SUPREME COURT of KOSOVO

19 January 2010
Prishtine/Pristina
Ap.-Kz. No. 413/2009

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Emilio Gatti as Presiding Judge, EULEX Judge Maria Giuliana Civinini and Kosovo National Judge Avdi Dinaj as panel members,

in the criminal proceedings against:

G[redacted] H[redacted] male, Kosovar Albanian, father's name H[redacted] mother's maiden name S[redacted] O[redacted] born on [redacted] in [redacted] village, Municipality of Prizren, current address in [redacted] in Prizren, identification number [redacted] married, father of 3 children, waiter by profession, finished primary school, of very poor financial situation, who was in detention on remand from 7 May 2008 until 2 June 2008 and from 2 June 2008 until 6 August 2008 in house detention;
charged by the indictment HP. No. 339/06 dated 14 July 2008 with committing the criminal offence of participation in a group that commits a criminal act (as a leader) under article 200 (2) of the Criminal Law of Kosovo (CLK).

Deciding upon the appeal on the District Court of Prizren/Prizren Judgment P. no. 339/06, dated 28 September 2009, convicting G[redacted] H[redacted] of having committed the criminal offence of participation in a gathering that commits violence under article 200 (1) CLK and imposing the suspended sentence of 6 (six) months of imprisonment,
appeal which was filed by the defense counsel on 2 November 2009.

After having heard the submissions of the defense counsel Mr. A[redacted] M[redacted] and opinion and motion of the EULEX Prosecutor Mr. Johannes Pieter Van Vreeswijk in the session held on 19 January 2010 and
after a deliberation and voting held on 19 January 2010.

Acting pursuant to Article 420 of the Provisional Criminal Procedure Code of Kosovo (PCPCK) renders this

JUDGMENT

The appeal filed in the interest of G[redacted] H[redacted] on 2 November 2009 is hereby REJECTED as ungrounded.

Pursuant to article 391 (5) of the PCPCK, the time spent in detention on remand from 7 May 2008 until 2 June 2008 and in house detention from 2 June 2008 until 6 August 2008 by the defendant is included in the amount of punishment.

The Judgment of the District Court of Prizren Judgment P. no. 339/06, dated 28 September 2009 is affirmed in its entirety.

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

REASONING

Procedural History

1. On 17 and 18 March 2004 a large number of Kosovo Albanians engaged in demonstrations and violent riots in the city of Prizren causing damages to properties and residences owned by private citizens and to the buildings and the vehicles owned by the United Nations Mission in Kosovo (UNMIK), during those demonstrations persons, including police officers, suffered personal injury.
As to 17 March 2004, the present proceedings is particularly related to the facts happened in the part of Prizren from Zahir Pajaziti Street passing by the Ben Af building to Shadervan and Theranda Hotel, as to 18 March 2004 it is related to the facts happened between Shadervan and the Army House.

2. Against G[redacted] H[redacted] the International Public Prosecutor filed on 8 August 2008 an indictment for three offences under articles 200 (2), 200 (1) of the Criminal Law of Kosovo (CLK) and under article 23 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) respectively.
The indictment was confirmed only on Count 1, participating in a group that commits a criminal act (as a leader) as defined by article 200 (2) of the Criminal Law of Kosovo with ruling dated 20 October 2008, the remaining counts were dismissed.

The main trial started on 18 June 2009, was held in the presence of the Public Prosecutor, of the defendant and of his defense counsel and included 6 hearings until 28 September 2009.
At the hearing of 28 September 2009 the judgment was announced.
G[redacted] H[redacted] was found guilty of participation in a gathering that commits violence under article 200 (1) of the Criminal Law of Kosovo (CLK) and imposed the suspended sentence of 6 (six) months of imprisonment.

3. G[redacted] H[redacted] was arrested and kept in detention on remand from 7 May 2008 until 2 June 2008 and from 2 June 2008 until 6 August 2008 in house detention.

4. The written verdict was served to the defendant on 3 November 2009 and to his lawyer on 28 October 2009.
The defense counsel filed appeal against the verdict on 2 November 2009.
The response of the District Public Prosecutor in Prizren was filed on 11 November 2009.
The opinion of the OSPK was expressed on 29 December 2009.

5. The Supreme Court of Kosovo scheduled the appeal session on 19 January 2010, where, after the report of the reporting judge, the defendant provided an explanation on the appeal and the Eulex Prosecutor replied as stated in the minutes of the record.

