SUPREME COURT OF KOSOVO
PML.-KZZ. No. 261/2014
Prishtinë/Priština
21 May 2015

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of

EULEX Judge Willem Brouwer as Presiding Judge, and
Supreme Court Judge Avdi Dinaj and
EULEX Judge Rolandus Bruin as members of the panel,
In the presence of EULEX Legal Officer Holger Engelmann, acting in the capacity of the recording clerk, in a session held on 21 May 2015,

In the criminal case against the defendants:

1. E[redacted] K[redacted], nickname [redacted], father's name [redacted], born on [redacted] in the village of [redacted], municipality of [redacted] Kosovo, currently residing in the same village, high school education, poor financial situation, Kosovo Albanian,
in detention on remand from 14 December 2010 until 2 August 2011,

2. S[redacted] B[redacted], father's name [redacted] born on [redacted] in the village of [redacted] municipality of Rahovec/Orahovac, Kosovo, currently residing in [redacted], Kosovo, Kosovo Albanian,
in detention on remand from 18 April 2012 until 1 February 2013;

Both charged with having committed the criminal offence of:

War Crimes against the Civilian Population in co-perpetration, pursuant to Articles 142 and 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia of 1976 (hereafter: CC SFRY), currently punishable according to Articles 31 and 153 paragraphs 2.1 and 2.14 of the Criminal Code of the Republic of Kosovo[1] (hereafter: CCRK), in conjunction with Article 3 of the Fourth Geneva Convention of 12 August 1949 and of Article 13.2 of the Protocol II Additional to the Geneva Conventions of 8 June 1977 (Additional Protocol II),

By final Judgment of the Supreme Court of Kosovo PA II. No. 3/2014, dated 7 August 2014, convicted for the criminal offense War Crimes against the Civilian Population, as described above, and sentenced to a term of two (2) years imprisonment,

Deciding on the Requests for Protection of Legality filed on 11 December 2014 by Defence Counsel E[redacted] R[redacted] on behalf of the defendant [redacted] on 22 December 2014 by The Office of the Chief State Prosecutor of the Republic of Kosovo (OSPK) and on 30 December 2014 by Defence Counsel V[redacted] R[redacted] on behalf of the defendant S[redacted] B[redacted] against the Judgment of the Supreme Court of Kosovo PA II. No. 3/2014, date 7

[1] Law No. 04/L-082, published in the Official Gazette of the Republic of Kosovo No. 19, 13 July 2012

August 2014, while taking into consideration the OSPK's Reply to the Requests of both defendants, filed on 14 January 2015,

Issues the following:

JUDGMENT

The Requests for Protection of Legality filed by the Defence Counsel on behalf of the defendant E[redacted] and by the Defence Counsel on behalf of the defendant S[redacted] and the Request for Protection of Legality filed by the Office of the Chief State Prosecutor of the Republic of Kosovo against the Judgment of the Supreme Court of Kosovo PA II. No. 3/2014, dated 7 August 2014, are REJECTED AS UNFOUNDED.

REASONING

I. Procedural Background

1) On 30 March 2011 the Special Prosecution Office of the Republic of Kosovo (SPRK) filed the Indictment PPS. No. 75/2010 against the defendant [redacted] and six (6) co-defendants with the District Court Prizren. [redacted] was charged with the criminal offence of War Crimes against the Civilian Population in co-perpetration committed in Opterushë/Opteruša on 17 and 18 July 1998.

2) On 29 April 2011 the Indictment was confirmed with Ruling KA. No. 76/2011.

3) The District Court Prizren with Ruling KP. No. 170/2011, dated 9 June 2011, rejecting defendant's Appeal against the Confirmation Ruling as unfounded.

4) On 28 June 2011 the main trial commenced before the District Court Prizren.

5) With judgment P. No. 134/2011 of 2 August 2011 the District Court of Prizren convicted the defendant [redacted] for War Crimes against the Civilian Population as described in the charges (see above) and sentenced him to five (5) years of imprisonment. The court, by a clause incorporated in the enacting clause of the judgment pronounced on 2 August 2011, terminated detention on remand against the defendant.

