Prishtinë/Priština
Case File Number
Pkl-Kzz 62/10

IN THE NAME OF THE PEOPLE

SUPREME COURT OF KOSOVO in the panel composed of
Maria Giuliana Civinini EULEX Supreme Court Judge and Presiding Judge
Charles L. Smith III EULEX Supreme Court Judge – panel member
Lars Dahlstedt EULEX Supreme Court Judge – panel member
Marie Ademi Supreme Court Judge - panel member
Salih Toplica Supreme Court Judge - panel member
assisted by Maria Rosa del Valle Lopez as court recorder in the criminal case against the defendant:

M. V. , nickname " ', father's name , mother maiden name , born in the village of ', municipality, widower with two sons, literate, current employment unknown, having completed technical high school, completed his military service at Kovin in 1967, of unknown economic status.

Charged with five (5) counts of War Crime as defined in Article 142 in connection with Articles 22 and 26 of the Criminal Law of the Socialist Federal Republic of Yugoslavia (CLSFRY).

Acting upon the request for Protection of Legality dated 26 March 2010 filed by the State Prosecutor of Kosovo against the judgment of the Supreme Court of Kosovo Ap-Kz No. 1/2009 dated 7 October 2009 issues the following,

JUDGEMENT

The request for Protection of Legality filed by the State Prosecutor against the judgment of the Supreme Court of Kosovo Ap-Kz No. 1/2009 dated 7 October 2009 is **GRANTED**; the judgment contains essential violations of:

(a) Article 385.1 in connection with Articles 381.1, 372.2 and 373 of the Code of Criminal Procedure of the Former Socialist Republic of Yugoslavia (CCPFSRY) when affirms that the Law does not allow amending the first instance verdict and does not provide any other remedy but sending the case back for re-trial to the first instance court.

(b) Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) when affirms in that the elapse of ten (10) years in conjunction with a number of re-trials allows the second instance court to terminate a criminal proceeding and acquit the defendant of all charges on the basis of the principle *in dubio pro reo* in order to protect his/her fundamental Human Rights.

REASONING

1. Procedural history.

After a first trial, the District Court of Mitrovicë/Mitrovica convicted the accused for the criminal act of Genocide in complicity pursuant to Article 141 as read with Article 22 of the CLFSRY and sentenced the defendant to fourteen (14) years in prison.

The Supreme Court of Kosovo overturned the judgment of the District Court of Mitrovicë/Mitrovica and the case was sent back to the District Court of Mitrovicë/Mitrovica for re-trial.

After a second trial –forty four (44) sessions- the District Court of Mitrovicë/Mitrovica found the defendant guilty of War Crimes against the civilian population in complicity with others, pursuant to Article 142, paragraph 1 of the CLFSRY, in conjunction with Article 22 CLFSRY and sentenced the accused to twelve (12) years of imprisonment.

The Supreme Court of Kosovo overturned the judgment of the District Court of Mitrovicë/Mitrovica and the case was sent back again to the District Court for re-trial.

After the third trial, the District Court of Mitrovicë/Mitrovica issued the judgment P. 48/01 dated 23 May 2008 and found the defendant guilty of pillage, as recognized by Article 142, in conjunction with Articles 22 and 26 of the Criminal Code of Yugoslavia (YCC), and encompassed by Article 4, paragraph 2 (g) of Additional Protocol II to the Geneva Conventions of 1949 and Application of Measures of intimidation

and terror, as recognized by Article 142, in conjunction with Articles 22 and 25 of the YCC, and encompassed by Article 13, paragraph 2 of Additional Protocol II to the Geneva conventions of 1949. The imposed an aggregated punishment of eight (8) years of imprisonment.

The Supreme Court of Kosovo, in a judgment dated 7 October 2009 Ap-Kz No. 1/2009 amended the first instance verdict and acquitted the defendant of all charges.

The Public Prosecutor filed a Request for Protection of Legality on 31 March 2010 against the judgment of the Supreme Court Ap. – Kz No. 1/2009 dated 7 October 2009.

The legal representation of the defendant, lawyer Miro Delevic, filed on 23 July 2010 opposition to the Protection of Legality; in the same sense, lawyer Bogdan Vladisavljevic also in representation of the defendant filed opposition to the Protection of Legality on 20 September 2010.

The present judgment decides on the request for Protection of Legality filed on 31 March 2010 by the Public Prosecutor against the judgment of the Supreme Court of Kosovo Ap-Kz No. 1/2009 dated 7 October 2009.

2. *Reasoning.*

The request for Protection of Legality filed by the State Prosecutor raises three issues: (1) whether the Public Prosecutor is bound by the deadline of three months stated by Article 452.3 KCCP to file a remedy of Protection of Legality, (2) procedural options in the second instance when the first instance judgment contains erroneous or incomplete factual situation and (3) whether the acquittal of the defendant is in compliance with the law.

