SUPREME COURT of KOSOVO

27 October 2009
Prishtine/Pristina
Ap.-Kz.No. 345/08

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of International Judge Emilio Gatti as Presiding Judge, International Judge Gerrit-Marc Sprenger and Kosovo National Judge Avdi Dinaj as panel members,

in the criminal proceedings against:

H K, the son of D and Sh K, born on in Municipality of , Republic of , last know residence in Village Municipality of , Republic of , detained since 24 May 2005 in the Dubrava Detention Centre, Domicile indicated according to Article 127 paragraph (2) of the Provisional Criminal Procedure Code of Kosovo (PCPCK) is Defence Counsel Besim Morina, William Walker street no. 3, Prizren/Prizren.

Deciding upon the appeal on the District Court of Prizren/Prizren Judgment P. no. 238/04, dated 13 April 2007, convicting the defendant of having committed the criminal offence of **Kidnapping** in co-perpetration as a member of a group in violation of Article 159 paragraph (2) as read with Article 23 of the Provisional Criminal Code of Kosovo (PCCK), appeal which was filed by the defence counsel on 22 July 2008.

After having heard the submissions of the defence counsel Mr. Besim Morina in the presence of the accused H .i K . and opinion and motion of the OSPK Prosecutors Ms. Anette MILK and Zyra ADEMI in the session held on 27 October 2009 and after a deliberation and voting held on 27 October 2009.

Acting pursuant to Article 420 of the PCPCK renders this

JUDGMENT

The appeal filed in the interest of H . K on 22 July 2008 is partially GRANTED, the Judgment of the District Court of Prizren/Prizren, dated 13 April 2007, P. No. 238/04 is MODIFIED as to the punishment, which is reduced to four (4) years and five (5) months of imprisonment.

Pursuant to article 391 paragraph (5) of the PCPCK, the time spent in detention on remand by the defendant is included in the amount of punishment.

The Judgment of the District Court of Prizren/Prizren P. no. 238/04, dated 13 April 2007 is affirmed in the remaining parts.

The costs of the second instance proceeding will remain in charge of the defendant.

With a separate ruling is decided about the detention on remand, according to articles 426 and 393 of the PCPCK.

REASONING

Procedural History

1. S S , owner and manager of a company in Prizren, was kidnapped at the premises of the business establishment on 8 August 2004, brought to Albania and kept there for some days.
The kidnappers asked initially for a ransom of 750.000 Euro.
On 14 August 2004, after that his son had promised to pay the ransom, the victim was released and escorted to Kosovo, he reached home the following day.
The sum of 200.000 Euro was actually paid on 17 August 2004.
On 27 September 2004 one of the kidnappers, a Kosovo Albanian named M K , was killed by unknown assailants.

2. Against H K , citizen of the Republic of , the International Public Prosecutor filed an indictment dated 12 May 2006 for the charge of Kidnapping committed in co-perpetration as a member of a group to the detriment of S S occurred in Prizren from 8 to 17 August 2004 and in violation of articles 23 and 159 paragraph 2 PCCK.
The indictment was confirmed with ruling dated 12 May 2006.

The trial started on 25 January 2007, included six public hearings and one session in camera and was terminated on 13 April 2007, with the announcement of the verdict.
H K was found guilty of the criminal act of Kidnapping and sentenced to five (5) years imprisonment.

3. Against H K the Pre-Trial Judge of the District Court of Prizren issued an order of arrest on 19 October 2004, whereas on 23 November 2004 the SRSG granted the request of the International Public Prosecutor for an International Wanted Notice.
H K was arrested on 24 May 2005 at the border attempting to enter in Kosovo and since then is continuously in detention.

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4. The written verdict was served to the defendant on 21 July 2008 and to his lawyer on 17 July 2008.
The defense counsel filed appeal against the verdict on 22 July 2008.

5. After the hand over of the case to EULEX Judges in January 2009, the Supreme Court of Kosovo scheduled the appeal session on 27 October 2009, where, after the report of the reporting judge, the defendants and his defense counsel explained the appeal and the International Prosecutor replied as stated in the minutes of the record.

