Basic Court of Mitrovica/ë

Case no: P No. 8/2013
22 May 2018

IN THE NAME OF THE PEOPLE

THE BASIC COURT OF MITROVICË/MITROVICA, in the Trial Panel composed of EULEX Judge Roxana Comsa as Presiding Judge and EULEX Judges Franciska Fiser and Arnout Louter as Panel Members, with the participation of EULEX Legal Officer Dukagjin Kerveshi as the Recording Officer, in the criminal case against:

S.F. nickname 'S.', father's name R., mothers maiden name M. D., born on .., in B. village, Leposaviq/Leposavić Municipality, with temporary residence in L., Serb, citizen of the Republic of Serbia, completed secondary school, worked as auto transporter, married, father of two children, average economic status;

Charged with the criminal offences of :

1. Organized Crime, contrary to Article 274 Paragraph (3) of the former Criminal Code of Kosovo (hereinafter: "CCK") ; related to the criminal offence of

2. Unauthorized Purchase, Possession, Distribution and Sale of dangerous narcotic, contrary to Article 229 Paragraph (4) Subparagraph (1) related to Paragraph (2) of the CCK;

After having held the Main Trial hearings, open to the public on 22 May 2017, 4 July 2017, 25 September 2017, 17 October 2017, 18 December 2017, 26 February 2018 and 23 March 2018 in the presence of the Accused (except on 25 September 2017), his Defence Counsel and the State Prosecutor,

Following the Trial Panel's deliberation and voting held on 23 March 2018,

Pursuant to Article 366 Paragraph (1) of the Criminal Procedure Code of Kosovo[1] (CPC) on 26 March 2018 in a public hearing and in the presence of the Accused, his Defence Counsel and the State Prosecutor;

Renders the following:

[1]CRIMINAL No. 04/L-123 PROCEDURE CODE;

JUDGMENT

The Accused is

FOUND NOT GUILTY

Because it was **not** proven beyond reasonable doubt:

- that during the month of December 2010 the Defendant together with the accomplices A.T., R.D., J.P. and I.Z.**,** working together as members of an organized criminal group based in Kosovo and Serbia engaged in the illegal activities of sourcing for narcotic drugs (heroin) in Kosovo and trafficking the drugs to Belgrade in Serbia taking advantage of the fact that two of the accomplices in the case were, at the material times, serving police officers of the Serbian police.
- that there were clear divisions of labour in the activities of the Defendant together with the said accomplices during that period, as follows: with the Defendant S.F. as the main Kosovo anchor of the criminal gang and having as responsibility to source for heroin in Kosovo using his network of contacts; with A.T. as the crucial link, the 'legman' between the gang members based in Kosovo and Serbia, responsible to relay information from the gang members in Serbia to S.F. who was based in Kosovo and vice versa; with J.P. and R.D., both, at the time police officers in the Serbian police and deployed to Leposaviq/

Leposavić and Raska as responsible for sourcing for buyers of the drugs in Belgrade and also responsible for smuggling the drugs into Belgrade; and with I.Z. as the buyer of the narcotics from J.P. and A.T..

- that in December 2010, after a number of telephone contacts between A.T. and J.P., the two of them agreed to meet on 11 December 2010 at Raska from where the two went together to Leposaviq/ Leposavić to meet with the defendant S.F. and reached an agreement on the nature, price and modality of obtaining and handling drugs to J.P. and R.D..
- that, subsequent to this meeting, the defendant and his alleged accomplices engaged in further telephone conversations by which they agreed to exchange drugs for cash on 22 December 2010.

And neither

– that on the 22 December 2010 the above mentioned individuals met in the area of Ceranjska Reka to exchange an agreed quantity of 2 kilograms of heroin.

Therefore, pursuant to Article 364 Paragraph (1) Subparagraph (1.3) of the CPC, the Defendant is ACQUITTED of the criminal offence Organised Crime contrary to the provisions of Article 274 paragraph 3 of the Criminal Code of Kosovo related to the criminal offence of Unauthorised Purchase, Possession, Distribution and Sale of dangerous narcotic contrary to the provisions of Article 229(3) paragraph 4 subparagraph 1 related to paragraph 2 of the Criminal Code of Kosovo.

Costs of Proceedings

Based on Article 450-454 of the CPC, the costs of criminal proceedings, the necessary expenses of the defendant and the remuneration and necessary expenditures of defence counsel shall be paid from budgetary resources.

