

SUPREME COURT OF KOSOVO
PML 121/2014

PPS 10/2013

26 June 2014

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Elka Filcheva-Ermenkova as Presiding Judge, and EULEX Judge Willem Brouwer and Supreme Court Judge Emine Mustafa as panel members, assisted by EULEX Legal Officer Natalie Dawson acting in the capacity of recording clerk,

In the criminal case against:

B [REDACTED] K [REDACTED], born on [REDACTED] in Lladoc, father's name [REDACTED], Kosovo Albanian

Suspected of the criminal offences of:

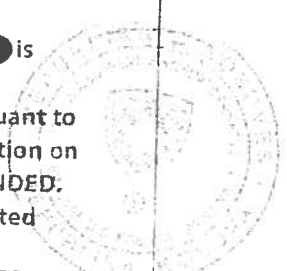
1. **Murder** in violation of article 146 of the Provisional Criminal Code of Kosovo (hereafter 'PCCK') and Attempted Murder in violation of article 146(10) PCCK in conjunction with article 20 PCCK;
2. **Aggravated Murder** in violation of article 147(10) PCCK and Attempted Aggravated Murder in violation of article 146 PCCK in conjunction with article 20 PCCK;
3. **Commission of Terrorism** in violation of article 110(1) and (3) together with article 109(1), (10) and (12) CCK punishable by at least fifteen (15) years of imprisonment;
4. **Endangering United Nations and Associated Personnel** in violation of article 142(1)(3) PCCK

Deciding upon a **Request for Protection of Legality** filed by Defence Counsel on behalf of B [REDACTED] K [REDACTED] received by the Basic Court of Prishtinë/Priština on 9 June 2014;

Taking into account the Opinion of the Office of the State Prosecutor of the Republic of Kosovo (OSPK) filed on 12 June 2014;

Following the deliberation and voting, in accordance with Article 435 of the Criminal Procedure Code (hereafter 'CPC'), the Supreme Court issues the following:

JUDGMENT

1. The Request for Protection of Legality filed by B [REDACTED] K [REDACTED] is APPROVED.
 2. The Ruling of the Basic Court on 23 May 2014 is modified pursuant to article 438(1.1) CPC and the Prosecutor's application for detention on remand in respect of B [REDACTED] K [REDACTED] is REJECTED AS UNFOUNDED.
 3. Detention on remand in respect of B [REDACTED] K [REDACTED] is terminated immediately.
- 

Procedural History:

1. Procedural Background

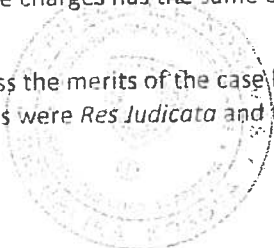
- a. An Indictment PP no. 276/04 was filed on 12 June 2006 against the Defendant K [REDACTED].
- b. On 9 November 2007 the District Court of Prishtinë/Priština delivered a final Judgment thereon rejecting the charges against the Defendant K [REDACTED], those charges having been withdrawn by the Prosecutor.
- c. The SPRK Prosecutor issued a Ruling on Initiation of Investigation on six Defendants including the Defendant K [REDACTED] dated 18 February 2013.
- d. On 23 January 2014 the Prosecutor filed requests for the issuance of arrest orders against the Defendant K [REDACTED] and two others. The Prosecutor also filed previous Indictments in relation to the Defendants. The Indictment relating to the Defendant K [REDACTED] is dated 12 June 2006.
- e. On 24 February 2014 the Prosecutor was called upon to supplement the requests with further detailed information, an elaboration on their position on the *ne bis in idem* principle and the necessity to go through the procedure for reopening.
- f. The Defendant K [REDACTED] was arrested on 22 May 2014 along with co-defendant F [REDACTED] E [REDACTED].
- g. On 23 May 2014 the Pre-Trial Judge at the Basic Court of Prishtinë/Priština remanded the Defendant K [REDACTED] in detention for a period of one (1) month, due to expire on 22 June 2014.
- h. On 9 June 2014 the Basic Court of Prishtinë/Priština received a Request for Protection of Legality against the ruling of the Pre-Trial Judge dated 23 May 2014.
- i. On 12 June 2014 the State Prosecutor filed an Opinion.
- j. On 18 June 2014 the Basic Court of Prishtinë/Priština extended detention on remand against the Defendant K [REDACTED] for a further one (1) month period, due to expire on 18 July 2014.
- k. On 20 June 2014 the Court of Appeals partially granted an Appeal filed by Defence Counsel on behalf of the Defendant K [REDACTED] against the ruling of the Basic Court dated 18 June 2014. The Basic Court Ruling was quashed and returned to the Basic Court for a further decision, the Defendant K [REDACTED] to remain in detention on remand until a further Ruling is issued.

2. Submissions of the Parties

The Defence

- a. The Pre-Trial Judge did not assess the existence of grounded suspicion.
- b. The Pre-Trial Judge did not assess the principle of *Ne Bis in Idem*.
- c. A Judgment rejecting the charges has the same consequences as a Judgment on the merits of the case.
- d. The Trial Court did assess the merits of the case because the Prosecutor withdrew the charges. The charges were *Res Judicata* and therefore there can be no grounded suspicion.

The Appellate Prosecutor



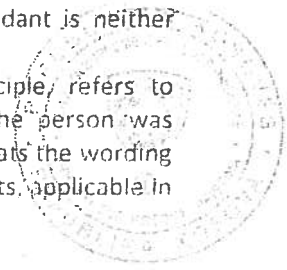
- d. The Trial Court did assess the merits of the case because the Prosecutor withdrew the charges. The charges were *Res Judicata* and therefore there can be no grounded suspicion.

