**SUPREME COURT OF KOSOVO**
**PML.-KZZ. No. 92/2013**
**Prishtinë/Priština**
**8 July 2013**

**IN THE NAME OF THE PEOPLE**

**THE SUPREME COURT OF KOSOVO,** in a panel composed of
EULEX Judge Dr. Horst Proetel as Presiding Judge,
Supreme Court Judge Avdi Dinaj and
Supreme Court Judge Salih Toplica as members of the panel,
in a session held on 8 July 2013, in the criminal case against the defendant:

N. M. [redacted]

Charged by the Indictment PPS. No. 114/2012 with having committed the criminal offences of:

1. **Abuse of Official Position or Authority** contrary to Article 339 Paragraph 1 and 3 of the Criminal Code of Kosovo (CCK) and
2. **Unauthorized Ownership, Control, Possession or Use of Weapons** contrary to Article 328 paragraph 2 of the CCK;

By Judgment P. No. 346/12, dated 23 May 2013, (henceforth: 'the Judgment') the Basic Court Pejë/Peć convicted the defendant for the criminal offences he had been charged with and sentenced him with an aggregate sentence of five (5) years of imprisonment, a fine of ten-thousand (10,000) Euro and the prohibition of holding any public office for a period of three (3) years following his release;

Deciding upon the Requests for Protection of Legality filed on 10 June 2013 by the defendant N.M. himself and the one filed on 17 June 2013 by Defence Counsel [redacted] on behalf of the defendant against the Ruling of the Court of Appeals KP. 780/2013, dated 1 June 2013, and the Ruling of the Basic Court of Pejë/Peć P. No. 346/2012, dated 23 May 2013, ordering detention on remand until the Judgment becomes final, while also taking into account the Reply to the aforementioned Requests filed on 28 June 2013 by the Office of the State Prosecutor of Kosovo (OSPK),

Issues the following

## JUDGMENT

**The Requests for Protection of Legality filed on 10 June 2013 by the defendant N. M. himself and the one filed on 17 June 2013 by the Defence Counsel on behalf of the defendant against the Ruling of the Court of Appeals KP. 780/2013, dated 1 June 2013, and the Ruling of the Basic Court of Pejë/Peć P. No. 346/2012, dated 23 May 2013, are REJECTED AS UNFOUNDED.**

## REASONING

**Procedural History**

With Ruling of the EULEX District Prosecutor Prizren Rez. 01/11 (2011-XI-122), filed Court of Pejë/Peć on 10 February 2012, the Investigation against N. M. and three more suspect was initiated.

The defendant was arrested on 2 April 2012.

Detention on remand against N. M. was initially ordered for a period of one (1) month by the Ruling of the District Court of Pejë/Peć PP. 43/12, dated 3 April 2012.

After that, detention on remand was extended several times at the intervals prescribed by law, by Rulings of the three judge panel and the later the presiding judge of the trial panel of the District Court of Pejë/Peć.

On 31 July 2012 the EULEX District Prosecutor filed the Indictment PPS. 114/2012, which was confirmed by the Confirmation Ruling KA. 228/12, dated 17 September 2012.

The main trial before the District Court of Pejë/Peć commenced on 3 December 2012.

On 14 February 2013 the trial panel of the Basic Court of Pejë/Peć by Ruling P. No. 346/2012 decided to permit a conditional release of the defendant, provided that the sum of ten thousand Euros (10,000 EUR) of bail was lodged with the court and that the defendant surrenders his travel documents.

On 19 February 2013 defendant N. M. after fulfilling the described conditions was released from detention on remand.

Upon an appeal filed on 21 February 2013 by the SPRK against the aforementioned Ruling, the Court of Appeals with Ruling of 7 March 2013 increased the amount of bail. [redacted] and two co-defendants were arrested again on 15 March 2013. On 16 March 2013 [redacted] lodged the additional bail money and was released. The two co-defendants did not lodge the additional amount of bail money and stayed in detention.