REASONING

A. Procedural Background

1. The Ruling on the Initiation of Investigation against S.F. was issued by the District Prosecution Office in Mitrovicë/a on 31 December 2010. By a Ruling of the Municipal Prosecution Office in Mitrovicë/a issued on 20 September 2011, the investigation was expanded.
2. The District Prosecution Office in Mitrovica issued the Indictment PP No. 162/2010 dated 20 December 2011 and filed it with the Registry of the Basic Court of Mitrovica/ë on 22 December 2011 against the Defendant S.F., charged with Organized Crime, contrary to Article 274 Paragraph (3) of the criminal Code of Kosovo; related to the criminal offence of Unauthorized Purchase, Possession, Distribution and Sale dangerous narcotic, contrary to Article 229 Paragraph (4) Subparagraph (2) of CCK;
3. It is also of note that On 19 April 2011, the Higher Public Prosecution Office in Belgrade filed the Indictment KT No. 1219/10 against five Defendants including S.F. for the criminal offence of Illegal Production and Trafficking of Narcotic Drugs contrary to Article 246 Paragraph (3) to be read in

connection with Paragraph (1) of the Criminal Code of the Republic of Serbia.

4. By the Ruling of the Higher Court in Belgrade Ki. 2591/10 detention on remand was ordered against the Defendant.
5. By the ruling of the Pre-Trial Judge of the District Court in Mitrovica PPS no. 109/2010, the Defendant S.F. has been in detention on remand since 31 December 2010 until 27 September 2011. On 27 September 2011 the District Court of Mitrovicë/a, replaced the detention on remand against S.F. with the measure of house detention, which was terminated on 11 January 2012 – Ruling PO. No. 241/11.
6. On 10 March 2014, pursuant to Article 242 Paragraph (4) of the CPC, (Criminal No. 04/L-123), the Presiding Trial Judge held the initial indictment hearing in this case.
7. By the Ruling issued on 13 October 2014, the Presiding Judge rejected as ungrounded the objections to the admissibility of evidence, as well as the request to dismiss the Indictment, both filed on 3 April 2014 by the Defence Counsel K.B. on behalf of Defendant S.F..
8. This Ruling was upheld by the Court of Appeals on 3 December 2014.

Competence of the Court

9. Under Article 20 Paragraph (1) of the CPCK, Basic Courts are competent to hear criminal cases involving charges for which the law allows the imposition of a penal sentence of at least 5 years. Pursuant to Article 29 Paragraph (1) of the CPCK, territorial jurisdiction is proper with the court in the district where the crime is alleged to have been committed.

10. The criminal offence at trial allows for the imprisonment as high as 20 years and it was allegedly committed at least in part on the territory of Mitrovica.

11. In addition, the President of the Assembly of EULEX Judges, in accordance with Article 3.1 of the Law on Jurisdiction 03/L-053 decided to delegate this case to EULEX Judges to follow up the procedure, having into consideration decision of the 1st of September 2010, issued by the Chief EULEX Prosecutor, authorizing the EULEX Prosecutors instrumenting this case to act as a SPRK Prosecutors.
12. Therefore EULEX Judges assigned to the Basic Court of Mitrovica are competent to hear this criminal case. The Main Trial panel was as set forth above.

B. THE MAIN TRIAL

13. It is of note that two first sessions were held in a previous main trial on 1 and 13 September 2016 respectively. Due to a change in the composition of the panel, the current main trial was reopened on 22 May 2017.

14. The Main Trial sessions were open to the public and they were held on 22 May 2017, 4 July 2017, 25 September 2017, 17 October 2017, 18 December 2017, 26 February 2018 and 23 March 2018.
15. During the Main Trial session of 22 May 2017, the Accused pleaded not guilty to both charges.