6) On 13 September 2011 the Supreme Court of Kosovo rejected an appeal filed by the SPRK against the termination of the detention on remand and affirmed that part of the decision.

7) On 18 April 2012 the defendant S[redacted] was extradited from Albania and after a hearing detention on remand was imposed on him.

8) On 31 May 2012 the SPRK filed the Indictment PPS. No. 75/2010 against the defendant S[redacted], charging him with the criminal offence of War Crimes against the Civilian Population in co-perpetration committed in Opterushë/Opteruša on 17 and 18 July 1998.

10) Më 4 shtator 2012, Gjykata Supreme e Kosovës ka pranuar ankesat e paraqitura nga i pandehuri Ejup KABASHI dhe një i bashkëpandehur tjetër kundër aktgjykimit të Gjykatës së Qarkut P. Nr. 134/2011, të datës 2 gusht 2011, dhe ka anuluar pjesën dënuese të aktgjykimit, duke e kthyer lëndën në rigjykim.

11) Me aktvendimin P. Nr. 249/12, të datës 7 nëntor 2012, Gjykata e Qarkut në Prizren ka bashkuar procedurën kundër E[redacted] dhe gjashtë (6) të bashkëpandehurve me atë kundër Sokol BYTYQIT me numrin e lëndës P. 249/2012.

12) Më 30 nëntor 2012, ka filluar shqyrtimi gjyqësor.

13) Më 1 shkurt 2013, Gjykata Themelore në Prizren ka lëshuar aktgjykimin e saj P. Nr. 249/2012, duke i liruar të gjithë të pandehurit. Paraburgimi kundër S[redacted] ishte ndërprerë.

14) Pas ankesës së paraqitur nga Prokurori Special më 28 maj 2013, më 30 janar 2014 Gjykata e Apelit ka lëshuar aktgjykimin PAKR. Nr. 271/2013, duke pranuar ankesën e PSRK-së dhe duke ndryshuar aktgjykimin P. Nr. 249/2012 të Gjykatës Themelore në Prizren. Gjykata e Apelit ka shpallur të pandehurit E[redacted] dhe S[redacted] fajtorë për veprën penale Krime të luftës kundër popullatës civile në bashkëkryerje të kryer në fshatin Opterushë më 17 dhe 18 korrik 1998. Secili i pandehur është dënuar me pesë (5) vite burgim. Të bashkëpandehurit tjetër janë shpallur fajtorë për një tjetër vepër penale dhe janë dënuar me gjashtë muaj burgim me kusht.

15) Pas ankesave të paraqitura nga të pandehurit, më 7 gusht 2014 Gjykata Supreme e Kosovës me aktgjykimin PAII./KŽII. Nr. 3/2014 ka ndryshuar aktgjykimin e Gjykatës së Apelit PAKR. Nr. 271/2013, të datës 30 janar 2014, duke dënuar E[redacted] dhe S.B. [redacted] secilin me nga dy (2) vite burgim dhe duke liruar të bashkëpandehurit e tjerë.

16) Më 17 dhjetor 2014, avokati mbrojtës E[redacted] në emër të pandehurit E[redacted] ka paraqitur kërkesë për mbrojtje të ligjshmërisë kundër aktgjykimit të lartpërmendur të Gjykatës Supreme.

17) Më 22 dhjetor 2014, ZPShK-ja ka paraqitur edhe një kërkesë tjetër për mbrojtje të ligjshmërisë në lidhje me të pandehurit E[redacted] dhe S[redacted]

18) Më 30 dhjetor 2014, avokati mbrojtës V[redacted] ka paraqitur kërkesë për mbrojte të ligjshmërisë në emër të pandehurit S[redacted]

19) Më 14 janar 2015, ZPShK-ja ka paraqitur përgjigje ndaj kërkesave të të pandehurve.

