

Supreme Court of Kosovo
Pkl-Kzz no. 109/2012
14 August 2012

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Horst Proetel as Presiding Judge, and EULEX Judges Tore Thomassen and Gerrit-Marc Sprenger, Supreme Court Judges Nazmije Ibrahim and Valdete Daka as panel members assisted by Legal Officer Chiara Rojek in the capacity of recording clerk,

In the criminal case against **SP**, nickname*****, son of SP and IM, born on*****in ****village, Municipality of*****, *****, citizen of Bosnia and Herzegovina , resident of *****, divorced and father of four children, completed elementary school, car mechanic with income of 1.000 Euro per month, average economic status, in detention on remand since 03 February 2010,

And **HS**, son of RS and FB, born on ***** in **** village, *****, *****, resident of Kosovo, *****, married, father of five children, completed high school, car mechanic with income of 300-500 Euro per month when employed, average economic status, in detention on remand since 22 February 2010,

Charged as per in the Indictment PPS no. 23/2010 - GJPP no. 11/2010 filed on 16 July 2010 by the Special Prosecutor with the District Court of Mitrovicë/a with the criminal offences of Organized Crime contrary to Article 274 Paragraph 3 of the Criminal Code of Kosovo (CCK) related to the offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 2 and Paragraph 4 Item 1 of the CCK,

Convicted in first instance by Judgment P no. 36/2010 of the District Court of Mitrovicë/a dated 23 February 2011, by which SP was found guilty for the Organized Crime contrary to Article 274 Paragraph 1 and Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 2 and Paragraph 4 Item 1 of the CCK, and sentenced to an aggregate punishment of eight (8) years of imprisonment and a fine of 51.00 Euros, and by which HS was found guilty for Organized Crime contrary to Article 274 Paragraph 3 and Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 2 and Paragraph 4 Item 1 of the CCK, and sentenced to an aggregate punishment is determined in 10 (ten) years of imprisonment and a fine of 51.00 Euros,

As confirmed in second instance by Judgment Ap-Kz no. 255/2011 of the Supreme Court of Kosovo dated 18 January 2012,

Acting upon the Request for Protection of Legality filed on 29 June 2012 by Defendant SP and the Request for Protection of Legality filed on 20 June 2012 by Defence Counsel Mahmut Halimi on behalf of Defendant HS against the Judgment P no. 36/2010 of the District Court of Mitrovicë/a dated 23 February 2011 and the Judgment Ap-Kz no. 255/2011 of the Supreme Court of Kosovo dated 18 January 2012, and considering the Opinion and Motion to the Requests filed by the Office of the State Prosecutor of Kosovo (OSPK) dated 23 July 2012, after having deliberated and voted on 14 August 2012,

Pursuant to Articles 451 and following of the KCCP, issues the following

JUDGMENT

1. The Request for Protection of Legality filed by Defendant SP on 29 June 2012 against the Judgment P no. 36/2010 of the District Court of Mitrovicë/a dated 23 February 2011 and the Judgment Ap-Kz no. 255/2011 of the Supreme Court of Kosovo dated 18 January 2012 is **DISMISSED** as impermissible pursuant to Article 451 Paragraph 2 of the KCCP.
2. The Request for Protection of Legality filed on 20 June 2012 by Defence counsel Mahmut Halimi on behalf of Defendant HS against both Judgments is **REJECTED** as ungrounded pursuant to Article 456 of the KCCP.
3. The Judgment P no. 36/2010 of the District Court of Mitrovicë/a dated 23 February 2011 and the Judgment Ap - Kz no. 255/2011 of the Supreme Court of Kosovo dated 18 January 2012 are **AFFIRMED** in their entirety.

REASONING

I. Procedural background

On 16 July 2010, the Indictment PPS no. 23/2010 – GJPP no. 11/2010 dated 13 July 2010 was filed against HS and SP by the Special Prosecutor for the abovementioned criminal offences. UJ and EM were charged with Organized Crime contrary to Article 274 Paragraph 1 related to the offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 2 and Paragraph 4 Item 1 of the CCK.

On 7 September 2010, the Indictment was confirmed by Ruling KA no. 56/2010.

On 23 February 2011, the District Court of Mitrovicë/a issued the Judgment P no. 36/2010. Defendant SP was found guilty for the criminal offences of Organized Crime contrary to Article 274 Paragraph 1 of the CCK (count 1) and Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 2 and Paragraph 4 Item 1 of the CCK (count 2). He was sentenced to seven (7) years of imprisonment and a fine of 50.00 euros (count 1), and to three (3) years of imprisonment and a fine of 50.00 euros (count 2). An aggregate punishment of eight (8) years of imprisonment and a fine of 51.00 euros was imposed onto him. HS was found guilty for Organized Crime contrary to Article 274 Paragraph 3 (count 1) and Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 2 and Paragraph 4 Item 1 of the CCK (count 2), and sentenced to eight (8) and a fine of 50.00 euros (count 1), and to three (3) years of imprisonment and a fine of 50.00 Euro (count 2). The aggregate punishment was determined to ten (10) years of imprisonment and a fine of 51.00 Euros.