By Judgment P. No. 346/12, dated 23 May 2013, (henceforth: 'the Judgment') the Basic Court Pejë/Peć convicted the defendant together with two co-defendants for the criminal offences they had been charged with and sentenced the defendant [redacted] with an aggregate sentence of five (5) years of imprisonment, a fine of ten-thousand (10,000) Euro and prohibition of holding any public office for a period of three (3) years following his release.

By Ruling P. No. 346/12, dated 23 May 2013, the three-judge panel of the same court ordered detention on remand against [redacted] until the aforementioned Judgment is final.

Upon appeal the Court of Appeals affirmed the aforementioned Ruling.

Requests for Protection of Legality were filed on 10 June 2013 by the defendant [redacted] himself and on 17 June 2013 by Defence Counsel [redacted] on behalf of the defendant against the Ruling of the Court of Appeals KP. 780/2013, dated 1 June 2013, and the Ruling of the Basic Court of Pejë/Peć P. No. 346/2012, dated 23 May 2013.

On 28 June 2013 the OSPK filed a reply to the Requests, proposing to reject them as unfounded and to affirm the contested Rulings.

**Submissions of the Parties**

a) Defendant [redacted] Request

The defendant claims that the Court of Appeals has violated the provisions of articles 274, 275, 276 in line with Article 391, paragraph 1 and Article 281 paragraph 1 and 2 item (1) of CPC.

He argues that the Basic Court has violated the rights of the defendant even after pronouncement of the Judgment by a ruling dated 27 May 2013 terminating bail and returning the bail sum of 25,000 Euro. In his opinion there is a contradiction in ordering detention on remand and at the same time upholding the order of bail.

The Basic Court and the Court of Appeals have infringed Article 277 paragraph 4 of the (old) Kosovo Code of Criminal Procedure (KCCP), which stipulates "If the defendant is punished by imprisonment, bail shall be cancelled only after he or she has started serving the sentence".

He asks for reconsideration, pointing out that he already has spent 1 year in detention on remand, a fact which has diminished the risk of flight. In comparable cases other defendants with more severe sentences were left to defend themselves in freedom.

The assertion he had sufficient financial means and contacts abroad is only an unsubstantiated assumption.

A.L.

He finally submits that the Chief Appellate Prosecutor, Mr. [redacted], should have been excluded from the appellate proceedings since he had been heard as a witness in the case.

He proposes to alter the final decision of the Appellate Court and confirm a violation of the law or alternatively return the case for a new decision on the matter.

B.T.

b) Defense Counsel [redacted] Request

The Defence Counsel claims that there are inconsistencies and contradictions in the Ruling of the Basic Court when it speaks about 'the District Court' instead of the Basic Court. It also mistakenly quoted the old procedural law, which was not applicable at the time of the Ruling anymore. The Ruling of the court of first instance quotes on the last page Article 281 paragraph 1 subparagraph 2 items ii) and iii) of the KCCP, which refer to grounds to believe that the defendant will obstruct the progress of the criminal proceedings and the danger of repeating the criminal offence, while in other places the ruling clearly denies the existence of these two conditions.

He implies that the ordering of detention on remand after the court of first instance had found his client guilty and imposed a punishment of only five (5) years of imprisonment is in contradiction with the common and established practice in Kosovo courts. There are no specific circumstances related to his client that could support such a measure after he had responded to all court orders and summons during the main trial.

The Request contests that the court of first instance acted in contradiction with the law when leaving the measure of bail in force until the 27 May 2013, when the court ruled to return the bail sum, after detention on remand had been ordered.

The defence also argues that both contested Rulings did not consider sufficiently the fact that the defendant has to care for the family, whose members are sick.

In addition, the Defence Counsel challenges that the Basic Court in the Judgment had mistakenly applied a wrong provision of the criminal law to the disadvantage of his client while it was obliged to apply the more favourable provision.

It is also asserted that the Court of Appeals did not really deal with the arguments presented in the writ of the Appeal against the first instance Ruling.

The Defence Counsel proposes to annul both contested Rulings, terminate detention on remand and order his client to be released in return for the previously ordered amount of bail.

c) The OSPK Reply

A.L.