II. Parashtresat e palëve

1. Kërkesa e paraqitur nga ZPShK

20) ZPShK-ja kërkesën e saj e bazon në shkelje substanciale të dispozitave të procedurës penale dhe në shkelje të ligjit penal.

21) In particular the Supreme Court exceeded its authority under the law decision on punishment. The Court's scope of review was limited by the the appeal of the defendants filed against the Court of Appeals judg 271/2013, dated 30 January 2014. While both defence appeals challenge as 'too severe' and 'draconic', the matter of particularly mitigating circ raised by any of the defendants. Consequently the Court was not autho apply Article 42 paragraph 2 of the CC SFRY and reduce the punishme limit of five (5) years imprisonment provided by Article 142 of the CC S seven (7) circumstances considered by the Supreme Court in calculatin were put forward in the defence appeals, none of them are extenuating, can be attributed to the defendants.

22) The Request moves the Supreme Court of Kosovo to establish th PAII./KŽII. No. 3/2014, dated 7 August 2014, is in violation of the law.

2. Request filed on behalf of the defendant E[redacted] K[redacted]

23) Defence Counsel E[redacted] R[redacted] claims that the challenged Judgment c of the criminal law (Article 404 paragraph 2 of the Kosovo Code of Crin henceforth: KCCP) and substantial violations of Article 403 paragraph KCCP.

24) The enacting clause is incomprehensible, inconsistent with the grounds lacks grounds in relation to decisive facts.

25) In particular the Request alleges the contested Judgement in its reasonin defendants shared the purpose of the KLA group to displace the Serb village and made their individual contributions to that purpose. In contrad defendant F[redacted] K[redacted] in the enacting clause was found guilty for population.

26) The Request challenges findings of the challenged Judgment, such as: Ca population be considered as civilians? Were the statements given by the w B[redacted] and S[redacted] B[redacted] credible?

27) The contested Judgment failed to prove beyond reasonable doubt th K[redacted] had been present at the time and place of the commission offence. It also failed to clarify the actions of the defendant, by wh contributed to the commission of the offence. Neither does the Judgment question if the assaulting group was organized and under responsible such subject to the Geneva Conventions.

28) The Request moves the Court to annul the Judgment of the Supreme C PAII./KŽII. No. 3/2014 of 7 August 2014, acquitting the defendant E[redacted] criminal liability.

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[2] Promulgated on 6 July 2003 by UNMiK Regulation 2003/26 and renamed and amended on by Law No. 03/L003

29) Avokati mbrojtës V[redacted] R[redacted] pohon se aktgjykimi i kundërshtuar përmban shkelje substanciale të nenit 403 paragrafit 1 pikës 12) të KPPK-së pasi që dispozitivi është i pakuptueshëm, kontradiktor me arsyetimin si dhe aktgjykimit i mungojnë arsyet në lidhje me faktet vendimtare.

30) Në kërkesë pretendohet se aktgjykimi i kontestuar në arsyetimin e tij ka gjetur se i pandehuri S[redacted] B[redacted] ka ndarë qëllimin e grupit të UÇK-së për ta zhvendosur popullatën Serbe nga fshati dhe kanë dhënë kontributin e tyre individual për këtë qëllim. Në kundërshtim të kësaj, i pandehuri në dispozitiv është shpallur fajtor për frikësimin e popullatës, që është vepër e veçantë.

31) Dëshmia e dëshmitares D[redacted] B[redacted] nuk është e besueshme pasi që ka pasur kundërthënie në lidhje me rrobat të cilat gjoja S[redacted] B[redacted] kishte të veshura. Burri i saj ka qenë Kryetar i fshatit dhe zbatonte urdhrat e qeverisë së Serbisë dhe djali i saj i ishte bashkuar ushtrisë së Jugosllavisë si vullnetar.
As dëshmia e dëshmitares S[redacted] B[redacted] uk është e besueshme sepse ajo është udhëzuar në përgjigjet e saj nga Prokurori.

