Supreme Court of Kosovo
Ap.-Kž. No. 435/2008
22 June 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");

Composed of Guy Van Craen, EULEX Judge, as presiding and reporting judge, Miftar Jasiqi and Agim Krasniqi, Supreme Court Judges, as panel members;

Assisted by Mircea Cristian Nicoara, EULEX Legal Officer, as recording officer, Stephen Parkinson and Ann Elizabeth Bateman, EULEX court recorders, Arlinda Gjebrea, Arben Pallaska, Vegim Rugova and Naser Syla EULEX Interpreters;

In the presence of Theo Jacobs, Anette Milk EULEX Prosecutor, Zyhra Ademi Public Prosecutor, Defence Counsel Tomë V. Gashi for L X Musa Xh. Dragusha, Xhafer Maliqi and Shpresa Rama for M N ;

In the sessions held on 26 May and 16 June 2009, following the deliberation of the panel concluded on 22 June 2009;

In the criminal case against:
L X

For the criminal offences of **Abusing Official Position and Authority as a co-perpetrator** with other suspects against whom a separate indictment had been filed, contrary to Article 25 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) and Article 210 paragraphs (1) and (4) of the Criminal Law of Kosovo (CLK), and **Entering into Harmful Contract**, contrary to Article 109 paragraphs (1) and (2) of the CLK;

And against:
M N

For the criminal offence of **Concealment**, contrary to Article 154 paragraph (1) of the CLK;

Deciding on the appeal of the Defence Counsel Tomë V. Gashi filed in favour of the defendant L X , on 6 August 2008;

Deciding also on the joint appeal of the Defence Counsels Musa Dragusha, Xhafer Maliqi and Shpresa Rama filed in favour of the defendant M N on 7 August 2008;

Filed against the verdict of the District Court of Prishtinë/Priština, dated 9 May 2008, P. No. 826/06;

Having reviewed the court records, heard the arguments of the Defence Counsels and that of the Public Prosecutor, 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 verdict of the District Court of Prishtinë/Priština, dated 9 May 2008, P. No. 826/06; is PARTIALLY **AFFIRMED**.

The appeal of the Defence Counsel Tomë Gashi filed in favour of the defendant L X , on 6 August 2008 is **PARTLY GRANTED**;

The joint appeal of the Defence Counsels Musa Dragusha, Xhafer Maliqi and Shpresa Rama filed in favour of the defendant M N , on 7 August 2008 is **GRANTED**;

The verdict of the District Court of Prishtinë/Priština, dated 9 May 2008, P. No. 826/06; is **MODIFIED**

The defendant L X is sentenced to a punishment of **three (3) years of imprisonment**;

The defendant M N is released of all charges due to the reaching of statutory limitation;

L X is obliged to pay a sum of 300.000 (three hundred thousand) EURO to the Injured Party Post and Telecommunications Enterprise in the Territory of Kosovo as a complete award of its claim within 15 fifteen) days after the service of the present judgment;

The Injured Party is instructed that she may pursue the property claim in civil litigation against M N , pursuant to Article 112 paragraph (3) of the KCCP.

L X will pay separately a scheduled amount at the customary flat rate of 200 (two hundred) EURO as the costs of the criminal proceedings;

The remaining part of the verdict of the District Court of Prishtinë/Priština. dated 9 May 2008, P. No. 826/06 is affirmed.

Reasoning

1. Procedure

- The indictment against the defendants L X and M N , was filed on 2 November 2006, then amended on 6 November 2006 and 4 June 2007, and finally the confirmation was concluded on 14 June 2007. The main trial started 14 April 2008 and the verdict (first instance) was announced on 9 May 2008. The public prosecutor filed her opinion on the appeals of the defendants (resp. 6 and 7 August 2008) on 4 December 2008. The case was transferred from UNMIK to EULEX on 2 January 2009.

- The appeal acts from the defense counsel Tomë Gashi on behalf of L X and from the defense counsels Musa Dragusha, Xhafer Maliqi and Shpresa Rama on behalf of defendant M N , introduced within the legal timeframe, are admissible.

- The injured party, the publicly owned enterprise PTK (Art.107-108 KCCP) although regularly summoned and invited, did not appear before the Supreme Court.