2.1. Whether the Public Prosecutor is bound by the deadline of three months stated by Article 452.3 KCCP to file a remedy of Protection of Legality.

Article 452 KCCP establishes who is entitled to file a request for Protection of Legality and the deadline for that purpose. The three first paragraphs of Article 452 deal with the subject-matter:

- **Paragraph 1 – establishes the general terms.** It indicates in general terms who can file the Request for Protection of Legality. According to this paragraph, the Public Prosecutor, the

defendant and the defense counsel of the defendant can file a request for Protection of Legality.

- **Paragraph 2 – relates specifically to the Public Prosecutor.** This paragraph indicates that the Public Prosecutor can file a request for Protection of Legality either to the disadvantage or in favor of the defendant.

- **Paragraph 3 – relates specifically to the defense counsel and *"other persons"*.** This paragraph establishes that the defense counsel and *"other persons"* can file a request for Protection of Legality within the deadline of three months.

The issue under analysis is the scope of *"other persons"* of paragraph 3, in particular, whether the Public Prosecutor is included and, therefore, bound to the deadline of three months to file a request for Protection of Legality.

In this respect, Article 452 paragraph 3 establishes that *"other persons"* are those *"listed in the final sentence of Article 443 paragraph 1 of the present code"*. In this sense, the final sentence of Article 443 paragraph 1 indicates *"After the death of the convicted person, the reopening may be requested by the Public Prosecutor or by the spouse, the extramarital spouse, a blood relation in a direct line to the first degree, an adoptive parent, an adopted child, a brother, a sister or a foster parent of the convicted person"*.

In order to properly interpret Article 452 paragraph 3, we must read it in conjunction with its legal precedents. This Article is based on Article 416 of the Code of Criminal Procedure of the Former Socialist Republic of Yugoslavia (CCPFSRY): *"The competent Public Prosecutor may file a petition for Protection of Legality against effective court decisions and against the court proceedings which preceded those effective decisions if a law has been violated"*. According to the previous legislation the remedy of Protection of Legality could be filed **only** by the Public Prosecutor and **without any deadline**. No other party apart from the Public Prosecutor had access to this remedy.

The clear intention of the new Criminal Procedure Code of Kosovo is to establish a more participative criminal proceeding and open the access to the remedy of Protection of Legality to the defendant, his defense counsel and *"other persons"* with a limitation of three months; when Article 452.3 refers to *"other persons"* is not referring to the Public Prosecutor but to *"the spouse, the extramarital spouse, a blood relation in a direct line to the first degree, an adoptive parent, an adopted child, a brother, a*

sister or a foster parent of the convicted person". The Public Prosecutor is specifically regulated in paragraph 2 of Article 452 following to the criteria of the precedent law of not having deadline.

It couldn't be otherwise. The Public Prosecutor cannot be included into the category of *"other persons"* and regulated by mere reference to another article. If the intention of the law would have been to change the precedent criteria and establish a deadline of three months for the Public Prosecutor, it would have done it in paragraph 2 of Article 452 which specifically relates to the Public Prosecutor.

In this respect, the Supreme Court has already addressed this issue in its judgment Pkl – Kzz 119/2010 dated 20 January 2010; in the same sense, the Supreme Court has already established that the Public Prosecutor is not included in the category of *"other persons"* referred by Article 452 paragraph 3 KCCP and, therefore, is not bound by the deadline of three months to file the remedy of Protection of Legality.

However, Article 452 KCCP has to be read in conjunction with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which is directly applicable in Kosovo according to Article 22 of the Constitution. In particular, Article 452 KCCP has to be interpreted in the light of Article 6 ECHR which establishes the Right to a Fair Trial.

The Supreme Court does not share the opinion of the Public Prosecutor according to which the remedy of Protection of Legality shouldn't be subject of the *"reasonable time"* guarantee of Article 6 ECHR given that it doesn't have any impact on individual rights and has just a declaratory effect that will only benefit the legal system.

The Supreme Court understands that the remedy of Protection of Legality may have clear and concrete impact on individual rights for instance with respect to civil liability arising from criminal activities; the civil consequences of a criminal offence are a matter of capital importance that affects directly the rights of individuals and must be established within a reasonable time according to Article 6 ECHR.

In this respect, the jurisprudence of the ECHR establishes the concept of *"reasonable time"* in the following terms:

CASE OF KRASUSKI v. POLAND
(Application no. 61444/00)
JUDGMENT
STRASBOURG
14 June 2005

"55. The Court will examine the reasonableness of that period in the light of the circumstances of the case and with reference to the criteria established by its case-law, particularly the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, Frydlender v. France [GC], no. 30979/96, § 43, ECHR 2000-VII, and Humen v. Poland [GC], no. 26614/95, § 60, 15 October 1999)."