6. The deliberation was taken by the Court on 19 January 2010.

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 and 11 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 of Mr. A[redacted] M[redacted] filed on 2 November 2009, challenges the judgment of first instance is challenged due to:

- basic violation of criminal procedure (article 403 paragraph 1 items 8 and 12 PCPCK),
- erroneous corroboration of factual situation (article 405 PCPCK) and
- violation of the criminal law (article 404 PCPCK).

The defense counsel proposes:

- to amend the first instance verdict and to release the defendant G[redacted] H[redacted] from charges pursuant to article 390 paragraph 1 item 3 of PCPCK.

9. As to the substantial violation of the provisions of criminal procedure the appeal claims as following.
- Incomprehensibility of the enacting clause, contradiction between it and the reasoning part and lack of reasoning as to decisive facts.

These claims don't appear to be substantiated in the appeal.
Here it can be noticed that the enacting clause takes, in a very clear way, the conviction of G[redacted] H[redacted] for the criminal offence envisaged by article 200 (1) of the CLK, that is the participation in a group that committed grave violence, arson, considerable property damage and serious bodily injury whereas the reasoning part explains both the conduct of the defendant for each of the two days of demonstration and the result of the conduct of the group participated by H[redacted] himself.
In itself and under this procedural point of view the two parts of the challenged verdict, enacting clause and reasoning, don't appear to be in contradiction to each other.
The enacting clause in itself does not contain incomprehensibilities.
As to the sufficiency of the reasoning it can be noticed that the First Instance Court first reviews all evidence proposed by the parties (pages 4 – 25), then examines it critically reaching its conclusions in the last part of the verdict (pages 25 – 33).
In its reasoning the First Court duly considers all decisive facts brought to its exam and related 1) to the presence of the defendant among the demonstrating crowd during the two crucial days, 2) to his material contribution to the charged violent acts and 3) to his defense.
These claims of the appeal are therefore ungrounded.

- The given reasons contradict to the content of the administered evidence, particularly to the testimonies of witnesses P[redacted] V[redacted] S[redacted] B[redacted] and A[redacted] in relation to the moment when the defendant left the Qylhani Market in Prizren in the afternoon of 17 March 2004.

This claim is ungrounded.
The reasoning part of the challenged verdict does not represent the testimonies of these witnesses in a way which contradicts to the content of the administered evidence.
What they said is correctly described (pages 18 – 21) and forms object of a critical review (pages 30 and 31).
The correctness of the assessment made by the First Court as to these testimonies is part of the determination of the factual situation (see further paragraph **II.10**) and is not related to possible procedural mistakes.

- Inadmissibility of the statements given by H[redacted] M[redacted] and P[redacted] B[redacted] before the Police.
The appeal claims that when H[redacted] M[redacted] and B[redacted] B[redacted] gave their statements before the Police they were "suspects" of having committed the same crime as the defendant and were interrogated in the capacity of "suspects".
Later on the First Court heard these two persons as "witnesses" and not as "suspects".

Accordingly the First Court could not make any use of their Police statements, which had to be considered as inadmissible evidence (violation of article 403 paragraph 1 item 8 PCPCK).

This claim is ungrounded.
From the case file it results that H[redacted] M[redacted] as interviewed by the Police on 7 April 2004 and on 8 December 2006, in both occasions as a suspect.
In both occasion he was duly informed about his rights as a suspect and he confirmed in written to have understood them, to give up to his right to silence and did not require a lawyer (see the challenged verdict on page 10, the record of the Police statement dated 8 December 2006, the record of the Police statement dated 7 April 2004 and the document attached).
As a suspect M[redacted] spoke about the conduct of another suspect H[redacted]
M[redacted] was later on presented at the main trial as a witness and examined and counter examined by the parties about the conduct of the defendant H[redacted].
During his Court examination M[redacted] was remembered of his previous statements according to 364 PCPCK (hearing of 18 June 2009 pages 21 and ff.).
Therefore the statements given by H[redacted] M[redacted] during the investigative stage were correctly considered admissible evidence.
In fact no legal provisions prevent to use statements given during the investigative stage by a suspect, even though later on he becomes a witness.
What is important is that on one side when the suspect was examined he was given the guarantees foreseen by articles 229 through 236 PCPCK (article 156 paragraph 1) and that during some stage of the proceedings the parties have been given the possibility to challenge his testimony (article 157 paragraph 1).
In this case both the above mentioned conditions were met.

