

Supreme Court of Kosovo
PKL-KZZ No. 29/08
29 December 2009

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo in a panel composed of EULEX Judge Norbert Koster as Presiding Judge, with Supreme Court Judges Miftar Jasiqi and Avdi Dinaj as members of the panel, assisted by Judit Eva Tatrai as court recorder,

in the criminal case against the accused **N. M.**, born on , and **Sh. K.**, born on, each of whom were charged, convicted and sentenced for the offence of Fraud in co-perpetration contrary to Article 261 (2) of the Provisional Criminal Code of Kosovo (PCCK), as read in conjunction with Article 23 of the PCCK,

acting upon the Requests for Protection of Legality, filed on 21.03.08 by Defence Counsel Haki Lecaj on behalf of defendant Sh. K. and Defence Counsel Vahid Halili on behalf of defendant N. M., against the judgment of the Municipal Court in Prishtinë/Priština (P.No. 595/05), dated 13 June 2007, and the judgment of the District Court in Prishtinë/Priština (Ap. 528/07), dated 06 February 2008, in a session held on 29 December 2009 after deliberation and voting

issues the following

JUDGMENT

The Requests for Protection of Legality are well-founded. The judgment of the Municipal Court in Prishtinë/Priština (P.No. 595/05), dated 13 June 2007, and the judgment of the District Court in Prishtinë/Priština (Ap. 528/07), dated 06 February 2008, are **ANNULLED** and the case is returned for retrial to the Municipal Court in Prishtinë/Priština (P.No. 595/05).

REASONING

I. Procedural History

The Municipal Court of Prishtinë/Priština with Verdict, dated 13 June 2007, found the defendants guilty of fraud in co-perpetration, in violation of Article 261 Paragraph 2 of the Provisional Criminal Code of Kosovo (PCCK), as read in conjunction with Article 23 of the PCCK. Each of the defendants was sentenced to one (1) year imprisonment.

The defendants and the Public Prosecutor appealed the Verdict. The District Court of Prishtinë/Priština in a panel composed of three (3) International Judges with Verdict, dated 6 February 2007, rejected the appeals as unfounded and affirmed the Verdict of the Municipal Court in all respects.

On 21 March 2008, Defence Counsel Haki Lecaj on behalf of defendant K. filed a request for protection of legality against the aforementioned Verdicts. Also on 21 March 2008, Defence Counsel Vahid Halili on behalf of defendant M. filed a request for protection of legality against the Verdicts.

II. Issues raised in the request for protection of legality

The requests are a repetition of the subjects raised by the Defence Counsels in their appeals against the Verdict of the Municipal Court. The counsels again contend:

- that the trial panel was not composed in compliance with the law,
- that the court of first instance was not competent to try the case,
- that the Verdict of the Court of first instance exceeded the scope of the indictment,
- that the enacting clause of the Verdict of the Court of first instance does not contain a factual description regarding decisive facts.

The Office of the Public Prosecutor of Kosovo with opinion, dated 10 April 2008, submits that the requests should be rejected as ungrounded since the alleged violations of the law do not exist.

III. Findings of the Supreme Court

The requests are timely filed and admissible.

They are also grounded pursuant to Article 451 Paragraph 1 item 2 of the Kosovo Code of Criminal Procedure (KCCP). The judgments of the Municipal Court and the District Court are based on a substantial violation of the provisions of criminal procedure provided for in Article 403 Paragraph 1 of the KCCP.

The sessions of the main trial at first instance were held on 12, 16, 19 April, 2, 10 May and 13 June 2007. The panel was composed of one (1) International Judge as presiding judge and two (2) Lay Judges. In the session on 2 May Lay Judge Shaban Gerxhaliu was replaced by Lay Judge Tahir Gashi.

The respective part in the minutes of the main trial session reads as follows:

"Presiding Judge: Good afternoon. We resume the trial Today, because the Lay Judge, Shaban Gerxhaliu is sick, we have replaced him with a new one, Tahir Gashi. Are there any objections to this new Panel member being a member of this panel?"

There were no objections.

The trial then continued with questioning witnesses as if nothing had happened.

This plain continuation constituted a substantial violation of Article 403 Paragraph 1 item 1 of the KCCP which reads:

There is a substantial violation of the provisions of criminal procedure if the court was not properly constituted or the participants in the rendering of the judgment included a judge or a lay judge who did not attend the main trial or was excluded from adjudication under a final decision.

The replacement of a member of the trial panel is not strictly prohibited by the procedural law in Kosovo. Although the presiding judge and the members of the

panel shall be continuously present at the main trial (Article 332 Paragraph 1 of the KCCP) the law does not exclude a change in the composition of the panel.

However, strict proceedings are stipulated in Article 345 Paragraph 1 of the KCCP which have to be followed in case of a replacement of a judge:

When the composition of the trial panel has changed, the adjourned main trial shall start from the beginning. However, after hearing the parties, the trial panel may in this case decide not to examine the witnesses and expert witnesses again and not to conduct a new site inspection, but rather to read the testimony of the witnesses and the expert witnesses given at the previous main trial or the record of the site inspection.