C. EVIDENTIAL PROCEDURE

a) Evidence presented during the course of the Main Trial

16. During the Trial Session of 22 May 2017 the parties agreed to consider read the record of 13 September 2016 containing the testimonies of Witnesses M.T., A.K. and Expert-Witness in Forensics S.D..
17. On the same date, 20 orders on intercepts received in December 2016 from the Serbian authorities following a Mutual Legal Assistance (MLA) request were considered as part of the evidentiary material.
18. During the course of the Main Trial the Panel heard the Witness R.D. on 4 July 2017.
19. On 26 February 2017, the prosecutor adduced as evidence the following documents as listed below:
20. KP Police cover letter, dated 31/12/2010, pages 35-37;
21. Criminal Report against S.F., dated 31/12/2010, pages 38-44;
22. Initial/Incident Report, 2010-DHTN3-39, dated 23/12/2010, pages 45-48;
23. Official Note – M.T. #6414, dated 24 /12/2010, pages 49-51;
24. Investigator's Report – captain A.K.#5290, dated 23/12/2010, pages 52-54;
25. Officer's Report – Ir. F. #5281, K-9 Unit, dated 24/12/2010, pages 55-56;
26. Decision on police custody, dated 30/12/2010, pages 57-58;
27. Rights of the arrested person, dated 30/12/2010, pages 59-67;

TFM reports:

28. Analysis of the sized phone and data, dated 28/03/2011, pages 68-85;
29. Overview of examined telephone data, dated 24/05/2011, pages 86-95;
30. Analyses of the cell phone number .., dated 27/05/2011, pages 96-103;
31. Analyses of the cell phone number ..-sms, dated 27/05/2011, pages 104-119;
32. Analyses of the cell phone number ..-"Za.", dated 30/05/2011, pages 120-183;
33. Evidence report – Overview, dated 13/06/2011, pages 184-187;
34. Information report, dated 14/07/2011, pages 188-193; Statements:
35. Record of defendant hearing, dated 14/02/2011, pages 284-295;
36. Interrogation statement of the defendant, dated 16/02/2011, pages 296-307;
37. Record of a hearing in an investigation, dated 29/07/2011, pages 308-331;

Forensic File Content:

38. Forensic No. 10-195, pages 334-335;
39. Crime scene examination report – KP Ar. Fe. #1782, dated 24/12/2010, pages 336-341;
40. Forensic List of Evidences – Chain of custody, dated 23/12/2010, pages 342-346;
41. List of seized items, dated 23/12/2010, pages 347-348;
42. Photo Album – No.10-195, dated 23/12/2010, pages 349-376;
43. Expertise report from Forensic Lab – Sector of Tracing and Dactyloscopy Expertise, dated 10/02/2011, pages 377-385;

44. Expertise report from forensic – Legal Science Unit, Chemical Analysis, dated 12/04/2011, pages 386-391;
45. Examination report, dated 18/05/2011, pages 395-402;

Documents received from foreign jurisdiction:

46. Request of DPP to Ministry of Justice of Republic of Serbia for mutual legal assistance – relating to case PP#162/10, dated 08/07/2011, pages 403-404;
47. Request of DPP to MJRS of criminal record of defendant S.F., dated 14/07/2011, pages 405-406;
48. Cover Letter of EULEX Regional Liaison Office to DPP, dated 27/08/2011, pages 407-408;
49. Criminal Record of S.F. from Ministry of Interior of Republic of Serbia, dated 01/09/2011, pages 409-410;
50. Cover Letter of EULEX Regional Liaison Officer to DPP – additional information, dated 08/11/2011, pages 411-412;
51. Criminal Record from PPO of Republic of Serbia, dated 20/10/2011, pages 413-416;
52. Cover Letter of EULEX Regional Liaison Officer to DPP re: mobile phone conversations reports, dated 27/09/2011, pages 417-418;
53. Official note, Authorized deputy high Prosecutor Br.S., dated 23/09/2011, pages 419-420; Reports on communication content
54. Object: A.T. (TORA 90U) – …., dated 07/12/2010, pages 421-424;
55. Object: A.T. (TORA 90U) – …, dated 08/12/2010, pages 425-428;
56. Object: A.T. (TORA 90U) – …, dated 10/12/2010, pages 428-435;
57. Object: A.T. (TORA 90U) – …., dated 11/12/2010, pages 436-444;