2. Statutory limitation on criminal prosecution

- Defendant M N is charged with the offence of concealment (Art 154 CLK) which is punishable up to three years of imprisonment. No criminal prosecution may commence after the period of 3 years have elapsed (Art. 90 (1) 4 CCK) from the commission of this crime of concealment. *In casu*, the commission of the crime is situated between February and April 2003, more than 6 years ago, meaning that more than twice the period of the statutory limitation elapsed (Art. 91 (6) CCK). Therefore, all charges against M N are rejected (Art. 389 (4) KCCP) and the injured party PTK, is instructed that she may eventually pursue the property claim in a civil litigation before the competent civil court (Art. 112 (3) KCCP).

3. Facts and charges concerning the defendant L X .

- The Supreme Court determines that the appealed decision of the first instance court properly and legally described and determined the material facts based upon the presented evidence during the main trial.
- In particular the Court, based on analysis of the witnesses, of the legally obtained documents and taking into account the particular public, strict regulated, working-business environment of the high skilled defendant concludes that:

a. defendant L X arranged the transfer of 300.000 EUR knowing that;
- she had not the authority to make or sign for this transfer. There is no explicit approval of the Kosovo Trust Agency (KTA) and the defendant never asked for a formal approval which in this not ordinary business activity (not typical/daily work for PTK to be dealing with Tetra-network, having the concerns of this amount of money and the establishment of the joint company) would be at least necessary. Being the General Manager, specialist in economics and business, the defendant, and she more than whoever, knows and should know the applicable rules concerning business contracts and money transfer.
- the payment of this (enormous) amount of money from a publicly owned enterprise to a just recently registered private company had no real justification because this company existed only a couple of months and did not had/could not have the activity mentioned in this too general invoice/bill covering the period 1.06.2002-10.03.03. The Kosovan company was registered only on 10.12.02, which is six months later than the first billed "activity".
- there was no pre-established contract by which the PTK had an obligation to pay the so called expenses up to 300.000 EUR. This enormous financial burden for PTK should at least be subject to a written clear contract but *in casu* it was not even the subject of the so called Memorandum of Understanding (MOU) which had the intention to create this joint company (ARTET) to plan the Tetra-network.
- that Kosovan company neither N I R&O, N I I , N I S , N I AS, or other linked companies, had no legal, nor a practical, relationship with the companies in Scandinavia responsible for the Tetra-network (Motorola, Nokia Ericson, etc.) and for sure N I , neither A had NO license which would enable them to establish this Tetra-network in Kosovo. It was obvious for the defendant and her partners, that without an official and legal relation with Tetra Industry Group the proper introduction of Tetra communication network was impossible.
- that her "partner" R played a double game as KTA/PTK Division Manager and Chairman of A (which actually did not legally existed) with the purpose to lift all suspicion and made it possible that also I K could be convinced to sign the transfer document (to the sub-account) even though he was – apparently on purpose – not confronted with the original invoice. Once the money in the sub-account "PTK-A ", created by defendant L X , appeared the latter immediately transferred the money to the N I bank-account. It is

obvious that Mr. R played a key role in this illegal transfer of money and could play this role only if the defendant L. X agreed on this and acted accordingly. The defendant in her position as general manager of one of the most important publicly owned companies of Kosovo, was indeed the responsible person, knew perfectly the rules governing the business operations of her company and its rules on accountability. This was the reason she was hired. So it seems at least naive to believe that she was pressured and pushed by R into this illegal transfer of this amount of money – as she declared – and that she entered into this long term business cooperation (Tetra-communication network) with partners like L J , O J , S and commercial companies as N I R&O AS, N I I , Company N / I , N I Kosovo ltd, without even checking their financial and judicial credibility and capacity. The defendant knew at least that the Project Manager of N I P B. was involved as a suspect/accused in a criminal investigation.

b. that once the money received on the bank account of N I , it was almost immediately diverted by M. N to different even private bank accounts without any legal justification (e.g. 250.000 EUR to O J 15000 EUR to his own private bank account) and M. N himself withdrew 229.000 EUR in cash. In any case, the first instance court made a correct analysis of the account of the Kosovan Company N I , which received the above mentioned amount of money, and established that the account is credited by N I R&O AS and that the account is systematically diminished by cash withdrawals (without justifications or booking-documents) and not by normal commercial financial transfers until 28 February 2003. The 1 March the transfer of 300.000 Euro from the PTK was realized. At that moment the bank-account of the Kosovan Company N I had a credit of – 0,26 EUR.