32) Në kërkesë pretendohet se aktgjykimi nuk i përmbush standardet e kërkuara ligjore të vërtetimit përtej çdo dyshimi të arsyeshëm.

33) Populata e armatosur serbe nuk është dashur të konsiderohet si civil por si luftëtar. Ata kanë marrë pjesë në aktet e terrorit kundër popullatës jo serbe.

34) Aktgjykimi dështon të elaboroj lidhur me çështjen nëse grupi sulmues ka qenë i organizuar dhe nën komandë përgjegjëse dhe si e tillë a i nënshtrohet konventave ndërkombëtare.

35) Në kërkesë propozohet që të ndryshohet aktgjykimi i kontestuar dhe të lirohet S[redacted] B[redacted] nga akuzat, në pajtim me aktgjykimin P. Nr. 249/12 të Gjykatës Themelore në Prizren.

3. Përgjigja e Zyrës së Kryeprokurorit të Shtetit ndaj kërkesave të mbrojtjes

36) Në përgjigje propozohet që të refuzohen të dy kërkesat e të pandehurve për mbrojtje të ligjshmërisë, si të pabazuara.

37) ZPShK-ja pohon se të dy kërkesat e mbrojtjes janë bazuar gabimisht në KPPK, gjersa Kodi i Procedurës Penale[3] (tani e tutje: KPP) është i aplikueshëm.

38) Asnjëra nga kërkesat e mbrojtjes nuk përmbushin kushtet formale ligjore të përcaktuara me nenin 376 paragrafin 1 nën-paragrafët 1.5., 1.7. dhe 1.8. të KPP-së dhe prandaj nuk duhet të merren parasysh.

39) Kërkesat janë gjithashtu pa meritë. Ato janë të paqarta lidhur me atë se cilin aktgjykim e kontestojnë: aktgjykimin e formës së prerë të Gjykatës Supreme të Kosovës apo aktgjykimin e shkallës paraprake të Gjykatës së Apelit, pasi që vetëm ky i fundit vërteton fajësinë e të pandehurve.

[3] Ligji Nr. 04/L-123, i publikuar në Gazetën Zyrtare të Republikës së Kosovës Nr. 37, 28 dhjetor 2012, në fuqi nga 1 janari 2013

40) The defence Requests make reference to alleged violations of the criminal law, pursuant to Article 404 paragraph 2 of the KCCP but fail to substantiate the claim or to provide any arguments in support.

41) In regard to the additional arguments supplied by the defence Requests, the OSPK qualifies them as mere disagreement with the established facts. Requests for protection of legality, however, may not be based on this ground.

III. Supreme Court Findings

42) The Panel finds the Requests for protection of legality filed by the OSPK and on behalf of the defendants [redacted] admissible but unfounded.

1. Applicable Law

43) The KCCP applies to the current extraordinary legal remedy proceedings.

44) Pursuant to the transitional provision of Article 545 paragraph 1 sentence 2 of the CPC:

> *"The determination of whether to use the present code of criminal procedure shall be based upon the date of the filing of indictment. Acts which took place prior to the entry of force of the present code shall be subject to the present code if the criminal proceeding investigating and prosecuting that act was initiated after the entry into force of that code."*

45) In *argumentum e contrario*, for acts for which these conditions don't apply the criminal procedure law previously in force is applicable. Hence, since the (charged) acts took place before the CPC entered into force, the investigations were initiated before and the Indictments were filed before, it is clear that the KCCP applies to the current criminal proceedings until the rendering of a final judgment.

46) This interpretation of the transitional provisions of the CPC in regard to all criminal proceedings that were initiated prior to entry into force of the new code, for which the main trial has commenced, but has not been completed or has been completed but were returned for re-trial by means of ordinary or extraordinary legal remedy, was confirmed by the Legal Opinion No. 56/2013, adopted by the General Session of the Supreme Court of Kosovo of 23 January 2013.

