

Supreme court of Kosovo
Pkl-Kzz 80/2012
14 June 2012

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Dr. Horst Proetel as Presiding Judge, and EULEX Judges Tore Thomassen and Gerrit-Marc Sprenger, Supreme Court Judges Marije Ademi and Nesrin Lushta as panel members assisted by Legal Officer Chiara Rojek in the capacity of recording clerk,

In the criminal case against **S.P.**, [nickname], [son of..], [born on..] in [place of birth], [citizenship], [resident of], in detention on remand since 03 February 2010,

Charged as per in the Indictment PPS no. 23/2010 – GJPP no. 11/2010 filed on 16 July 2010 by the Special Prosecutor with the District Court of Mitrovicë/a with the criminal offences of Organized Crime contrary to Article 274 Paragraph 3 of the Criminal Code of Kosovo (CCK) related to the offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 2 and Paragraph 4 Item 1 of the CCK,

Convicted in first instance by Judgment P no. 36/2010 of the District Court of Mitrovicë/a dated 23 February 2011, by which S.P. was found guilty for the criminal offence of Organized Crime contrary to Article 274 Paragraph 1 of the CCK and Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 2 and Paragraph 4 Item 1 of the CCK, and sentenced to an aggregate punishment of eight (8) years of imprisonment and a fine of 51.00 Euros, confirmed in second instance by Judgment Ap-Kz no. 255/2011 of the Supreme Court of Kosovo dated 18 January 2012,

Acting upon the Request for Protection of Legality filed by Defence Counsel A.V. on behalf of Defendant S.P. on 3 May 2012 against the Judgment P no. 36/2010 of the District Court of Mitrovicë/a dated 23 February 2011 and the Judgment Ap-Kz no. 255/2011 of the Supreme Court of Kosovo dated 18 January 2012, and taking into consideration the Reply to the Request filed by the Office of the State Prosecutor of Kosovo (OSPK) on 28 May 2012, after having deliberated and voted on 14 June 2012,

Pursuant to Articles 451 and following of the KCCP, issues the following

JUDGMENT

The Request for Protection of Legality filed by Defence Counsel A.V. on behalf of Defendant S.P. on 3 May 2012 against the Judgment P no. 36/2010 of the District Court of Mitrovicë/a dated 23 February 2011 and the Judgment Ap-Kz no. 255/2011 of the Supreme Court of Kosovo dated 18 January 2012, is **REJECTED** as ungrounded.

The Judgment P no. 36/2010 of the District Court of Mitrovicë/a dated 23 February 2011 and the Judgment Ap - Kz no. 255/2011 of the Supreme Court of Kosovo dated 18 January 2012 are **AFFIRMED**.

REASONING

I. Procedural background

On 16 July 2010, the Indictment PPS no. 23/2010 – GJPP no. 11/2010 dated 13 July 2010 was filed by the Special Prosecutor with the Registry of Mitrovicë/a District Court. As per in the Indictment, H.S. and S.P. were charged with the criminal offences of Organized Crime contrary to Article 274 Paragraph 3 of the CCK related to the offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 2 and Paragraph 4 Item 1 of the CCK. Additionally, U.J. and E.M. were charged with Organized Crime contrary to Article 274 Paragraph 1 of the CCK related to the offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 2 and Paragraph 4 Item 1 of the CCK.

On 7 September 2010, the Indictment was confirmed in its entirety by Ruling KA no. 56/2010.

The trial commenced on 8 December 2010 and continued through January and February 2011 in the presence of the parties. On 23 February 2011, the District Court of Mitrovicë/a issued the Judgment P no. 36/2010.