In brief, Article 452 KCCP has to be read in conjunction with Article 6 ECHR, which means that **when filing a remedy of Protection of Legality the Public Prosecutor is not bound by the deadline of three months established in Article 452.3 KCCP but must respect the general limitation of *"reasonable time"* established by Article 6 ECHR as interpreted by the European Court of Human Rights.**

2.2. Procedural options in the second instance when the first instance judgment contains erroneous or incomplete factual situation.

The judgment of second instance Ap-Kz No. 1/2009 dated 7 October issued by the Supreme Court of Kosovo makes an assessment of the procedural options in order to address the erroneous and incomplete factual situation of the first instance judgment; it indicates in page 18 of the English version that *"As consequence the verdict in accordance with Article 385 Paragraph 1 of the LCP – CCPFSRY- should be quashed and the case sent back to the court of first instance for retrial. The wording of the procedural law clearly does not provide any other remedy. In particular it does not allow amending the first instance verdict".*

The Supreme Court agrees with the Public Prosecutor that this analysis is wrong. The simple reading of the Criminal Procedural Law shows other procedural options: Article 381.1 in fine CCPFSRY *"In a session of the panel **or on the basis of a hearing**, the court in the second instance may (...) **revise the verdict of the court in the first instance**"*; Article 372 *"1- The court in the second instance shall render a decision in a session of the panel **or on the basis of a hearing held**. 2- The court in the second instance shall decide in a session of the panel whether to **hold the hearing**."*

In order to clarify the matter of **RE-TRIALS** and harmonize the practice at the second instance level in Kosovo, in the following paragraphs the Supreme Court will analyze the procedural options for the second instance court in case of erroneous or incomplete factual situation according to both, Criminal Procedural Code of the Socialist Federal Republic of Yugoslavia (CCPFSRY) and Criminal Procedure Code of Kosovo (KCCP):

As a principle to be followed in all appeals against judgments of first instance that, according to the second instance court, hasn't established the facts in a clear and correct manner, the court shall have the following procedural options:

1) **Make a new assessment of the evidence available in the case-file and establish the facts in a clear and correct manner in the judgment of second instance (Articles 424.4, 426.1 KCCP / Article 381.1 *in fine* CCPFSRY).**

2) **Schedule a hearing at the second instance level in order to establish the facts (Articles 411 and 413.4 KCCP / Articles 372 and 373.1 CCPFSRY).**

3) **Send the case for re-trial to the first instance court, taking into consideration that this option must only be exercised in exceptional circumstances when it is not possible to establish the facts at the second instance level according to paragraph one and two above (Article 424.1 *in fine* KCCP / Article 385.1 CCPFSRY).**

4) **Acquit the defendant on the basis that there is no sufficient evidence to support the charges, taking into consideration that this option must only be exercised when it is not possible to establish the facts according to paragraphs one, two or three above (Article 420.4 read in conjunction with Article 390.3 KCCP / Article 381.1 *in fine*, read in conjunction with 350.3 CCPFSRY).**

The practice at the second instance level to systematically send cases back for re-trial to the first instance results in a burden to all parties, a burden to the system and turns the administration of justice seriously dysfunctional –as we have witnessed in this particular case which is a clear example– Therefore, this practice must be corrected. Sending a case back for re-trial should never be the rule but the exception. It is a decision that must be very carefully considered at the second instance level and adopted ONLY exceptional circumstances.

2.3. Whether the acquittal of the defendant is in compliance with the law.

The judgment of second instance Ap-Kz No. 1/2009 dated 7 October issued by the Supreme Court of Kosovo acquits the defendant of all charges. The second instance court argues that Article 385.1 LCP obliges to quash the first instance judgment and send the case back for re-trial and the law does not provide any other remedy, in particular, does not allow amending the first instance judgments. According to the second instance court, Article 385.1 LCP has to be interpreted in the light of the ECHR, specifically Article 6 which states that every defendant is entitled to criminal proceedings *"within reasonable time"*. The second instance court argues that the defendant has been tried not less than three (3) times at the first instance level and not less than three (3) times at the second instance level and underscores that the criminal proceeding started in 1999; in this respect, the number of retrials in combination with the elapse of ten years marks an intolerable delay of proceedings and consequently requires that the criminal proceeding against the accused is brought to a termination in order to protect his basic Human Rights. For that reason, the second instance court refrained from sending the case back for another re-trial and, instead, applied the principle *in dubio pro reo*, modified the verdict of first instance in total and acquitted the accused from all charges.