As to the testimony of P[redacted] B[redacted] it must be noticed that the First Instance Court (pages 29 and 30) did not make any use of his statements to the detriment of the accused, because both before the Police during the investigation and before the First Court this witness did not recognize anybody in the pictures he was shown and could not accuse the defendant.
Therefore the testimony of this witness appears to be irrelevant.

10. Under the point related to the erroneous and incomplete determination of the factual situation the appeal claims as follows.

- The existence of contradictory evidence as to the conduct of the defendant on 17 March 2004.
This claim is referred to the content of the testimonies given at the main trial by witnesses P[redacted] V[redacted] S[redacted] B[redacted] and A[redacted] B[redacted] in relation to the moment when the defendant left the Qylhani Market in Prizren in the afternoon of 17 March 2004, time that was indicated approximately at 17:hrs (see better further on).
The defendant gave two different versions: first stating to have left the market between 3 and 4 pm (before the International prosecutor on 19 may 2008), later on saying to have left the market at 17:00 hrs (during the confirmation hearing and at the main trial).

The First Court rejected the testimony of the three witnesses because it appeared to be related more to the routine of every working day than to a precise recollection of the facts of 17 March 2004 and because those testimonies were contradicted by what the defendant himself had stated before the International Public Prosecutor on 19 May 2008.
For the same reason the First Court rejected also the trial testimony of the defendant.

This Court shares the opinion of the First Instance Court.
From the minutes of the main trial it results as follows.
F[redacted] V[redacted] (hearing of 24 June 2009) stated that H[redacted] worked at his market stall until 5pm.
She however made clear to speak according to the usual routine more than according to memory related to that day: she repeated that the stall-holders leave that time "every day" and at the remark of the Prosecutor "So it's an assumption and not an exact remembrance" she replied "Correct I always leave at 5" (page 6).
S[redacted] B[redacted] (hearing of 24 June 2009 pages 10 to 12) stated that H[redacted] worked at his market stall until 5pm, conceding however that he could have left 15/30 minutes before and that he was not sure about the exact time because he did not look at the watch when H[redacted] eft.
Usually, he added, stall holders started folding and putting away their merchandise approximately 30 minutes before the closing of the market doors, which is at 5pm.
A[redacted] B[redacted] (hearing of 24 June 2009 page 15), sister of the defendant, stated that Hazeraj worked at his market stall until 5pm, adding that they usually leave the market at 4.30 – 5pm.
As correctly observed by the First Court, all these testimonies appear to be based more upon the routine than on a precise recollection of the investigated day, they don't quote any specific fact which could be of corroboration for their statements about the time the defendant left the market that day.
Moreover, these testimonies are contradicted by what the defendant stated on 19 May 2008 before the International Public Prosecutor, when he admitted to have left the market between 3 and 4pm.
Confronted with his previous statements, the trial statements of the defendant appear to be motivated by the intention to defend himself and thus don't appear to be reliable.
This claim of the appeal is therefore ungrounded.

- Secondly, the appeal stresses the lack of evidence as to the participation of the defendant (as a leader) in a group that committed a criminal offence, adding that he actually assisted people in need during the demonstrations of 17 March and warning the shopkeepers to close their shops on 18 March.

This point is ungrounded.
Firstly it must be noticed that the challenged verdict does not contain the conviction of the defendant as a "leader" (article 200 paragraph 2 CLK) but only as a "participant" (article 200 paragraph 1 CLK) of the group that commits a criminal act.
Secondly it can be noticed that the findings of the First Court in this regard appears to be correct as to the collected evidence.

In the case file are present pictures which show the defendant [redacted] together with other persons among whom [redacted] as participants in the manifestations (exhibits P3, P4a, P9, P12 and C5).
Those photos were recognized by witnesses [redacted] and [redacted] as depicting moments of the manifestations.
Those two witnesses confirmed the direct participation of the defendant in the violent manifestations of both days.
The defendant admitted to have been present ("embedded") in the crowd on 17 March and to have walked with the demonstrators for one hour and for about 1,5 to 2 km. from Zahir Pajaziti Street to the Ben Af building, to Shadervan and Theranda Hotel.
Moreover, the defendant recognized himself as depicted in some photos (exhibit C5) portraying the participants at the manifestations of 18 March 2004, in one of them he is carrying a flag, that day he remained approximately two hours with the protesters.
During his Police interview witness [redacted] confirmed that one photo portraying the defendant (exhibit P9) represented the man who on 18 March threatened him in order to prevent him to take pictures of him during the manifestation.
The First Court pointed out the reliability of this first statement of Mr. [redacted] and the unreliability of his recantation at the main trial.
The reasoning of the First Court (pages 12, 13 and 29), based upon the existence of a note written by [redacted] himself where he confirmed the threats coming from [redacted] appears to be logically correct and free from any procedural flaws.