Defendant S.P. was found guilty for the criminal offences of Organized Crime contrary to Article 274 Paragraph 1 of the CCK and Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 2 and Paragraph 4 Item 1 of the CCK. “[B]ecause between October 2009 and 03 February 2010, they, as part of an organized group, in distinguished roles took part in the transportation, distribution and selling for profit of several shipments of narcotic substances, delivered from Albania to Kosovo, then through Serbia with the destination of Bosnia and Hercegovina. The Accused H.S. had a leading organizational role in the group whereby he was the coordinating link between the two unknown Albanian members of the group (L and D), the accused S.P. and the accused E.M. The two Albanians brought marijuana in unknown quantity to the Accused E.M.’s residence in Mitrovica, [street], where S.P. and E.M. measured and wrapped it in smaller packages, then put them in larger bags, and took them to the garage of the house from where two unknown male persons took and delivered them by different cars to an unknown destination. On 03 February 2010, 26.449 kgs of cannabis (marijuana) and 4.342 kgs of a light brown powder substance containing a mixture of Acetaminophen (Paracetamol) and Caffeine that can be used as mixture to Heroin and drugs of Opiate group were found. Furthermore, traces of heroin were found on a digital scale, a sieve and a strainer

confiscated from the home of E.M. The total quantity of the transported drugs remains unknown.”

He was sentenced to seven (7) years of imprisonment and a fine of 50.00 euros for the offence of Organized crime, and to three (3) years of imprisonment and a fine of 50.00 euros for the offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances. An aggregate punishment of eight (8) years of imprisonment and a fine of 51.00 euros was imposed onto him pursuant to Article 71 Paragraph 1 and Paragraph 2 Items 2 and 4 of the CCK.¹

Two of the co-Defendants were also convicted. The fourth co-Accused was acquitted.

In June 2011, appeals were filed against the Judgment P no. 36/2010 by three Defendants, including S.P. On 18 January 2012, the Supreme Court of Kosovo issued the judgment Ap-Kz no. 255/2011 by which the Appeals filed by the Defence were rejected, and the First Instance Judgment affirmed.

On 3 May 2012, Lawyer A.V. filed a Request for Protection of Legality on the behalf of S.P. The Office of the State Prosecutor of Kosovo (OSPK) filed a Reply to the Request on 28 May 2012.

II. Submissions of the Defence and Reply of the OSPK

1. Request for Protection of Legality

The Defence files a Request for Protection of Legality because of a violation of the provisions of criminal procedure under Article 451 Paragraph 3 read with Article 403 Paragraph 2 Item 1 of the KCCP, and proposes to the Supreme Court of Kosovo to annul the contested Judgment, and to return the case to the First Instance Court for re-trial; and to terminate detention on remand pursuant to Article 420 Paragraph 1 Item 3 read with Article 424 Paragraphs 1 to 4 of the KCCP.

The Defence avers that the First Instance Court and the Second Instance Court did not act properly when they found the Defendant guilty for the mentioned criminal acts and imposed two punishments. As a result, a serious violation under Article 71 Paragraph 1 of the CCK occurred.

Lawyer A.V. claims that S.P., together with the co-Defendants committed one act, and not two acts. The Defendant can be found guilty only of the criminal offence of Organized Crime or Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances, but not of both offences, as there was no plurality of criminal acts. Consequently, the Court should have imposed one punishment.

¹ The time spent in detention on remand since 03 February 2010 is to be credited pursuant to Article 73 Paragraph 1 of the CCK. The District Court Panel also issued a decision on the confiscation of the narcotic drugs pursuant to Article 60 and Article 494 of the CPCK and on the reimbursement of the costs of the criminal proceedings.

2. Reply of the State Prosecutor

The State Prosecutor moves the Supreme Court of Kosovo to reject the Request as not meritorious pursuant to Article 456 of the KCCP.

The OSPK notes that the Defence has only requested the annulment of the Second Instance Judgment.

Even assuming that the Request is grounded, the Supreme Court could modify the judgment pursuant to Article 457 Paragraph 1 sub-paragraph 1 of the KCCP, rather than annulling whole or part of the judgment.²

The State Prosecutor presents the following arguments: this issue was already dealt with by the Supreme Court in the judgment Ap-Kz no. 225/2011; the enacting clause of the First Instance Judgment contains an implicit description of the acts for the criminal act of Organized crime; the enacting clause should be read in conjunction with the remaining part of the Judgment, in particular pages 23 and following under “The Organized Crime Charge”.

III. Findings of the Supreme Court of Kosovo

The Request for Protection of Legality is admissible.

The Supreme Court of Kosovo rejects the Request as ungrounded.