47) The Supreme Court now had to decide the question whether this principle applies to extraordinary legal remedy proceedings, after the Judgment became final.
Following the systematic of Article 544 of the CPC, which provides that:

> *"...if on the occasion of an appeal or an extraordinary legal remedy the judgment is annulled, the main trial shall be conducted mutatis mutandis under the previous code",*

the Panel concludes that the same applies also for the actual extraordinary legal remedy proceedings, which take place chronologically before any re-trial. Hence, the KCCP continues

to be applicable until the conclusion of extraordinary legal remedy proceedings, which carry the potential to have a case returned for re-trial.

The Request filed by the OSPK

48) The Panel finds the challenges raised by the OSPK Request without merit. The Supreme Court in the contested Judgment did not exceed its scope of review nor its authority under the law when reducing the punishment for each of the defendant to two (2) years of imprisonment.

49) The scope of review for the Supreme Court upon the defence appeals against the Court of Appeals Judgment PAKR. No. 271/2013 was determined pursuant to Article 415 paragraph 1 of the KCCP as the part of the judgment which is challenged by the appeal and the issues that the Court had to examine *ex officio* (subparagraphs 1 through 4).

50) The Supreme Court notes that the appeals of both defendants had challenged the imposed punishments as too severe. Therefore the previous instance was within the legally determined scope of review when examining the calculation of punishment.

51) The OSPK claims that the Court was not authorized to apply the provision of Article 42 paragraph 2 of the CC SFRY. The provision is similar in wording to Article 66 paragraph 2 of the Criminal Code of Kosovo[4] (henceforth: CCK) and Article 75 subparagraph 1.2. of the CCRK. It allows the imposition of a punishment below the limits prescribed by the law/statute when the court finds that such extenuating (in both newer codes: "particularly mitigating") circumstances exist which indicate that the purpose of the punishment can be achieved by a lesser punishment.

52) The Panel rejects the argument supplied by the OSPK Request that the previous instance would have only been authorized to consider mitigation pursuant to Article 42 paragraph 2 of the CC SFRY if the appeals had specifically requested to do so or at least had raised the issue of extenuating circumstances. The Court considered Article 42 paragraph 2 of the CC SFRY based on the arguments provided in the appeals, not, as the OSPK claims *ex officio*.

53) The appeals had to be interpreted by the Supreme Court in the light of the challenged Judgment in order to evaluate the true intention of the appellants. Concluding from the fact that the Court of Appeals had imposed the minimum punishment of five (5) years of imprisonment on both defendants[5], their appeals requesting a review of the punishments would be meaningless if the Court had to remain within the limit provided by Article 142 of the CC SFRY, since within these limits no further reduction of punishment was possible. Therefore the only reasonable interpretation of the appeal arguments was to understand them as request to consider particularly mitigating/extenuating circumstances, pursuant to Article 42 paragraph 2 of the CC SFRY.

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[4] Promulgated by UNMIK Regulation 2003/25 on 6 July 2003 as 'Provisional Criminal Code of Kosovo', on 6 November 2008 renamed and amended by Law No. 03/L-002

[5] In respect to the defendant B[redacted] the principle of restriction of *reformatio in peius* prevents a more severe punishment since when his case was returned for re-trial upon defence appeals an appeal filed by the Special Prosecutor was dismissed as inadmissible.

54) As to the particular extenuating circumstances that the Court took into consideration, the Panel notes that it was not required that the appeals explicitely named any specific new extenuating circumstances. Since the general issue of extenuating circumstances was raised by the defendants, even in absence of newly submitted circumstances the Court had to examine the factual findings of the previous instances if they contained any such conditions.

55) The Panel notes that out of the allegedly seven (7) specific circumstances that the OSPK mentions as base for the mitigation of the punishments, the last two:

vi) Dangerousness of the offence and the offender much lower compared to similar cases,
and
vii) Elapse of time since the commission of the criminal offence;

were only mentioned in support of the argument that there are no aggravating circumstances in the case.

56) The Court however concurs with the OSPK's argumentation regarding the extenuating circumstances numbered in the Request as i) and ii).