58. Object: A.T. (TORA 90U) – …, dated 12/12/2010, pages 445-450;
59. Object: A.T. (TORA 90U) – …, dated 13/12/2010, pages 451-465;
60. Object: A.T. (TORA 90U) – …, dated 14/12/2010, pages 466-474;
61. Object: A.T. (TORA 90U) – …, dated 15/12/2010, pages 475-478;
62. Object: A.T. (TORA 90U) – …, dated 16/12/2010, pages 479-484;
63. Object: J.P. (TORA 94U) – …, dated 16/12/2010, pages 485-490;
64. Object: J.P.(TORA 94U) – …, dated 17/12/2010, pages 491-502;
65. Object: J.P.(TORA 94U) – …, dated 19/12/2010, pages 503-519;
66. Object: J.P.(TORA 94U) – …, dated 21/12/2010, pages 520-530;
67. Object: A.T. (TORA 90U) – …, dated 21/12/2010, pages 531-536;
68. Object: J.P. (TORA 94U) – …, dated 22/12/2010, pages 537-550;
69. Object: J.P. (TORA 94U) – …, dated 24/12/2010, pages 551-561;
70. Object: J.P. (TORA 94U) – …, dated 25/12/2010, pages 562-568;
71. Object: J.P. (TORA 94U) – .., dated 27/12/2010, pages 468-581;
72. In the session of 26 February 2018, the Defendants presented his statement.

b) Motions

Motion regarding Witnesses R.D., A.T., J.P., Ne.D., I.Z., Ra.J.and B.S.

73. During the Trial session of 22 May 2017, the Defence requested to hear as Witnesses, in addition to R.D.[2], the following individuals: A.T., J.P., Ne.D., I.Z., Ra.J. and B.S..

[2] This witness was heard on 4 July 2017

74. The Panel initially accepted the motion but later on reconsider their position and concluded that the examination of these Witnesses is unobtainable under article 258, paragraph 2.3 of the procedure code. Therefore it was decided not to administer this evidence anymore[3].

Notice of corroboration

75. During the Trial session of 26 February 2018, the Prosecution filed a "notice of corroboration" request, seeking to adduce as evidence certain statements and documents specified therein.

76. The Panel rejected the request[4].

Factual findings

77. On 22 December 2010, while in his car in the area of Ceranjska Reka, Municipality of Leposavić, the Defendant got shot, as established by the medical report issued by the Thoracic Surgery Clinic, University Clinical Center of Kosovo, Registry No. .. and dated ...

78. The circumstances of his shooting are still under investigation (case number 2010-BI-458).

[3] Record of the main trial 26 February 2018
[4] Record of the main trial 26 February 2018

79. As the police received information that the reason behind the shooting was a drug deal gone wrong, on 23 December 2010 "they organized a search operation in the house where the Defendant resided at that time"[5].
80. Both Witnesses M.T. and A.K. attended the search in their capacity of police officers and confirmed the findings in the report.
81. The expert-Witness in Forensics S.D., Director of the Chemistry and Biology Department in Kosovo Forensic Agency in Pristina confirmed that on that occasion a quantity of 7, 87 grams of marijuana and two scales with traces of narcotics were found.
82. A corollary allegation by the Prosecution is that on 22 December 2010 the Defendant was in possession of a quantity of 2 kilograms of heroin which he intended to sell to R.D. and J.P. in exchange of the amount of 28.000 Euro.
83. From the outset the Panel remarks that there is no solid evidence to establish that the Defendant was in the possession of any amount of drugs on the critical day or was in any way involved in the transaction of the quantity of drugs specified in the Indictment.
84. The only facts that can be established are that indeed the Defendant drove to Ceranjska Reka that day and that while being there, he got shot.
85. The rest of the theory presented by the Prosecution is not supported by the evidence adduced in the present trial and is, therefore, considered as unsubstantiated.
86. Even if the Defendant has not offered any plausible motive as to why was he attacked and the circumstances of this incident are indeed obscure, this

[5] Witnesses M.T. and A.K., Record of the main trial 13 September 2016, read into the Record of the main trial 22 May 2017

alone cannot serve to establish the allegations by the Prosecution, more so given that the burden of proof belongs to the latter.

87. It is of note that during the search, a certain quantity of marijuana was identified at the Defendant's place of residence. With the reserve that the Defendant was not the only inhabitant of the house, this could indicate that the Defendant might be involved in using or handling such substances. However, the quantity of narcotics found at the search is not so significant as to suggest a pattern similar to the one described in the Indictment. More importantly, this quantity of marijuana is not included in the object of the Indictment, as indicated by Prosecution[6].

88. The very presence of any drugs in the Defendant's vehicle or in the area where his vehicle was stationary at the time of the incident it is in fact not proven. No link is established between the Defendant and the narcotics seized by Police further on in Serbia proper.