1. Competence of the Supreme Court of Kosovo

The Supreme Court of Kosovo is competent to decide on the Request of Protection of Legality pursuant to Articles 454 and 26 Paragraph 3 of the KCCP. The Supreme Court panel has been constituted in accordance with Article 3 Paragraph 7 of the Law No. 03/L-53 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo.

2. Admissibility of the Request for Protection of Legality

The latest challenged judgment, the Judgment Ap-Kz no. 255/2011, was announced on 18 January 2012. The Defendant received it on 26 March 2012, and Lawyer A.V., on 22 March 2012. The Request for Protection of Legality was registered on 3 May 2012.

The Request for Protection of Legality is hence admissible as timely filed by an authorized person pursuant to Articles 452 Paragraph 3 and 453 of the KCCP.

3. Merits of the Request for Protection of Legality

As a preliminary remark on the scope of review, the State Prosecutor submits that the Defence filed the Request against the Second Instance Judgment as Lawyer A.V.

² Reference to Supreme Court of Kosovo, Pkl-Kzz no. 114/2009, Judgment on Request for Protection of Legality, 12 April 2010 (pages 5 and fol.) recalled by the Supreme Court of Kosovo, Pkl-Kzz no. 39/2012, Judgment on Request for Protection of Legality, 24 April 2012 (pages 8 and fol.)

proposes to annul solely this very judgment. The Supreme Court of Kosovo does not concur with this stand. The Request was filed “against the verdict of the Supreme court of Kosovo in Pristina Kz. No. 255-2011 dated 18 January 2012 which rejected as ungrounded the appeal of the Defence Counsel of the Defendant S.P. filed against the verdict of the District Court of Mitrovica P No. 36/2010 dated 23.02.2011...” In addition, the Defence explicitly refers to both judgments in the first paragraph of the Request. Finally, the content of the Request clearly contains allegations against both judgments. Therefore this contention on this point is rejected.

The Supreme Court, however, wishes to emphasize that a Request for Protection of Legality has to be drafted in such way as to ensure a relative preciseness of the submissions for a proper adjudication of a case.

Furthermore, it is noted that the Defence refers to Article 420 Paragraph 1 Item 3 read with Article 424 Paragraphs 1 to 4 of the KCCP. The Supreme Court of Kosovo does not see any relevance to such mention as these provisions apply to the decisions of the Court of Second Instance on Appeal, which is not the case at hand.

Substantial violation of the provisions of the criminal procedure provided for in Article 452 read with Article 403 Paragraph 2 Item 1 of the KCCP

The Defence contends the fact that S.P. was found guilty and sentenced to both criminal offences, Organized Crime and Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances. On the other hand, the State Prosecutor claims that the enacting clause read with the reasoning of the judgment clearly mentions a description of the facts for both criminal offences.

After perusing the First Instance Judgment, it appears that there is only one description of the factual state although the Defendant was found guilty of two distinct criminal offences. Moreover the two legal designations of the criminal conducts are not evidently distinguished in the First Instance’s enacting clause.

As it alludes to the acts and legal designation for which an individual is found guilty or acquitted, the enacting clause shall contain a state of facts for each criminal offence, for the sake of clarity and foreseeability. The requirements on the drawn up of the enacting clause mentioned in Articles 396 Paragraphs 3 and 4 and 391 are mandatory.

The Supreme Court Panel, however, holds that the enacting clause of the challenged Judgment contains all the necessary requirements under the law, so to ensure that the enacting clause is comprehensible.³ In this instance, the factual description of the enacting clause contains the elements of Organized crime under Article 274 Paragraph 1 of the CCK: legal element, act itself and mental element. As well as for the Narcotics

³ See Supreme Court of Kosovo, Ap-Kz no. 179/2007, Judgment on appeal, 23 June 2009, page 25: “The law does not require that the enacting clause contains a very detailed description of the conduct of the convicted person, this description being matter of the reasoning of the judgment. The enacting clause however must be “comprehensible”, meaning that it must make clear what the defendant has done.”

offence. The First Instance Court mentions the acts of the Defendants and their respective roles in the enacting clause.⁴