The third co-Accused was convicted and the fourth co-Accused was acquitted.

On 18 January 2012, the Supreme Court of Kosovo issued the judgment Ap-Kz no. 255/2011 by which the Appeals filed on behalf of the three Defendants were rejected, and the First Instance Judgment affirmed.

On 3 May 2012, Lawyer Adem Vokshi filed a Request for Protection of Legality on the behalf of SP, which was rejected by Judgment Pkl-Kzz no. 80/2012 of the Supreme Court of Kosovo dated

14 June.

On 20 and 29 June 2012, two Requests for Protection of Legality were filed, respectively by Defence counsel Mahmut Halimi on behalf of Defendant HS and by Defendant SP.

II. Submissions of the Defence and Reply of the OSPK

1. Request for Protection of Legality filed by Defendant SP

SP filed the Request on the ground of a substantial violation of the provisions of the criminal procedure under Article 451 Paragraph 1 item 3 read with Article 403 Paragraph 2 item 1 of the KCCP, and proposes to the Supreme Court of Kosovo to annul the challenged Judgment and send back the case for re-trial, or to reduce the imposed sentence. He also requests the termination of the detention on remand pursuant to Article 420 Paragraph 1 item 3 read with Article 424 Paragraphs 1 through 4 of the KCCP.

In his view, the First and Second Instance Courts committed a violation of the criminal procedure under Article 71 Paragraph 1 of the CCK which affected the lawfulness of the judicial decision, as two punishments were pronounced for the same offence.

The Defendant alleges discrepancies between several statements of the co-Accused, EM, given to the Police and to the Prosecutor, and submits that EM was attempting to involve him. He claims that he is not criminally liable, and that FM, the father of EM, was involved in the drug business and the setup of HS. He mentions his personal situation, e.g. father to four children under aged.

He finally refers to the acquittal of UJ, and to the differentiation of treatment in sentencing between HS and EM.

2. Request for Protection of Legality filed by Defence Counsel Mahmut Halimi on behalf of Defendant HS

The Defence bases its Request on a violation of the provisions of criminal procedure and a violation of the criminal law under Article 451 Paragraph 1 items 1,2,3 read with Article 403 Paragraph 1 items 10 and 12 of the KCCP. Lawyer Halimi suggests to the Supreme Court of Kosovo to amend it in order to acquit HS pursuant to Article 390 item 3 of the KCCP, or to modify it by specifying the actions of the Defendant relating to the offence of Organized Crime, to impose a more lenient punishment, or to annul the First and Second Instance Judgments and to send back the case for retrial. He lastly proposes to terminate or postpone the enforcement of the final judicial decision, pursuant to Article 454 Paragraph 4 of the KCCP.

He avers an essential violation of the provisions of criminal procedure, because the State Prosecutor modified the Indictment against Defendant S as to reclassify the criminal act under Article 25 of the CCK (assistance). The Court should have followed the State Prosecutor's amendment to the benefit of the Accused, in accordance with Article 413 Paragraph 5.

The Defence submits that the First Instance Court acted in contradiction with Articles 387 Paragraph 1 and 231 Paragraph 2 item 5 of the KCCP, by failing to assess the evidence presented by the Defence, and mainly relying on pre-trial statements to decide on the guilt of the Defendants. The Second Instance Court only endorsed these findings.

The Defence also alleges contradictions between the reasoning of the verdict and the content of the records of statements and letters, e.g. police reports regarding the conduct of EM and the allusion to HS in his statements on one hand, and the reasoning of First Instance Judgment on the other hand. He avers that some evidence against him was fabricated by three police.

The Defence Counsel contends the Appeal Panel's rejection to hear YK as witness. This individual was sharing EM room in Dubrava prison in February and was aware of the phone contact between EM and Witness MT, and the motives of the witness. The Defence also claims that the Motion to hear FM was precluded without sufficient explanations. Lawyer Halimi, furthermore, refers to the promise made to the Defendant to get a reward (release from detention on remand) by the investigators in contravention with Article 155 Paragraph 1 item e of the KCCP.

Finally, the Defence alleges a violation of the criminal law, by the imposition of two sentences for the offences of Organized crime and Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances although the principle of 'absorption' is applicable in Kosovo.

3. Reply of the State Prosecutor

The OSPK moves the Supreme Court of Kosovo to reject both Requests for Protection of Legality as unfounded.

