Republic of Kosovo. The lawmaker has foreseen a number of limitations to the exercise of prosecution.

- legal limitations are also foreseen in Article 159 (1) of the CPC. The Prosecution has failed to complete the investigative actions within the time limits. There were no obstructions to the investigation imposed by the justice system, and so the Prosecutor cannot blame the justice system and claim a violation of the Prosecution's constitutional right to exercise the prosecution.

- the Court of Appeals did not contest the Prosecution's rights as foreseen by the Constitution, but has only emphasized the principle of the legality pertaining to the duration of investigations.

### **3. Findings of the Panel**

#### **3.1. Admissibility of Appeal against the Ruling of Court of Appeals**

3.1.1 The Appeal filed by the State Prosecutor, and the Responses filed by defense counsel ██████████ on behalf of A ██████ F ██████, and by defense counsel ██████████ on behalf of A ██████ S ██████ are all timely filed.

3.1.2 The Panel, by a majority, finds that the Appeal filed by the State Prosecutor is admissible. The Panel disagrees with the interpretation of Articles 408 and 374 of the CPC as reasoned in a previous Ruling of the Supreme Court<sup>2</sup> which adjudicated on this issue.

3.1.3. The Panel agrees with the State Prosecutor that Article 374 of the CPC does not provide for an exhaustive list of occasions when legal remedies are available. Paragraph 1 includes the words 'Unless otherwise provided for under the present code...'

3.1.4. The Panel first considered that, as a principle foreseen in Article 102 paragraph 5 of the Constitution, all Rulings are appealable unless otherwise provided by law.

3.1.5. The view of the Panel is that any departure from this principle must be expressly provided for in the CPC by the clear and explicit wording of a provision. There is no such general prohibition against filing an Appeal with the Supreme Court against a Ruling of the Court of Appeals in the CPC.

3.1.6. Pursuant to Article 411 paragraph 9 of the CPC, even if the Appeal against the Ruling of Court of Appeals does not comply with Chapter XXI which determines general requirements for legal remedies, it may be summarily dismissed by the Supreme Court only

<sup>2</sup> PN 2.1/2015 dated 16 March 2015

after ensuring that it does not raise an important issue of constitutionally protected rights. Therefore, the lawmaker leaves no doubts that as a general principle, Rulings of the Court of Appeal are appealable.

3.1.7. Moreover, Article 408 paragraph 4 of the CPC explicitly excludes an Appeal against a Ruling rendered by the Supreme Court of Kosovo. Therefore, if the lawmaker does not allow for third-instance appellate review this exclusion would also be obviously redundant.

3.1.8. The impugned Ruling prevents the State Prosecutor from exercising the right to prosecute persons charged with committing criminal acts which is vested in him by Article 109 paragraph 1 of the Constitution of the Republic of Kosovo, and therefore must be considered as constitutionally protected.

#### **4. Meritum of the Appeal**

4.1. The Panel, by a majority, grants the Appeal. It is clear that the time limit for the filing of an Indictment is not specifically stated in the CPC. Consequently, neither does any provision of the CPC detail any circumstances when an Indictment is 'belated', nor provide for the dismissal of an Indictment on this ground.

4.1.1. The Panel first considered, as a starting point, Article 68 of the CPC which details the four distinct stages of criminal proceedings; the investigation stage, the indictment and plea stage, the main trial stage and the legal remedy stage. By such explicit division of the stages of criminal proceedings in the CPC, the Panel finds that it is the clear intention of the legislator that the filing of the Indictment falls within the second stage of criminal proceedings (indictment and plea stage) rather than the first stage (the investigation stage). This view is reinforced by Article 159 of the CPC. This Article is very clear as to the time limits of the investigation stage, and it does not include a provision to state that the filing of an Indictment must be within the time limits permitted.

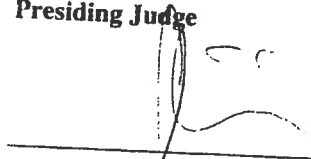
4.1.2. The Panel next considered Article 240 of the CPC, which details the courses of action available to the Prosecutor after the investigation has been completed. Paragraph 1 provides for proceedings before the Court on the basis of an Indictment filed by the State Prosecutor, and paragraph 2 provides for, in the alternative, a Ruling by the State Prosecutor to terminate the investigation. In both situations, explicit reference is made to the completion of the investigation, and it is the view of the Panel that the meaning of the Article is that the filing of an Indictment is not part of the investigation stage, and therefore not subject to the time limits imposed by Article 159 of the CPC. It is also logical that the State Prosecutor will not be able to make a decision as to which course of action to take – to file an Indictment or to file a Ruling – until the investigation is complete. It is also apparent that Indictments are typically lengthy and detailed documents, which inevitably take some time to accurately and fully prepare.

4.1.3. The Panel, by a majority, therefore finds that there is no time limit for the filing of an Indictment. A 'belated Indictment' is not foreseen in the CPC. The State Prosecutor is only

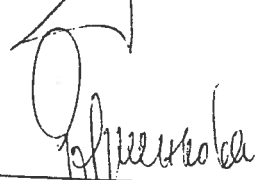
time barred by the statutory limitation of the criminal offence/s concerned. However, it is clearly advisable for the State Prosecutor to file an Indictment, when one will be filed, as soon as possible after the conclusion of the investigation, as the risk of violation of the right to fair trial within reasonable time limits increases with the passage of time. In addition any Court when deciding on the merits of a criminal charge and in case of a sentencing decision would always take into consideration the time taken for the criminal proceedings, in their entirety.

4.1.4. The Supreme Court grants the Appeal filed by the State Prosecutor. The impugned Ruling of the Court of Appeals is modified to grant the Appeal of the Special Prosecutor dated 10 June 2015, which was filed against the Ruling of the Basic Court dated 28 May 2015. The objections to the Indictment filed by defense counsels based on belatedness are rejected. The Indictment is not belated. Any other objections against the Indictment raised by defense counsel still remain for the review of the Presiding Trial Judge. Therefore, the case is returned to the Basic Court of Pristina in order for the Presiding Trial Judge to proceed accordingly.

**Presiding Judge**



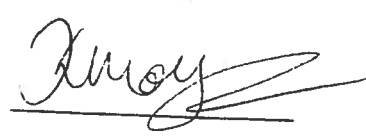
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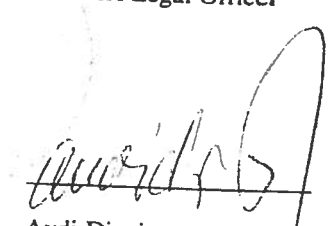
Judge Elka Filcheva-Ermenkova  
EULEX Judge

**Panel members**

**Recording Officer**



Kerry Moyes  
EULEX Legal Officer



Avdi Dinaj  
Supreme Court Judge