Furthermore, it is noted that the First Instance Court described the established facts (under Part E. Factual findings, pages 21-22) and clearly distinguished the Narcotics charge from the Organized Crime charge (under F. Legal qualification, pages 22-24) in the reasoning of the Judgment. The Trial Panel also provides explanations on the composition of the group and the role of each member, the 'structured' nature of the group, the time of commission of the offences, the various activities of the group and its purpose. The Supreme Court finds that the enacting clause, read together with the reasoning, gives a detailed description of the facts, base of both convictions. As the Prosecutor suggests, the enacting clause contains the implicit description of the acts for the criminal offence of Organized crime.

Moreover, the Supreme Court holds that Organized Crime is a separate criminal offence under the Criminal Code of Kosovo. Consequently, the First Instance Court did not commit any violation of the law by convicting the Defendant for both offences. This issue was raised at the appeal stage by the Defence and this Supreme Court Panel fully concurs with the Second Instance Court's findings.⁵

This offence is criminalized under Chapter XXIII (Criminal Offences against property) of the Code, as an independent offence among others. If the legislator intended to insert the fact that the Accused acts as a member of an organized criminal group, as an aggravating circumstance, this provision would have been inserted in Chapter III on punishments (e.g. Article 64 and following of the CCK on the calculation of punishment and aggravating circumstances).

The definitions of organized criminal group, structured group and of serious crime under Article 274 of the CCK replicate almost *verbatim* the definitions under UNMIK Regulation 2001/22 on measures against organized crime⁶ and the terms used under Article 2 of the United Nations Convention against Transnational Organized Crime.⁷ The concept of Organized Crime was indeed introduced by UNMIK Regulation 2001/22. The wording of the preamble and the provisions of the UNMIK Regulation tend to support the stance that Organized Crime is an autonomous offence.⁸ Along this line,

⁴ See District Court of Mitrovicë/a P no. 36/2010, First Instance Judgment, pages 2-3: "The Accused H.S. had a leading organizational role."; "where S.P. and E.M. measured and wrapped it in smaller packages, then put them in larger bags, and took them to the garage of the house from where two unknown male persons took and delivered them.")

⁵ Supreme Court of Kosovo, Ap-Kz no. 225/2011, Judgment on appeal, Part F. Legal qualification, pages 19-20, paras 99-106

⁶ UNMIK Regulation no. 2001/22 on measures against organized crimes dated 20 September 2001

⁷ United Nations Convention against Transnational Organized Crime adopted by the United Nations General Assembly Resolution 55/25 of 15 November 2000

⁸ See *inter alia* Preamble: "For the purpose of establishing a clear definition of Organized crime consistent with international and regional standards, as set forth in the United Nations Convention on Transnational Organized Crime, For the purpose of creating legislative measures for the prosecution and punishment of perpetrators of organized crime, [...]"; Section 2 Penalties for Commission of Organized Crime Offences: "2.2 Any person who commits an organized crime shall be liable upon conviction to imprisonment for a term of five years to 15 years and a fine of up to 500,000 DM."

Article 5 of the United Nations Convention, on Criminalization of participation in an organized criminal group, provides that the parties shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: “Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:[...]”. As rightfully stressed by the Second Instance Court, though the UN Convention leaves some room to the State Parties to adapt their national legislations to the international standards, “[i]n very many cases falling under the scope of the Convention the result of the criminal activity will itself be a crime in domestic law.”⁹ It is also worth mentioning that the European Union signed and approved the Convention.¹⁰

This position is also confirmed by the jurisprudence of the Supreme Court of Kosovo, referenced in the Second Instance Judgment:

104. The Supreme Court respectfully disagrees with this assertion. District Court of Prishtinë/Priština has, on 27 April 2007, with a Judgment P. no. 740/2005 found the defendants guilty of narcotics charges but acquitted the defendants for the charges of organized crime because it deemed that the narcotics charges were not “serious crimes” – a prerequisite for organized crime. The Supreme Court of Kosovo has, on 2 July 2009, with a Judgment Ap. – Kz. No. 394/2007 modified the Judgment of the District Court by qualifying the narcotics charges as serious crimes and finding both of the defendants also guilty to the charges of organized crime. Thus the Supreme Court has in its Judgment confirmed that in case of organized crime a single event can constitute two separate criminal acts as opposed to criminal absorption of the lesser of the crimes into the more serious one. The Supreme Court did not change its stance when deciding on the request for protection of legality on 25 May 2010.¹¹