6. The deliberation was taken by the Court on 27 October 2009.

Court Findings

I

7. According to article 415 PCPCK the Court of Second Instance shall examine ex officio some violations of procedural and criminal law.
Reserving for the next paragraphs the examination of the claims raised by the appeal, here it can be noticed that:

- no violations are to be found as to the constitution of the First Instance Court and to the participations of the judges in the main trial and in rendering of the judgment (article 403.1 items 1 and 2), as to the jurisdiction of the same Court (article 403.1 item 6) and as to the items 9, 10, 11 and 12 of article 403.1 PCPCK,
- the main trial was conducted in the presence of the accused and of his defense counsel (article 415.1 items 2 and 3).

II

8. The appeal challenges the judgment of first instance due to:
- basic violation of the legal provisions of PCPCK (article 403),
- violation of Criminal Law (article 404),
- incomplete and erroneous corroboration of factual situation (article 405) and
- decision on sentence (article 406).

The defense counsel proposes:
- to modify the challenged verdict and acquit the defendant, or
- to annul the challenged verdict and to send the case to the First Instance Court for a re-trial, ordering at the same time the termination of detention, or
- to impose to the accused a more lenient punishment.

9. As to the substantial violation of the provisions of criminal procedure the appeal claims as following.
- H. K. was interviewed by the Police in the absence of his defense counsel and he was threatened that he should speak about matters he had no knowledge of.

The review of the documents does not confirm the claim of the appeal because the defendant H K was interviewed by the Police only once, on 25 May 2005 (the day after his arrest) and on that occasion his lawyer was present.
In the case file there is no trace of any threat against the defendant.
The claim is therefore ungrounded.

- In its judgment the First Instance Court did not fully adjudicate the substance of the charge (violation of article 403 paragraph 1 item 7 PCPCK).

This claim is not better explained in the appeal and can not be accepted.
Actually the first judgment examined not only all the constitutive elements of the charged crime of kidnapping, the evidence related to the fact and to the responsibility of other co-perpetrators as M K but also and in a specific way the evidence related to the involvement of the defendant in the crime, his defense and the nature of his responsibility.
H K was charged with the criminal offence of having taken part in the kidnapping of S. S and the First Instance Court examined thoroughly the substance of this charge.

- The first judgment was based on inadmissible evidence (violation of article 403 paragraph 1 item 8 PCPCK.

Also this claim is not better substantiated in the appeal and appears to be ungrounded.
Actually, the first judgment was not based on inadmissible evidence.
The list of evidence used by the Court is on the fifth page of the judgment: it is composed by testimonies, photos exhibits, police investigations on the spot, transcript of phone conversations, the statements of the defendant.
Relevant evidence results to be collected in a correct manner.

10. As to the violation of the criminal law the appeal claims numerous omission made by the First Court without however specifying better this point.

This Court deems this point as ungrounded because no violation of the criminal law is to be found in the first judgment which affirmed the responsibility of the defendant for having taken part, as an accomplice, to the charged crime of kidnapping.
The concepts of criminal responsibility and of complicity appear to be correctly applied in the challenged verdict.
According to article 159.1 PCCK the criminal offence of kidnapping occurs when a person is deprived of his liberty and the perpetrator acts with the intent to force him or another person to do or abstain from doing an act or to acquiesce to an act.

The purpose to obtain a material benefit from the crime is not expressed but can be considered included in the coercion exercised upon the victim to do an act.
From the wording of the legal provision it is clear that the crime is complete when the person is abducted and the perpetrator acts with that specific intent.
The realization of the intent is not necessary in order to integrate the crime.
However, if the aim of the conduct (in our case the payment of a ransom) occurs, it can not be considered as something which stays outside the crime, but it is a part of it.
In our case the deprivation of liberty of the victim was aimed to force him to pay ransom in the amount of 750.000 Euro, the request of the ransom was delivered still during the captivity (see testimony of S and F S . and the letter with the request, Exhibit no. 6).
On this way the conduct of the perpetrators integrated the charged criminal offence.
It is known that the ransom was paid some days after the release of the victim.
However during the time of his captivity the victim and his family had been informed of the request of ransom and the son of the victim had already collected some money.
The evening after his release the victim was visited by M K and with him reached an agreement on the amount of money (200.000 Euro) he would pay as ransom.
The request of ransom was accompanied by other threats but the payment was the result of and found its cause in the kidnapping, without which S . S would not have paid any money.
Thus, the payment of 200.000 Euro can not be considered as the result of a crime different from the kidnapping.
The intentional participation in the collecting the money of ransom amounts to a participation in the crime of kidnapping, considering that the person who received the money substantially contributed in the achieving the common result.
Since the crime was committed by a group of perpetrators paragraph 2 of article 159 PCCK finds application.