The Supreme Court agrees with the Public Prosecutor that there are substantial violations of the provisions of the Criminal Procedure in this reasoning of the judgment of second instance Ap-Kz No. 1/2009 dated 7 October and therefore must be corrected.

First, Article 385.1 CCPFSRY is not the only procedural option for the second instance court when the first instance judgment contains erroneous or incomplete factual situation; as indicated above, the second instance court could have made a new assessment of the evidence according to Article 381.1 *in fine* CCPFSRY or could have scheduled a hearing at the second instance level in order to properly establish the facts according to Articles 372.2 and 373.1 CCPFSRY. In fact, the second instance court could have made a new assessment of the evidence or held another hearing each and every time that the case was tried at the second instance level during the precedent ten (10) years instead of sending the case back for re-trial to the first instance provoking an unbearable delay in the administration of justice.

Furthermore, the interpretation of Article 6 ECHR is not correct either. The second instance judgment takes only into consideration the entire duration of the proceeding since it started in 1999 (10 years at

the time of the judgment). According to the jurisprudence of the ECHR the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the case; every period of inactivity must be properly assessed and it must be found whether it is imputable to the defendant or not; the complexity of the case and the evidence must also be taken into consideration. In this sense:

CASE OF STRĂIN AND OTHERS v. ROMANIA
*(Application no. 57001/00)*JUDGMENT
STRASBOURG
21 July 2005

The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the criteria enshrined in its case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, Frydlender v. France [GC], no. 30979/96, § 43, ECHR 2000-VII, and Hartman v. the Czech Republic, no. 53341/99, § 73, 10 July 2003).

Besides, the second instance court quashed the verdict of first instance and applied the principle *in dubio pro reo* as a legal basis to acquit the defendant of all charges. By doing this, the judgment of the second instance court left the case **not adjudicated, which constitutes a failure of the justice system**. In fact, the principle *in dubio pro reo* can only be applied after exhausting all ex officio powers provided to Judges by Law in order to establish the facts. If the second instance court considered that the evidence available in the case-file after three trials was not sufficient to convict the defendant, it should have acquitted the defendant on the basis of lack of sufficient evidence to support the charges. There has been an important effort at the first instance level in order to establish the facts according to the instructions of the second instance court (e.g. the first re-trial at the District Court of Mitrovicë/Mitrovica held forty four -44- sessions). The second instance court shouldn't have disregarded the entire proceeding and acquit the defendant on the basis of the principle *in dubio pro reo*. If the second instance considered that the evidence was not sufficient to convict the defendant, it should have properly adjudicated the case and acquitted the defendant on the basis of lack of sufficient evidence to support the charges.

In this sense, the European Court of Human Rights establishes the necessity of never leaving unpunished the infringement to life in order to maintain the confidence of the general public in the administration of justice.

AFFAIRE ALIKAJ ET AUTRES c. ITALIE
(Requête n° 47357/08)
ARRÊT
STRASBOURG
29 mars 2011

"94. (...) The national jurisdictions can never leave unpunished the infringement to life. This is necessary in order to maintain the confidence of the general public and to ensure its compliance to the rule of law and also in order to prevent any appearance that the state would tolerate illegal acts or would collide in their perpetration. (...)
107. The Court notes also that 11 years after the death of Julian Alikaj, the Supreme Court, after having recognized that A.R is guilty of "murder by negligence" has announced a "non-suit" because the constitutive elements of the offence are prescribed.
108. The court notes that the steps undertaken by the investigative authorities after the death of Julian Alikaj and by the judges during the trial are not controversial. However, taking into account the obligation of promptness and reasonable diligence, which are implicit as to the positive obligations in question, it is sufficient to observe that the applicability of the prescription belongs to the category of inadmissible measures, according to the jurisprudence of the Court, because this applicability had as a consequence to prevent the conviction.(...)
111. Therefore, the Court considers that far from being rigorous the criminal system as applied here was not strong enough to prevent efficiently illegal acts as denounced by the claimants. In the specific circumstances of this case, the Court concludes that this criminal procedure did not provide for an appropriate redress in view of the violation of Article 2 of the Convention."

In conclusion, the request for Protection of Legality filed by the Public Prosecutor against the judgment of the Supreme Court of Kosovo Ap-Kz No. 1/2009 is granted.

SUPREME COURT OF KOSOVO
On 15 April 2011, Pkl.-Kzz. No. 62/2010

Presiding judge:

Maria Giuliana Civinini
EULEX Judge

Members of the panel:

Charles L. Smith III
EULEX Judge

Lars Dahlstedt
EULEX Judge

Salih Toplica
SC Judge

Marie Ademi
SC Judge