All these elements support the challenged verdict in the conviction of the defendant for the charged criminal offence.
The responsibility of the defendant is not excluded even if he could have helped somebody in need during the demonstrations because the time of the facts appears to be compatible with different actions of the defendant, who previously participated in the violent manifestations and only later on could have helped persons in need or suffering the effects of teargas.
Particularly the testimony of witness [redacted] about the presence of the defendant in the Hotel Theranda on 17 March 2004 appears to be imprecise as to the time: at the question at what time did [redacted] come there this witness replied :"Sometime after 5.30 or 6.00pm. I can not remember exactly" (hearing of 18 September page 4).

11. As to the violation of the criminal law the appeal claims that due to an erroneous and incomplete corroboration of the factual situation the material law was mistakenly approved 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 the charged crime of participation in a group that committed a crime.
The concept of criminal responsibility appears to be correctly applied in the challenged verdict.
In fact, the provision of article 200 paragraph 1 KCL punishes the mere participation in a group that commits a criminal act, without the necessity that the single participant commits directly the typical act of the criminal offence which represents the goal of the

group (see Supreme Court of Kosovo, 23 June 2009, Ap.-Kz No. 179/2007 A[redacted] et al.).
The First Court firstly determined the existence of violent manifestations on 17 and 18 March 2004 resulting in large scale property damage, arson and serious bodily injury, then the direct participation of the defendant in the group that, through joint action, committed those acts.
Correctly the First Court noticed that the defendant could have left the demonstration of 17 March 2004 as soon as he realized that the demonstrators became violent.
By not leaving the violent manifestations H[redacted] showed his intentional adhesion to them.
The following day he adhered again to the manifestations even if he knew of the violence occurred the previous day.
Correctly again, the First Court bases the conviction of the defendant for the facts of the second day on the pictures which show the defendant as an active participant in the manifestation, even carrying a flag and on the testimony of F[redacted] K[redacted] about the threats he received from H[redacted]

The sentencing appears to be correct considering both the amount of the legal punishment, from three months up to five years imprisonment, foreseen for the charged criminal offence according to article 200.1 of KCL and the evaluation tools as provided by articles 64 and followings of the PCCK, particularly the seriousness of the offence, the culpability of the defendant and his previous good characters.

In conclusion no violations of the criminal law can be found in the challenged verdict.

12. The First Instance Court imposed a suspended sentence of six months imprisonment and omitted to credit in it the time the defendant has spent in detention on remand or in house detention, according to articles 391 paragraph 1 item 5 and 278 paragraph 7 PCPCK.
In this case the violation of the criminal law to the detriment of the defendant is clear but can be amended also by the Supreme Court in his judgment (see for specific precedents Supreme Court of Kosovo 14 December 2004 Ap.No. 352/2004 and Supreme Court of Kosovo 12 October 2009 Pkl.-Kzz 108/2008 S.H. et al.).
Thus, the time spent by the defendant C[redacted] H[redacted] in detention on remand from 7 May 2008 until 2 June 2008 and in house detention from 2 June 2008 until 6 August 2008 must be credited in the punishment imposed to him.

III

The appeal of the defendant is therefore rejected and the verdict of the District Court of Prizren P. no. 339/06, dated 28 September 2009 is confirmed, with the unique clarification that the period spent in detention on remand or in house arrest must be credited in the amount of the imposed punishment.
The costs of the proceedings of Second Instance will be borne by the appellant.

Dated this 19th day of January 2010.
Ap.-Kz No. 413/2009

Prepared in English, an authorized language.

International Presiding Judge
Emilio Gatti

International Recording Officer
Judit Eva Tatraj

International Judge
Maria Giuliana Civinini

Kosovo National Judge
Aydi Dinaj

Legal Remedy

No appeal is possible against this Judgment (art. 430 KCCP). 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 KCCP).