11. Under the point related to the erroneous and incomplete determination of the factual situation the appeal claims that no reliable or concrete evidence was brought as to the criminal responsibility of the defendant.
In fact, neither the victim nor the witness who took the money of the ransom (N S . and Sh S .) ever saw the defendant as a person involved in the crime.
The First Court gave more reliability to anonymous witnesses than to the above mentioned ones and this means that the case was based on indications and presumptions.
Collected evidence is defined as inaccurate, incomplete, insufficient and disputable.
The appeal claims that the evidence and the photos selected by the Prosecutor indicate the perpetrators as persons with beards and brown hair, whereas the sons of H K , suspected as perpetrators, have blond hair.
Therefore testimonies of anonymous witnesses A and B have nothing to do with the reality.
The telephone calls made by the son of the defendant had nothing that could incriminate the latter and their content was abused by the Court.
It is still unclear what the material conduct of the defendant was and the manner of his participation to the crime.

The extreme poverty of the defendant and of his family is evidence that he did not take any benefit from the crime.
An indication of the innocence of H[illegible]li is given by his spontaneous return to Kosovo.
The appeal asks that the judgment is taken respecting the provisions of paragraphs 1 to 4 of article 157 PCPCK.

This Court deems the factual establishment made by the First Instance Court as accurate and that relevant legal provisions were fully respected.

- Firstly it must be noticed that the First Instance Court excluded the testimony given before the Prosecutor by Anonymous Witness B as inadmissible evidence according to article 156 paragraph 1 PCPCK.
For this reason the challenged verdict was not based on that testimony and the claims against it can not be examined here.

- Secondly it can be added that no violation of the provisions of article 157 PCPCK can be found because:
- relevant evidence was challenged by the defense during both the pre-trial and the main trial stage (art. 157 paragraph 1);
- the challenged verdict did not find the accused guilty based solely or to a decisive extent upon statements given by the defendant to the police or to the prosecutor (article 157 paragraph 2) because the relevant and decisive evidence was constituted among other by trial testimonies, documents and transcript of phone calls;
- in this case no cooperative witnesses were involved (article 157 paragraph 4).

12. A more accurate examination is required as to the provision of article 157.3 PCPCK which states that the court can not find the accused guilty based solely or to a decisive extent on testimony given by a single witness whose identity is anonymous to the defense counsel and the accused.
In this case it is clear that the First Instance Court did not base its judgment solely on the testimony of Anonymous Witness A, because it found different and important evidence to corroborate the first one.

As to the second part of the above mentioned legal provision (which excludes that an anonymous witness can be used by a Court in order to base "to a decisive extent" the conviction of a defendant) it is crucial the definition of "decisiveness" of a piece of evidence.
This Court is of the opinion that "decisive" is the evidence which "decides" on the criminal responsibility of a defendant.
In other words is decisive that piece of evidence without which a Court is not able, has not enough evidentiary material in order to pronounce the defendant guilty.
PCPCK admits anonymous witness only as evidence which is used "in addition" to other pieces of evidence which alone are already sufficient to ground the criminal responsibility of the defendant.