c. that defendant L X wrote on 14 May 2003 to S that the continuance of the project was dependant on the "written approval and confirmation by the KTA management" which indicates once more that there was NO previous approval or consent of the KTA Management. In the mean time the transferred money (300.000 Eur) was dispatched to the different beneficiaries. (b)

d. that therefore, taking into account the above, the defendant knew perfectly that by transferring this amount of money she granted unlawful material gain to N / I and its representatives, and through this unauthorized payment she executed an illegal obligation enforcing the concluded harmful contract between the PTK and N I .

4. The Supreme Court finds, that the facts, as determined by the First Instance Court and confirmed in appeal, should be legally qualified and identified, solely and only, in Count 2, because the crime foreseen in Count 2 absorbs and includes the facts of "Abusing of Official Position or Authority" foreseen in Count 1.

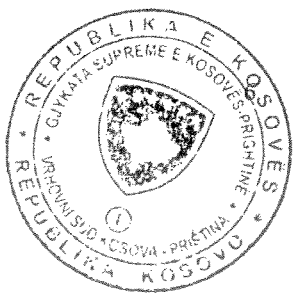
Indeed in this case "entering into a harmful contract" (Count 2) was only possible, and presupposes the abuse of the official position or authority" (Count 1). The constitutive elements of the crime "entering into a harmful contract" are the knowledge that the contract is damaging the legal entity and that its conclusion is contrary to one's authorization or capacity in this business operation. The Supreme Court abides the legal definition and legal reasoning concerning the crime "entering into a harmful contract" of the First Instance Court and refers to it as the answer to the arguments repeated by the defendant in appeal. In other words receiving the invoice and ordering the payment concludes the "contract". The Supreme Court does not need an (financial, economic) expert, as suggested by the defendant, to establish this legal opinion neither an expert to establish that an authorization to sign the transfer of this amount of money (exceeding largely, more than 10 times) the authorized transfer and entering in this contract, is absent and not existent. The existence of the MOU and/or the signature and/or approval of a co-perpetrator (even if he is a staff–member of KTA) do not change the illegality of the act and the absence of the authorization to sign. A so-called "pressure on or superior order" on the defendant to act illegally is not existent and for sure the criteria of Art. 10 (1)1, 2, 3 CCK are not fulfilled.

5. This above mentioned criminal absorption, established by the Court's practice, is in the defendants favor and the Supreme Court takes this absorption into account in determining the lower (in comparison with the first instance penalty) punishment as determined in the enacting clause. In determining the penalty the Supreme Court abides by the First Instance Court but underlines in particular:

- the enormous amount of money and the harm it caused to this public company,
- the high level position which was misused by the defendant,
- the absorption and the time elapsed since facts (more than 6 years) which is counted in favor of the defendant.

6. Concluding, the Supreme Court applies Art. 426 (1) KCCP, abides by the determination of the facts by the First Instance Judgment, refers to the factual and legal reasoning of the First Instance Court, but modifies the First Instance Judgment in particular:

- the legal absorption of Count 1 into Count 2 so the defendant Leme Xhema is only punishable for Count 2,
- the defendant M N is freed from all charges due to the Statute of Limitation and is not held to the costs of the criminal procedure,
- the defendant L X is punished as determined in the enacting clause and is held civil responsible for the payment of the damages as established in the First Instance Judgment to the injured party PTK,
- the injured party PTK is instructed to address her eventual claim against M. N before the competent civil court,



- the defendant L X is responsible for the 2/3 of the costs of the criminal procedure, 1/3 for the State due to the application of the statute of limitation in favor of M. N

Supreme Court of Kosovo
Ap.-Kž. No. 435/2008
22 June 2009
Prishtinë/Priština

Members of the panel:

Miftar Jasiqi
Supreme Court Judge

Agim Krasniqi
Supreme Court Judge

Presiding Judge:

Guy Van Craen
EULEX Judge

Recording officer:

Mircea Cristian Nicoara
EULEX Legal Officer