

COURT OF APPEALS

Case number: PAKR 349/14

31. August 2015

Dissenting opinion of EULEX Judge Piotr Bojarczuk attached to the judgment of the Court of Appeals dated 31 August 2015, pursuant to Article 398 par.4 of the CPC

As presiding and reporting judge on this case I disagree with the majority decision in relation to two aspects: (1) the essential violation of Article 384 par. 1 item 1.12 in conjunction with Article 370 par. 6 and 7 of the CPC and (2) the essential violation of Article 384 item 1.12 in conjunction with Article 370 par. 8 of the CPC. I find that these matters of disagreement are sufficiently important to justify a written dissenting opinion.

Violation of Article 384 par. 1 item 1.12 in conjunction with Article 370 par. 6 and 7 of the CPC

By majority it was decided that the judgment contains an essential violation of Article 384 par. 1, item 1.12 in conjunction with Article 370 par. 6 and 7 of the CPC due to the fact that the enacting clause is incomprehensive, unclear and inconsistent with the statement of grounds and decisive facts presented by the first instance court. The panel remarks that it is unclear which facts and actions have been determined by the basic court by which evidence as there is no factual description that could clarify the specific incriminatory actions of the accused.

Derogating from the judgment I find that it is quite clear which facts and actions have been determined by the basic court. The basic court has clearly presented the grounds for each individual point of the judgment. Furthermore, the court has succeeded in providing a proper reasoning about the accuracy of the evidence as well as the supporting grounds on which the court did approve the concrete proposals of the parties. I do not see a lack of reasoning when affirming the existence of the criminal offence as well as the criminal liability of the accused.

Contrary to the findings I believe it is furthermore quite clear from the first instance judgment who benefited from the actions and who is the damaged party. For count 1 it is **M.K.**, **M.Q.** and **J.A.** who obtained the benefit in the amount of 30.050,- EUR, for count 2 it is **EC Gulistan** who benefited with 20.120,- EUR because of the exemption of rent, and for count 3 the first instance court ascertained that **Kamila factory** had a benefit of 4.500,- EUR in the form of free charge use of Municipality property. With regard to count 4 the actions of the defendants were aimed at causing damage to another person, in particular to the functioning of the justice. With banning the experts the defendants caused delays in the progress of the property civil case. Damaged party is the public interest in the proper functioning of the justice. For all counts the first instance

court properly has ordered an expert for an in-depth analysis and has made a thorough assessment.

Finally, the panel assumes that there is a lack of clarification about which defendant made which profit. By doing so in my eyes the panel does not clearly follow the law. According to Article 422 par. 1 of the Criminal Code the law “only” requires the specific intention aimed at acquiring benefit; the law does not require that someone *de facto* receives a specific profit. From the first instance judgement it is obvious, well elaborated and proven that the defendants acted with the specific intention as required to commit the criminal offence of *Abusing Official Position or Authority* pursuant to Article 422 of the Criminal Code.

Essential Violation of Article 384 item 1.12 in conjunction with Article 370 par. 8 of the CPC

The decision of the Court of Appeals is further based on an essential violation of Article 384 item 1.12 in conjunction with Article 370 par. 8 of the CPC. The panel argues that the first instance court did not consider all circumstances of the defendants when determining the punishment. According to the Court of Appeals decision it is unclear how the first instance court has justified the punishment and which mitigating and aggravating circumstances do exist and have to be taken into account when individualizing the punishment. The panel stresses that the first instance court is free in its decision when assessing the evidence while the Court of Appeals shall reassess it only if it finds legal mistakes in the assessment conducted by the court. In the next step it considers legal mistakes making it necessary to annul the judgment. However, I find that the first instance court made a correct assessment when determining the punishment. It took all mitigating and aggravating circumstances into consideration. The calculation of punishment of the defendants has clearly, thoroughly and exhaustively been described on pages 52-55 of the judgment.

With regard to defendant **M.** especially his high position has been considered as aggravating circumstance. Therefore, the higher burden falls on him. Defendant **P.** acted in his capacity of the Director of the Directorate of Urbanism and Spatial Planning of the Municipality. Insofar he had a legal duty to be aware of the procedures for allocating the public land; he should have made proper efforts to follow the procedure as ascribed by the law. With regard to defendant **A.** the trial panel considered as a mitigating fact that he only executed a decision already made by the major. With regard to defendant **U.** the Basic Court considered the age of the defendant and his medical condition of the need to perform dialysis twice a week as a mitigating circumstance. With regard to defendant **T.**, the panel decided to impose a slight sentence taking into consideration the mitigating circumstances that he was active in reaching an agreement and that he visited the court and the President of the court in order to find a solution. With regard to defendant **K.** the first instance court is of the opinion that the defendant in the capacity of the Director of the Directorate of Administration Office of Property and legal Affairs of the Municipality was aware that the allocation of the land to the chocolate factory was awarded

unlawfully, yet again he instructed defendant **A.** to transfer the ownership of the land prior having the consent of the Municipal Assembly. Regarding count 4 it is evident to the trial panel that defendant **K.** used his position and capacity while being negligent in the work of the court thereby obstructed the flow of the procedure. In this point I observe that the basic court wrongfully made a link between defendant **K.** and the allocation of the land to the chocolate factory (count 3) when making the calculation for the punishment. Defendant **K.** was not involved in the allocation of land to the chocolate factory (count 3) but in the allocation of land to EC Gulistan (count 2). However, I find that such a link to the wrong count is only a “clerical mistake” which has no impact on the lawfulness of calculation. The error is not substantial.

As a matter of fact, I strongly disagree with the Court of Appeals decision that there is a lack of assessment when calculating the punishment. To my opinion the Court of Appeals shall not be entitled to annul a judgment when it would just prefer to impose a more lenient or severe punishment. The Court of Appeals has to accept the imposed punishment of the first instance court when the calculation is made within the legal range the law provides. I find that the calculation is lawfully made and is within the legal frame. Therefore there is no space to annul the judgment.

Final Remarks

The panel has assumed and argued that it is not clear whether the court has to deal with a criminal, civil or administrative, public law case. I strongly disagree with this. If there is a proper indictment with criminal charges then the prosecutor has positively assumed a criminal case. The court is bound by this assessment and has only to decide whether or not the defendant has committed a specific criminal offence. The court is not entitled to discuss whether the present case should be assigned to a civil court, criminal court or administrative court and is restricted to the question whether it is faced with a criminal case or not. Finally, the Court of Appeals has already stated when deciding about the indictment that it considers the criminal relevance of the case. It is more than concerning that the panel now has second thoughts about the criminal relevance taking this as justification for annulling the first instance judgment.

I concur with the panel and agree that the contested judgment contains some specific legal lacks violating Article 370 of the CPC. However, I would like to express my opinion that there are no sufficient legal grounds to annul the first instance judgment and to return it for retrial.

Presiding Judge

Piotr Bojarczuk
EULEX Judge

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Recording Officer

Dr. Bernd Franke
EULEX Legal Officer

Court of Appeals
Pristina

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