In this case there was not violation of the above mentioned legal provision.
It can be noticed that the basic and decisive evidence for the conviction of the defendant is constituted by the phone calls dated 11 June and 2 July 2005, by witness statements and by part of the statements of the defendants, to which the testimony of "A" offers an important but not decisive corroboration.
In fact, by reading the transcripts of the phone calls it is clear what follows:
- the speakers are on one side S K (his voice was recognized by KPS Officer Selman Hoxha and the recorded phone was owned by him) and on the other side D K ., respectively the brother of one of the kidnappers (M K j) and the son of the defendant H K ;
- the telephone calls happened immediately after the arrest of H K i (24 May 2005);
- both telephone calls are strictly related to the crime, the investigations, the evidence collected and particularly to the evidence which can justify the charge and the detention of H K .
The two calls don't appear to be motivated only by the interest in the fate of the defendant (father of D K li) but and above all by the interest on the result of the investigation, on the sufficiency of evidence, on the probability that just S K can have spoken to the Authorities about the role of the defendant and thus constitute the main evidence against him.
During the first telephone call (11 June 2005), S denies to have given to the Police the elements to charge the defendant and explains that very probably had been the brother and the nephew of the victim to have seen H face on the balcony of the house of Muje Kadriaj the day when the two of them brought the money of the ransom.
This constitutes a first evidence of the fact that H K was present in that house exactly when the ransom was paid.
This element is corroborated by the statements given by Nevahir Sadullahu to the Prosecutor and confirmed at the main trial, according to which that day he saw a man and a female exactly on the balcony of the house of M K .
This element is confirmed also by the statements given by the defendant on 25 May 2005 before the Police[1] when he remembered that the year before (that is 2004) he and one of his daughters (S , had paid a visit to M s house, they stayed there for about 15 minutes and had a coffee in the balcony of the house.
That Haxhi Kurpali was in the house exactly of M K is confirmed by the rest of the statements of the defendant who remembers that some time later M was killed;
- during the first telephone call we are informed also about another important item: it was D K and some persons connected to him that detained the victim in a "bunker" not far from D s house.
This detail is affirmed by S (who mentions "the place where you kept him") and confirmed by D who admits that the Police found the bunker where the victim had been kept;
The point of the bunker finds corroboration in the testimony of the victim, S S who confirmed to have been kept in a bunker during part of his captivity.
The defendant stated to live in Albania near the border with Kosovo and the victim remembered to have been brought beyond the border with Albania during his captivity;

[1] The defendant confirmed this fact at the main trial (see hearing 11 April 2007 pages 4, 5 and 7).

- the two speakers add some details about the version given by S K to the Police, according to which K family met H K because of the friendship with K K and that they drank coffee together.
However, at the same time, S admits that the emerging evidence can not be undervalued or deemed as "accidental": H K was in K house exactly at the time of payment of the ransom and the bunker where the victim had been kept was "not far from their house" meaning the house of K family.

- It must be remembered that both the victim S S u (hearing 1 February 2007 pages 24 and 26) and the witness R Sh i (hearing 5 February 2007 page 9) recognized one of the material perpetrators in the same picture (no. 7) of the photo line up (exhibit no. 5) and that was the picture of H K son of Haxhi.

The second telephone call confirms the content of the first one:
- S K asks about the detention of H K i and this means that this call is not motivated by the wish of D to know about the fate of his father, because he is the person who informs S K about the detention of H ;
- Dervish is actually interrogating S in order to ascertain if it was S who said "that the old man was there and received money".
S himself repeatedly and denies to have charged H , explaining that he was accused by the persons who brought the money.
D n speaks of the accusation, warns and actually threatens S . with the words "I mean, it would have been good for you to withdraw it (the accusation) man, because you know how we have been man, we have not been that kind of people that fuck each other, do you get me?"
S denies again and suggests that H "should not admit that he came to pick up the money from us".
Dervish replies that H will never admit this.
It is clear that in this telephone call the two speakers discuss about the conduct charged to H and above all about the person who may have accused him before the Police.
Once again from the explanation given by S K it is confirmed that Haxhi was present when the ransom was paid.
The two speakers insist that Haxhi should never admit to have picked up the money from K 's family, but exactly this appears to be the unique logical explanation for his presence there and for the risk to be accused just by the persons who brought the money.
Considering the above mentioned elements related to the involvement of two sons of the defendant in the apprehension and in the detention of S S , it could not be accidental that H K was in the house of M K exactly the day when the latter received the ransom but his presence there was clearly related to the will of the perpetrators to obtain immediately part of the money.
The alternative explanation for his presence in K 's house given by the defendant (to have paid a very short visit after that M K had visited the son of the defendant in prison) does not find any corroboration.

- It can be added that H K has admitted that the day when he visited M K house he was in possession of a black or dark gray bag, where he had the dirty cloths of his son who was in prison.
Thus, H K admits to have been in possession of an object, a bag, which could be used to hide and transport the money.