As for the Request of SP, the State Prosecutor claims that the First Instance Court made a thorough assessment of the evidence, including the statements of EM and SP and provided a detailed reasoning. The Supreme Court of Kosovo did so at the appellate stage. The State Prosecutor also submits that the District Court's reasoning to acquit UJ is clear. The Prosecutor opines that an analogy between both defendants and evidence is misleading as the First Instance Court relied on corroborating evidence to convict HS. The absence of fingerprints of SP on the scale and of traces of narcotics in UJ vehicle was argued in details at the first and second instances.

In respect to HS, the State Prosecutor submits that the First Instance Judgment is based on evidence presented at the main trial. The OSPK refers to the above arguments as to the credibility of Defendant EM. Witness YK can only provide hearsay evidence. In the State Prosecutor's view, the assertion that the OSPK submitted an amendment to the Indictment in favor of the Accused in the sense of Article 413 Paragraph 5 of the KCCP, when submitting its Opinion to the Appeals of the Defendants, does not stand. Finally, the State prosecutor agrees with the reasoning of the appeal Judgment concerning the principle of absorption.

III. Findings of the Supreme Court of Kosovo

The Request for Protection of Legality filed by SP is impermissible pursuant to Article 451 Paragraph 2 of the KCCP.

The Request lodged on behalf of HS is admissible. The Supreme Court of Kosovo rejects it as unfounded pursuant to Article 456 of the KCCP.

1. Competence of the Supreme Court of Kosovo

The Supreme Court of Kosovo is competent to decide on the Request of Protection of Legality pursuant to Articles 454 and 26 Paragraph 3 of the KCCP. The Supreme Court panel has been constituted in accordance with Article 3 Paragraph 7 of the Law on jurisdiction.¹

¹ Law no. 03/L-53 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo dated 13 March 2008

2. Admissibility of the Request for Protection of Legality

The latest challenged judgment, the Judgment Ap-Kz no. 255/2011, was announced on 18 January 2012. The Defendant SP received it on 26 March 2012. His Request dated 25 June was filed with the Court Registry on 29 June. The post stamp is illegible to ascertain the date of sending.

The Supreme Court of Kosovo finds the Request impermissible pursuant to Article 451 Paragraph 2 of the KCCP. There is no legitimate legal interest in further proceeding.

The Supreme Court has already decided on a Request in favour of the Defendant filed by his lawyer on very similar grounds on 3 May 2012. The judgment contains a detailed reasoning covering most of the aspects of the present Request. This Supreme Court Panel therefore refers to this judgment and its reasoning. A full assessment (and review) of the case, in facts and law, was already done at the first and second instance level, in compliance with the provisions of the Code and the human rights standards.² The Supreme Court of Kosovo, furthermore, examined the lawfulness of the final judicial decisions in the case, when deciding on the Request for Protection of Legality in June 2012.

Article 451 Paragraph 2 of the KCCP clearly prohibits the filing of a Request “against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon support this interpretation.” Only one Request can be filed against a final judicial decision, let alone the requests related to the detention on remand under Article 451 Paragraph 4 of the KCCP. An exception is to be found in Paragraph 4 of Article 452 of the Code that states “If a decision of the European Court of Human Rights establishes that a final judicial decision against the defendant violates human rights, the prescribed period of time for filing the request for protection of legality shall be counted from the day the decision of the European Court of Human Rights was served on the defendant.” This reading of the procedural provisions is along the line of the procedures of extraordinary legal remedies adopted by most of the European countries.³

The contested Judgment was delivered to HS on 26 March and to his Defence Counsel on 22 March. The Request filed by Lawyer Mahmut Halimi was registered with the Court on 20 June. This Request is hence admissible because filed within the three-month deadline by an authorized person, pursuant to Articles 452 Paragraph 3 and 453 of the KCCP.

3. Merits of the Request for Protection of Legality filed on behalf of Defendant HS

The allegation that a substantial violation of the provisions of criminal procedure and of the

² See Article 2 of Protocol no. 7 of the European Convention for Human Rights for the Protection of Human Rights and Fundamental Freedoms dated 4 November 1950 (ECHR), dated 22 November 1984: (1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. (2) This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal; see *inter alia* International Covenant on Civil and Political Rights dated 16 December 1966, Article 14 (5); Constitution of the Republic of Kosovo entered into force on 15 June 2008, Article 32 on the Right to Legal Remedies and Article 54 Judicial Protection of Rights of the Constitution of Kosovo

³ See *inter alia* German Criminal Procedure Code, Chapter IV Appeal on Points of Law; French Code of Criminal Procedure Title I Cassation applications, Article 567; Polish Code of Criminal Procedure, Act of 6 June 1997, Part XI extraordinary appeals, Chapter 55

criminal law under Article 451 Paragraph 1 items 1, 2, 3 read with Article 403 Paragraph 1 item 12 of the KCCP was committed