89. The testimony of R.D. does not serve to shed any more light on what occurred on 22 December 2010 since the witness used his legal privilege to decline to answer questions.

90. The prosecution has failed to provide sufficient evidence to prove the connection and involvement of the Defendant with this shipment of drugs.

91. Furthermore, there is no concrete or clear evidence that the Defendant and the other individuals had any kind of cooperation in connection with drugs.

92. Based on the evidence available in the case, the Panel cannot draw any certain inferences concerning the existence or potential nature of the collaboration between the Defendant and the other four individuals.

[6] Record of the main trial 1 September 2016

93. The content of intercepts is not conclusive. While the possibility exists that the conversations are encoded and intended to conceal certain illegal activities, this conclusion cannot be drawn based exclusively on their content. In addition, there is not any other corroborative evidence in support of this theory. The purpose of the communication remains unclear. Therefore, the evidence by means of interception is inconclusive as to the involvement of the Defendant and his interaction with the others in relation to the narcotics shipment on 22 December 2010.
94. Again, the evidence relied upon by the Prosecution to prove their cooperation is circumstantial at best and therefore not sufficient to prove the existence of the purported criminal organisation.

Legal Findings

95. Under article 8 of the CCK a criminal offense has to be committed by an act or omission.
96. Article 20 of the same code statutes that "a person is not criminally liable if there is no causal link between the action and consequences".
97. The presumption of innocence "*imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt [and] ensures that the accused has the benefit of the doubt".*
98. On the basis of this principle, the burden of proof incorporated in the Prosecution's obligation to prove a Defendant's guilt beyond reasonable doubt means that it must be established and proven that there are no

other reasonable alternatives to the one demonstrated by the Prosecutor. As explained by the European Court of Human Rights (ECtHR) in the case of *Barberà, Messegué and Jabardo v Spain,* in relation to the right to a fair trial, Article 6 of the European Convention on Human Rights (ECHR),: "Paragraph 2 [of Article 6] embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the Accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the Accused."[7] Therefore, this principle is intrinsic to the right to be presumed innocent until proven guilty according to the law. Subsequently, based on the principle of *in dubio pro reo,* the Court, when evaluating the facts and the evidence, must find in the favor of the Accused in case of doubt.

99. The Yugoslavia Tribunal clarified that this standard "*requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused"[8].*

100. While an inference of involvement of the Defendant in a certain activity related to narcotics could be drawn from the fact that a small quantity of marijuana and a scale were found at this residence, in the view of the Panel, there are no other elements to establish the allegations in the Indictment. It necessarily follows, having regard to the burden of proof, that it has not been proven beyond a reasonable doubt by the Prosecution that the Defendant was in any way involved in the exchange of the quantity of 2 kilos of heroin on 22 December 2010 or that he was part of a

[7] A 146 (1989); 11 EHRR 360 para 77 PC;
[8] *Prosecutor v Milan Martić* (IT-95-11-A), ICTY Appeals Chamber (8 October 2008) §§55, 61.

criminal organisation set up for this purpose. This doubt and the presence of other possible and plausible alternative solutions had to be interpreted in the favour of the Accused, based on the principle of *in dubio pro reo*.

101. To sum up, the Trial Panel could not establish as proven beyond a reasonable doubt the facts giving rise to these charges against the Accused.
102. The actus *reus* in criminal law consists of all elements of a crime other than the state of mind of the Defendant.
103. The *actus reus* of the criminal offenses the Defendant is charged with under the two counts in the Indictment could not be established. The *actus reus* is, therefore, not met under the legal standard and the Defendant cannot be considered criminally liable.
104. Since the objective elements of the criminal offences in the law in force at the time the acts were committed were not found, it is superfluous to analyse the subjective element or *mens rea*.
105. Based on the above, the charges against the Defendant are not proven beyond a reasonable doubt and he is found not guilty and acquitted (Article 364(1.3) of the CPC).

Presiding Trial Judge	**Panel Member**	**Panel Member**
Roxana Comsa	**Franciska Fiser**	**Arnout Louter**

Recording Officer

Dukagjin Kerveshi

LEGAL REMEDY: *A Defendant, their legal counsel, the Prosecutor, an Injured Party or their Authorised Representative have 15 days from service of this judgment to appeal in accordance with Articles 380(1) and 381(1) of the CPC. Any appeal must be filed with the Court of first instance under Article 388(1) of the CPC.*