- The two witnesses who brought the ransom to the house of M K remember to have been in possession of a bag where the money was kept.
The color of this bag is indicated by these two witnesses in a different way during the investigative stage and at the main trial.
N S stated before the Prosecutor (Investigative Hearing 1 June 2005 page 3) that the bag was a blue nylon bag, whereas at the main trial (hearing 5 February 2007 page 25) he remembered an orange plastic bag.
Sh S (Investigative Hearing 1 June 2005 page 4) remembered a plastic bag, whereas at the main trial (hearing 5 February 2007 page 22) remembered a yellowish orange plastic bag.
These details can not be seen as a decisive discrepancy able to put in doubt the narration of these two witnesses.
Firstly the two witnesses may simply have made a mistake about the color of the bag, which was dark in the first interview and became orange three years after the crime.
Secondly and above all, the bag with the money brought by the witnesses can have been contained in the black bag of the defendant when he left the house.

- Finally at the moment of his arrest H K was in possession of a small paper with written just the names of S K and of his father
This confirms on one side that Ha K li had some relation with the family of Muje Kadriaj.
On the other side the explanation given by the defendant (that he wanted to remember their names) does not appear compelling if one considers that he had the paper with those names many months after he had paid the visit to those persons.

The above mentioned evidence allows the conclusion that the defendant was personally and intentionally involved in the crime, playing the role to receive from one of the other perpetrators, M K , the money of the ransom.

13. To the above mentioned evidence must be added the testimony of anonymous witness "A" who confirms the role played by Haxhi Kurpali as that of the person who received a part of the ransom from M K in the house of the latter, the same day when the ransom had been paid by the relatives of the victim.
This testimony matches with all details already contained in the telephone calls and also in the first statement given by the defendant before the Police: H was accompanied by a young woman, the two of them stood outside K 's house at the terrace, the money was taken some time later by two men in a dark brown or dark blue bag made of cloth, these two men left after some minutes without their bag and still later Ha K and the young woman left the house with the money in a bag

It can be concluded that the testimony of anonymous witness "A" confirms the pieces of evidence mentioned in the previous paragraphs without appearing decisive for the conviction of the defendant.
For this reason the legal provision of article 157 paragraph 4 PCPCK appears to be respected.

14. The remaining claims related to the factual establishment appear to be ungrounded.
The physiognomic characteristics of the sons of the defendant does not appear here relevant, considering firstly that the two of them who could be involved in the crime (H and D K were never present in the Court and their physiognomic characteristics could not be established directly and certainly by the latter.
Secondly, as noticed before the victim and the witness R Sh. recognized one of the material perpetrators in the picture of H
Thirdly, during the above mentioned telephone call of 11 June 2005 S K speaks with D H (son of H .) about the bunker "where you kept him", meaning D rvish and some persons connected to him.

The defendant has admitted to go to Kosovo, particularly to Gjakova, very often thus the fact that he was arrested during an attempt to enter Kosovo can not represent evidence of his innocence.
It must be remembered that he was arrested on 24 May 2005, nine months after the crime when it could appear reasonable to believe that investigation might be suspended or have brought no result at all.

Finally, the poor life conditions of the defendant can find explanations different from that alleged by the defense counsel.

15. The appeal deems the sentence as too heavy considering the old age of the defendant (born in 1939), his attitude during his detention and finally the time (one year) which was necessary to the First Court to write and to deliver the verdict.

This Court shares the claim of the appeal.
The First Instance Court gave to the conduct of the defendant the correct legal qualification of intentional participation in an aggravated fact of kidnapping, according to article 159.2 committed in co-perpetration as a member of a group according to article 23 PCCK.
For this crime the punishment is the imprisonment from one up to ten years.
The punishment concretely imposed to H. K (5 years) considers the violent circumstances of the kidnapping, the threats used to compel the victim to pay money to the perpetrators, the amount of the ransom.
The First Instance Court did not consider mitigating circumstances envisaged by article 64.1 PCCK as the personal circumstances of the perpetrator and the time that it was necessary for trying the defendant.
This Court is of the opinion that the above mentioned circumstances should be considered in the sentencing with more attention than that used in the challenged verdict.