The OSPK rejects the arguments related to the cancellation of bail since the Ruling of 27 May 2013 is not subject of the current legal remedy. The Chief Appellate Prosecutor, [redacted], was not involved in the appeal proceedings. The Court of Appeals in its Ruling has addressed all arguments raised by the defence appeal against

the Ruling of the court of first instance. The Requests for Protection of Legality are just repeating the same arguments already considered in the appeal proceedings.

In respect to the risk of obstructing the criminal proceedings, which had been denied by the contested Rulings, the OSPK describes an incident where the vehicle of the witness P.M. [redacted] exploded in front of his house on 23 June 2013. Although the criminal procedure in first instance had been concluded by that time, the incident could well lead to a different assessment of this condition.

The OSPK finds no reason to alter the Ruling of the Court of Appeals and proposes to reject the Requests as unfounded and to affirm the contested Rulings.

**Findings**

The Supreme Court of Kosovo establishes the following:

The Requests are admissible but unfounded.

The Requests have been launched in time and by parties authorized to so pursuant to Article 433 paragraph 1 of the CPC. Article 432, paragraph 4 of the CCPK foresees an appeal against a decision ordering or extending detention on remand although the Judgment is not final.

The level of grounded suspicion required by Article 187 paragraph 1.1. of the CPC after the Judgment convicting the defendants is apparently fulfilled.

The Supreme Court rejects the challenge that the termination of bail only after the detention on remand had been imposed violates the law. It is fully clear from the contested Ruling of the Basic Court of Pejë/Peć, dated 23 May 2013, that the court had after the convicting Judgment made a new assessment of the circumstances determining the risks of Article 187 paragraph 1.2. of the CPC and that the resulting order of detention on remand replaces any previously ordered measure. The order of 27 May 2013 to return the bail sum is only consequent. The fact that this happened only four days after the contested Ruling is of no relevance and did not, nor does it affect the lawfulness of the detention on remand ordered on 23 May 2013.

The defendant is mistaken in proposing that Article 277 paragraph 4 of the KCCP (equivalent to the now applicable Article 182 paragraph 4 of the CPC) prevents the court from replacing the measure of bail with an alternative one in case it assesses that the relevant circumstances have changed. Article 182 paragraph 1 of CPC clearly gives the court the competence to order detention after new legal grounds arise.

The panel is not permitted to consider the claims raised about wrong application of material law in the convicting Judgment based on Article 432 paragraph 1 of the CPC. The extra-ordinary legal remedy of the request for protection of legality may be only filed against final judicial decisions. The mentioned challenge is directed against the Judgment of first instance, which is not yet final and as such cannot be subject of the current proceedings.

The panel notes that the allegation that the Chief Appellate Prosecutor, [redacted] had been involved in the appeal proceedings is without basis. The defendant has not substantiated in which way the Chief Appellate Prosecutor, [redacted] had participated in the proceedings. The panel acknowledges that the file does not contain any evidence indicating a participation of the mentioned person in the appeal proceedings.

In regard to the mistake of quoting of the Article 281 paragraph 1 subparagraph 2 items ii) and iii) of the KCCP, the Supreme Court refers to the third paragraph from the end of the Ruling of the Court of Appeals, which points out that this is an inconsequential clerical error and corrects the misquotation.

The Supreme Court of Kosovo finds that the Court of Appeals in its Ruling has thoroughly addressed all arguments raised by the defence appeal against the Ruling of the court of first instance. The panle concurs with the conclusions of the final Ruling. The Requests do not introduce any new arguments but repeat the claims presented in the appeal proceedings.

The defence argues that both previous Rulings did not consider sufficiently the fact that the defendant has to care for the family, whose members are sick. This intervention does not stand because the defendant could have considered this situation before the commission of the crimes he is charged for. The final Ruling of the Court of Appeals has discussed the arguments and come to the logic and binding conclusion that these arguments are not suitable to significantly alter the assessment of the risk of flight.

In light of the above, pursuant to Article 437 of the CPC, the Supreme Court of Kosovo decided as in the enacting clause.

**Presiding Judge:**

**Dr. Horst Proetel**
EULEX Judge

Recording Officer:

Holger Engelmann
EULEX Legal Officer

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