57) It was not established as a fact by any previous instances that [redacted] had called from outside the house to keep the civilians inside in order to prevent the happening of unnecessary harm. The Court of Appeals Judgment PAKR. No. 271/2013, dated 30 January 2014, in paragraph 33 (pages 10/11) concludes that

"From the evidence presented it has not been possible to establish exactly what happened during the attack..."

58) For both defendants it was just found proven that they had been present in the Božanić yard immediately after the attack.

59) In the Basic Court of Prizren Judgment P. No. 249/2012, dated 1 February 2013, in the Chapter VI. "Summary of Factual Situation Proven" on page 12 there is neither any mention being made of [redacted] calling to the inhabitants of the Božanić house before the shooting commenced.

60) Also in regard to the second mentioned circumstance of absence of cruel, inhumane, degrading treatment or threats, the Panel finds that such conditions are the expected behaviour and cannot be considered as mitigating.

61) However, the Court considers the remaining mentioned circumstances that the injured parties were given food while in custody, that money taken from them was later returned and that they were released after only a short period of time as valid extenuating circumstances attributable to the defendants and appropriate to justify the mitigation of the punishments pursuant to Article 42 paragraph 2 of the CC SFRY.

62) The Panel rejects the objection that the mentioned circumstances are not attributable to the defendants. Since pursuant to Article 22 of the CC SFRY the defendants were found criminally liable for the joint commission of the criminal offence of War Crimes against the Civilian Population, the manner and circumstances of jointly perpetrating that act have

to be counted to the disfavour and to the favour of each of them. The mentioned extenuating details were part of the intent (*mens rea*) of the defendants and by their individual contributing actions they contributed to the joint plan.

63) The Panel also concurs with the evaluation of the Court of the previous instance that in recognition of the preponderance of particularly mitigating circumstances and the calculation of the mitigated punishments for both defendants.

2. The Requests filed by the defendants

64) Since the arguments in both defence Requests are almost identical the Court does not see necessity to consider them in separate chapters.

65) Both Requests name as subject of the legal remedy the Judgment of the Supreme Court of Kosovo PAII./KŽII. No. 3/2014 of 7 August 2014. In recognition of both Requests proposing to acquit the respective defendant in accordance with the verdict P. No. 249/12 of the Basic Court of Prizren, the Panel interprets the intention of the Requests as to challenge the convicting Judgment of the Court of Appeals PAKR. No. 271/2013, dated 30 January 2014, in its final form of the aforementioned Supreme Court Judgment.

66) The Supreme Court finds the allegation of the defence without base that there is a contradiction between the enacting clause, which found both defendants guilty of *intimidating* the population, and the grounds that talk about the joint purpose of the KLA group to *displace* the Serb population of the village Opterushë/Opteruša. Both challenged Judgments are clear and consistent in evaluating the armed attack on the Serb civilians as way of intimidating the population with the purpose to coerce them to leave. There is no contradiction in these findings.

67) Concerning the violation of the criminal law pursuant to Article 404 paragraph 2 of the KCCP, claimed by both defence Requests without further substantiating, the Panel does not see any circumstances that would preclude criminal liability.

68) Pursuant to Article 451 paragraph 2 of the KCCP, the defence arguments of lack of standard of proof, alleged doubts about the credibility of witnesses, alleged doubt about the civilian status of the persons subject to the armed attack and status and degree of organization and command of the armed group are claims of erroneous or incomplete determination of the factual situation and as such not permitted.

69) For the aforementioned reasons, the Supreme Court of Kosovo decides on the Requests for Protection of Legality as in the enacting clause.

Presiding Judge:

Willem Brouwer
EULEX Judge

Willem Brouwer

Members of the panel:

Avdi Dinaj
Supreme Court Judge

Rolandus Bruin
EULEX Judge

Recording Clerk:

Holger Engelmann
EULEX Legal Officer

SUPREME COURT OF KOSOVO
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