The Appellate Prosecutor

- a. The criminal acts for which detention on remand is sought are the same as those described in the Indictment dated 12 June 2006, which were rejected as withdrawn by the Prosecutor.
- b. The Prosecutor makes reference to a Ruling of the Court of Appeals on 30 May 2014 (in relation to the Co-Defendant E only), and invites the Supreme Court to decide on whether the principles raised therein are applicable to this Defendant.
- c. The Prosecutor does not commit to a clear view.

2. Findings of the Court:

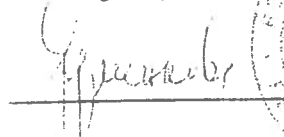
- a. The Request for Protection of Legality is admissible and timely filed.
- b. The Panel carefully considered the assessment made by the Pre-Trial Judge. The Panel agrees that state authorities conducting these proceedings have a duty at each and every stage of the proceedings to assess whether circumstances exist which bar the prosecution and therefore whether the *ne bis in idem* principle has been violated. The Panel also agrees that this is particularly important where detention on remand may be, or in this case is, imposed on the Defendant, detention on remand being a deprivation of his liberty.
- c. The Panel considered the wording of article 4(1) of the CPC as well as article 4 of Protocol No. 7 to the European Convention on Human Rights and Fundamental Freedoms.
- d. The Panel notes the findings of the Court of Appeals in its Ruling of 30 May 2014 in relation to the wording of article 4(1) CPC. The Panel concurs with the Court of Appeals Panel that there is a difference between the language contained in the Albanian and English versions of the CPC.
- e. In the English version the text reads, '*...or if the indictment against him or her was dismissed by a final decision of a court*' (emphasis added). The same phrase in the Albanian text reads, '*or if the indictment against him or her was rejected by a final decision of a court*' (emphasis added).
- f. The original language of the CPC (and the language in which the Law was voted for in the Parliament) was Albanian. Therefore it should be accepted that this is the correct language version (following art.3 (2) of the Law of the Official Gazette - Law No.2004/47).
- g. Regardless of whether there was a dismissal or a rejection of previous charges, the decision referred to in the provision of art. 4 (1) *supra* is of procedural nature. It is not a decision on the merits of the criminal case as the defendant is neither acquitted, nor convicted.
- h. Article 4 (1) of the CPC, describing the *ne bis in idem* principle, refers to prosecution or punishment for a criminal offence for which the person was acquitted or convicted with a final decision. Thus far the CPC repeats the wording of art. 4 of Protocol 7 of the European Convention on Human Rights, applicable in



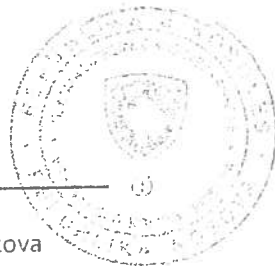
Kosovo by reference to article 2(2) of the Kosovo Constitution. Unlike the Convention, the CPC, in addition to a final acquittal or conviction, refers in addition to a final decision of a court with which an indictment has been rejected. One of the hypothetical situations in which this may occur is when a Prosecutor withdraws the charges.

- i. The CPC forbids a second prosecution not only when there is a final decision on the merits, but also when there is a final decision of a procedural nature, which has been rendered on the basis of a withdrawal by motion of a Prosecutor without any substantial assessment of whether the crime has been committed or not. Thus the CPC provides for a regime which is more favorable to the defendant and therefore this principle should be applied.
- j. In this particular case there was a Judgment issued by the first instance court on 9 November 2007 under the provision of art. 389 (1) of the Provisional Criminal Procedure Code of Kosovo, UNMIK/REG/2003/26 from 6 July 2003. With the Judgment the charges, based on the same criminal offences were rejected because the Public Prosecutor withdrew them. It is irrelevant how the offences were qualified at that time and how they are qualified now. What is important is the identity of the material acts that constitute the offence. There is no argument in the current case that both before and now the charges were and are based on the same material acts. Therefore new prosecution is not possible as it violates the principle of *ne bis in idem*.
- k. The Panel notes the procedure for re-opening criminal proceedings contained within article 423(1.3) CPC. The Panel finds that this provision only applies where such a re-opening would be to the benefit of the Defendant. Therefore the Panel finds that this procedure is not applicable in the case concerning the Defendant K [REDACTED]
- l. The Panel is aware that since the challenged Ruling was delivered, the Pre-Trial Judge has delivered another Ruling extending detention on remand in respect of the Defendant K [REDACTED]. Furthermore this Ruling was appealed by Defense Counsel representing the Defendant K [REDACTED], which resulted in the Ruling being partially annulled. The case has been returned to the Basic Court for a further decision.
- m. It is the finding of this Panel that the *ne bis in idem* principle has been violated and the Defendant K [REDACTED] should be immediately released.

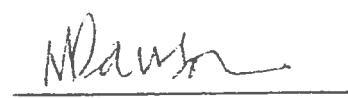
Presiding Judge:



Elka Filcheva-Ermenkova
EULEX Judge

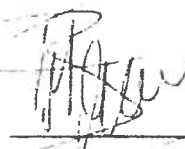


Recording Officer:

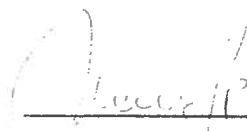


Natalie Dawson
EULEX Legal Officer

Members of the panel:



Willem Bower
EULEX Judge



Emine Mustafa
Supreme Court Judge

SUPREME COURT OF KOSOVO
PML 121/2014
26 June 2014