Certainly, a serious crime, the base-crime, is a prerequisite of the offence of Organized crime. As envisaged under Article 274 of the CCK, the base-crime need not be committed. The criminal act can be consumed if the individual actually commits the serious crime, but also if s/he actively participates in the criminal or other activities of an organized criminal group, knowing that his or her participation will contribute to the commission of serious crimes, or if s/he organizes, establishes, supervises, manages or directs the activities of an organized criminal group. An individual can be convicted for Organized crime even though the base-crime is not committed, providing that the required elements of the offence of Organized crime are met in the instance. Similarly, a

⁹ Supreme Court of Kosovo, Ap-Kz no. 225/2011, Judgment on appeal, Part F. Legal qualification, page 20, para 105; see as examples of comparative law: Section 129 Forming criminal organisations of the German Criminal Code; Articles 212-3 (other crimes against humanity), 214-4, 222-34 (trafficking in drugs) of the French Criminal Code; Chapter 17 Offences against public order, Section 1 (a), Participation in the activity of a criminal organisation of the Criminal Code of Finland; Article 294 (Criminal Association), Article 298 (Participation in a Group Committing a Criminal Offence) of the Criminal Code of Slovenia

¹⁰ Signature on 12 December 2000 and Approval on 21 May 2004

¹¹ Supreme Court of Kosovo, Ap-Kz no. 225/2011, Judgment on appeal, page 20, para 104, referring to Supreme Court of Kosovo, Judgment Ap-Kz no. 394/2007 dated 2 July 2009, page 4

conviction for the base-crime does not prevent the court from finding the Defendant guilty of the distinct act of Organized Crime.

The Supreme Court Panel agrees with the Second Instance's findings that "the correct interpretation of the Article 274 of the CCK is that the sentence described is to be added to the sentence imposed for committing the so called "base-crime", the serious crime."¹² Consequently, neither the First Instance Court, nor the Second Instance Court have committed a substantial violation of the provisions of criminal procedure by imposing two distinct punishments, and then an aggregate punishment onto the Defendant.

The aforementioned stance is also applicable to the following. S.P. was convicted for Organized Crime under Article 274 Paragraph 1 of the CCK and for Unauthorised Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances under Article 229 Paragraphs 2 and 4 Item 1 of the CCK. More specifically under Item 1 the fact that the perpetrator is acting as a member of a group is a circumstance to take into account for the punishment by a fine and by imprisonment of three (3) to fifteen (15) years. It can be disputed that the fact that the Defendant acted as "a member of group" is already included in the legal designation of the Narcotics charge, and therefore the Defendant could not be convicted also for his participation to an organized criminal group under the charge of Organized Crime. This contention does not stand, as Item 1 is clearly an aggravating circumstance aiming at increasing the punishment, whereas as stated above, the involvement as a member of an organized criminal group is a separate criminal offence.

At last, the Supreme Court finds that one sequence of acts may be divided into several criminal offences, as long as all the elements of the very criminal offence are fulfilled in the instance. The Code does not prohibit such segmentation of acts. On the contrary, the legal provisions entitle the judge to determine the factual situation and the legal designation of an act in an accurate manner so to establish the truth.¹³

It has been therefore decided as in the enacting clause.

Presiding Judge

EULEX Judge Horst Proetel

Panel member

Kosovo Judge Marije Ademi

Panel member

EULEX Judge Tore Thomassen

Panel member

Kosovo Judge Nesrin Lushta

Panel member

EULEX Judge Gerrit-Marc Sprenger

Recording clerk

Legal officer Chiara Rojek

¹² Supreme Court of Kosovo, Ap-Kz no. 225/2011, Judgment on appeal, page 20, para 105

¹³ See *inter alia* Article 386 of the KCCP

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