The old age of the perpetrator can not constitute an aggravating circumstance as deemed by the Prosecutor but a mitigating one.
The limited role played by the defendant in the crime and his attitude during the trial constitute a mitigating circumstance as well.

As to the time of the proceedings this Court has already noticed[2] that, according to international instruments and particularly to article 6.1 of the European Convention for the Protection of Human Rights, the "reasonable" duration of a proceeding represents a right of the defendant and a duty of the State.
That to consider is the time of the overall proceeding, both in each single phase and in its entirety.
It is related not only to the time by which a trial should begin, but also to the time by which it should end and judgment be rendered.
Trials carried on for a long unreasonable time allow to introduce the equivalence between "justice delayed" and "justice denied", because they keep for a long time the individual in a situation of uncertainty which is incompatible with the rule of law.
The criteria laid down in the European Court of Human Rights case-law in order to assess the reasonableness of the length of the case regard usually the complexity of the case, the applicant's conduct and that of the competent authorities.
In criminal cases when the defendant is in detention the concept of "reasonableness" is tighter, since he must be provided with a final decision as soon as possible, that is in a time which does not make for him practically impossible to have recourse to alternative institutes as i.e. the conditional release.
To reach a final decision within a reasonable time means also that the defendant should never spent all or the biggest part of his punishment in detention on remand before having been final convicted.
According to the jurisprudence of the European Court of Human Rights and to the legislation of some Member States of the Council of Europe the length of a proceeding when it is "unreasonable" may conduct to form of economic compensation.

This case does not appear to be of particular complexity: the first instance was related to one defendant, charged with one specific criminal offence, during the main trial were heard eight witnesses and the defendant, the trial included six public hearings and one session in camera within a period of less than three months, although due to the participation of international judges and prosecutor everything was translated in English and in Albanian, the dimensions of the case file (nine binders) does not appear to be considerable, the written judgment amounts to twenty eight pages.
The defendant did not use any dilatory conduct.
Compared with the not particular complexity of the proceedings and the not dilatory conduct of the defendant the time from the announcement of the judgment of first instance (13 April 2007) to the moment when the written decision was received by the registry of Prizren District Court (17 July 2008, that is fifteen months) was in itself unreasonably long with consequences affecting the rights of the defendant not to spend in detention on remand the biggest part of the punishment imposed by the First Court before the judgment becomes final and to have access to alternative institutes.

[2] Supreme Court of Kosovo judgment 10 April 2009 Ap.-Kz No. 371/2008, Selim Krasniqi et al.

It is not within the competence of this Court to decide on a form of economic compensation grounded on the unreasonable delay of the criminal proceeding.
Nevertheless, this point can be considered under the provision of article 66 no. 2 of PCCK as a particularly mitigating circumstance[3] which indicates that the aims of punishment can be achieved by imposing a lesser punishment.

Considering all the elements indicated in article 64 PCCK included the above mentioned mitigating circumstances (the age of the defendant, the limited role played by him in the crime and the unreasonable duration of some parts of the proceedings) this Court deems appropriate to reduce the imposed punishment to imprisonment of four (4) years and five (5) months.

III

The verdict of first instance was partially modified as to the punishment imposed to the defendant.
The Judgment of the District Court of Prizren P. no. 238/04, dated 13 April 2007 is affirmed in the remaining parts.
The costs of the proceedings of Second Instance will be borne by the appellant.
The time spent in detention on remand by the defendant is included in the amount of punishment.
With a separate ruling it is decided about the detention on remand for the defendant, according to article 426 and 393 KCCP.

[3] In this sense confront the above mentioned judgment of this Supreme Court and the judgments of District Court of Pristine 9 November 2007 Shkumbin MEHMETI and of District Court of Pristine 5 October 2007 B.M.

Dated this 27th day of October 2009.
Ap.-Kz. No. 345/2008

Prepared in English, an authorized language.

International Presiding Judge
Emilio Gatti

International Recording Officer
Judit Eva Tatrai

International Judge
Gerrit-Marc Sprenger

Kosovo National Judge
Avdi Dinaj

Legal Remedy

No appeal is possible against this Judgment (art. 430 PCPCK). Only a request for the protection of legality is possible, to be filed with the court which rendered the decision in the first instance, within 3 months of the service of this decision (art. 451 – 460 PCPCK).