Thus the main trial has, as a general rule, to start from the beginning, i.e. with the reading of the indictment (Article 357 of the KCCP). In the course of this new trial the question might come up if evidence taken in the previous trial – and the law is very clear as to that by using the words *previous trial* – has to be taken again. To this regard Article 345 Paragraph 1 of the KCCP allows an exception from the general rule that all evidence has to be presented during the main trial by giving the panel after hearing the parties the option to decide not to question the witnesses again but rather read the testimony of these witnesses.

As a result the proceedings in case of a replacement of a panel member are strictly governed and absolutely clear: the trial must without any choice start again from the beginning with reading the indictment. As to witness statements obtained in the previous trial the panel has to hear the parties if there are objections against reading these statements. If the statements shall be read the panel has to issue a decision and to read the statements. Through these proceedings it is ensured that the new panel member is sufficiently and in a public session informed about the case and the evidence, what is the essential precondition for a public trial and for a Judge to give an informed opinion in the deliberation and voting.

In the case in question none of these rules was respected by the first instance court. Instead of starting the trial from the beginning with reading the indictment the main trial simply continued with a Lay Judge who, as a consequence, was not officially informed about the charges against the defendants.

The statement of the defence counsels that they had no objections against the new Lay Judge cannot be seen as an agreement in this omission.

Firstly, the requirement of the law that the main trial has to start from the beginning including reading the indictment is not at the disposal of the parties. Reading the

indictment is one of the essential parts of the main trial proceedings which cannot be altered or waived by the parties.

Secondly, the parties were not even asked by the court of first instance if they agreed in the continuation of the main trial. Since the question asked by the presiding judge solely referred to objections against the new Lay Judge being a panel member their answers – “no objections” - cannot be interpreted as an agreement in disregarding essential provisions of criminal proceedings.

The panel of the Supreme Court disagrees with the contrary interpretation by the court of second instance. It was clearly not the duty of the defence counsels to assess what the presiding judge – who asked a very precise question - was “really” asking. Far from it, it is the duty of the judges to ensure that the proceedings are held in accordance with the procedural law. In addition to this general rule Article 333 Paragraph 2 of the KCCP expressly states that:

It shall be the duty of the presiding judge to ensure that the case is thoroughly and fairly examined

This duty cannot be shifted on to the defence.

The court of first instance furthermore failed to produce the evidence again after the new Lay Judge had joined the panel. The witnesses were not questioned again. The parties were not asked if they agreed in reading the witness statements instead. The statements of the witnesses obtained at the time before the new Judge joined the panel were not read indeed.

Against this background the panel of the Supreme Court again disagrees with the opinion of the court of second instance that it was clear that “Lay Judge Gashi would become familiar with the testimony of prior witnesses by reading the minutes from the two prior trial sessions”. Article 345 Paragraph 1 of the KCCP sets clear rules as to the way in which the new judge has to be informed about the evidence taken before. With these rules the law maintains at least a minimum level of the requirement of a public trial which is a Human Right (Article 6 of the European Convention on Human Rights). The idea of the court of second instance that the new judge would familiarize himself with the evidence by privately reading the minutes (where? when? how? did he read all of them?) violates this right of the defendant to a public trial.

As a consequence the plain continuation of the main trial created a situation in which Lay Judge Tahir Gashi after a main trial which was not entirely held in public took

part in the deliberation and voting although he was not informed in the appropriate manner, provided by the law, about the charges and the evidence.

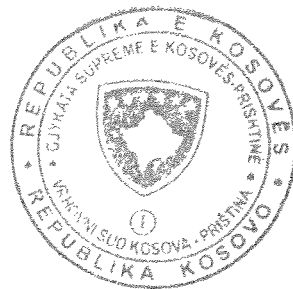
The opinion of the court of second instance that these errors given the strength of the evidence were “harmless in character” cannot be accepted. It is not in compliance with European law traditions to focus on the result only. The law with good reasons defines substantial violations of the criminal procedure which are unacceptable regardless the correctness of the result.

The question whether the violation of Article 345 Paragraph 1 of the KCCP results in a panel which cannot be seen as properly constituted or in a judgment which was taken by a Judge who did not attend the main trial is of mere academic nature, because both violations are seen as substantial violation of the provisions of criminal procedure pursuant to Article 403 Paragraph 1 item 1 of the KCCP which renders the Requests of the defendants for Protection of Legality as well-founded in accordance with Article 451 Paragraph 1 item 2 of the KCCP.

SUPREME COURT OF KOSOVO IN PRISHTINË/PRIŠTINA
PKL.-Kzz. No. 29/2008

Presiding Judge

Norbert Koster



Panel Member

Miftar Jasiqi

Panel Member

Avdi Dinaj