The Supreme Court of Kosovo concurs with the State Prosecutor's submissions and, therefore, rejects this contention as ungrounded. In reply to the Appeal for HS, the State Prosecutor filed an Opinion and Motion dated 30 September 2011, by which the OSPK proposes to re-qualify the acts as Assistance in the Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances, pursuant to the combined reading of Article 229 Paragraphs 2 and 4 sub 1 read with Article 25 of the CCK, and Organized Crime under Article 274 Paragraph 2 of the CCK – thus not as a leader of the group, and to recalculate the eventual aggregate punishment accordingly. The State Prosecutor clearly refers to Article 409 Paragraph 2 of the KCCP as basis of this Motion, which states “[t]he public prosecutor may file his or her motion in returning the files, or may declare that he or she will file it during the session of the appellate panel.”

The Supreme Court finds that the conditions for the application of Article 413 Paragraph 5 are not met in the instance. This provision clearly requires to hold a hearing under Article 412 of the Code, whilst the Motion of the State Prosecutor dated September 2011 was filed way before the appeal session. It is also noted that the Appeal Panel did not follow the proposal of the State Prosecutor suggesting to change the legal qualification of the criminal act. Indeed, the Second Instance Court is not bound by the Motion and Opinion filed on an appeal by the OSPK.

The allegation that a substantial violation of the provisions of criminal procedure under Article 403 Paragraph 1 item 12 read with Article 387 Paragraph 1 and Article 231 Paragraph 2 item 5 of the KCCP occurred

The Supreme Court of Kosovo also rejects this argument. After having reviewed the First Instance Judgment, this Panel notes that the District Court assessed all the statements of the co-Defendants and witnesses, the ones taken at the pre-trial stage and the ones given during the main trial. The First Instance Court then proceeded to a lengthy evaluation of these statements and the credibility of witnesses and co-Defendants to reach a conclusion based on all the evidence administered.⁴

The Supreme Court Panel acknowledges the complexity of the case, since the core evidence is mostly the statements of EM, one of the co-defendants. However, the First Instance Court provides substantive explanations on its findings on the basis of the evidence available, including corroborating elements. The assessment of the evidence is under the competence of the trial panel as foreseen in Article 387 Paragraphs 1 and 2 of the Code. In the case at hand, the First Instance Court rightfully reached the conclusion that the pre-trial statements of EM were the most reliable ones and that the new assertions made by this Accused shall be disregarded. By doing so, the District Court has not committed any violation that may significantly affect the Defence's rights. As such, this Panel fully concurs with the Second Instance Court's findings in this respect.⁵

Likewise the Supreme Court considers that the First Instance Court proceeded to a thorough examination of the Defence's contention that the evidence against HS was fabricated, and does not find any contradictions between the content of records and statements and the reasoning of

⁴ District Court of Mitrovicë/a, P no. 36/2010, First Instance Judgment, 23 February 2011, pages 8 and following

⁵ Supreme Court of Kosovo, Ap-Kz no. 255/2011, Appeal Judgment, 18 January 2012, pages 12-13, paras 66-70

the Judgment.

As to the contention regarding the potential witnesses, YK and FM, the Supreme Court finds it without merit. The Second Instance Court, without violating the Defence's rights, e.g. to examine or have examined witnesses, rejected the motion of HS to open a hearing and call YZ in court during the appeal session. According to the Defence, the individual who was sharing EM room in Dubrava prison, knew about the phone contact between EM and Witness MT. The Supreme Court affirms that such testimony should be to the very best hearsay evidence which would not have any impact on the outcome of the proceeding. In regard to FM, the District Court Panel read out his pre-trial statement in court. As such, the undersigned Panel agrees with the Second Instance Court's findings.⁶

The Supreme Court also refuses the allegation that the police officers negotiated with HS, which is not substantiated in the instance. The Defence is also reminded that a Request for Protection of Legality cannot be filed on the basis of an erroneous or incorrect determination of the factual situation.

As to the submission related the imposition of two sentences for the commission of the offence of Organized crime on one hand and the offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances on the other hand ('principle of absorption'), the Supreme Court finds no need to reiterate the findings upon the first Request for Protection of Legality, and therefore refers to the previous Judgment Pkl-Kzz no. 80/2012.

Considering the above, the Request of the Defence to terminate or postpone the enforcement of the final judicial decision pursuant to Article 454 Paragraph 4 of the KCCP is rejected.

The Supreme court Panel rules as per in the enacting clause.

Presiding Judge

EULEX Judge Horst Proetel

Panel member

Supreme Court Judge Valdete Daka

Panel member

EULEX Judge Tore Thomassen

Panel member

Supreme court Judge Nazmije Ibrahim

Panel member

EULEX Judge Gerrit-Marc Sprenger

Recording clerk

Legal officer Chiara Rojek

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⁶ Ibid, pages 11-12, paras 59-65