

Dissenting Opinion

in the criminal case PAKR 1/2017 against E.S. :

I respectfully disagree with the decision of the majority of the panel to order the retrial of the case at hand. I believe that the Court of Appeals should properly decide on all challenges brought by the parties in their respective appellate motions and evaluate all the evidence that would be found admissible. Moreover, the Court of Appeal should complete the body of evidence and to hear Rr.A. as a witness in the case.

I do not concur with the opinion presented in the judgement that the *modus operandi* of the perpetrator was not clearly established by the first instance court. It is my conviction that retrial brings unnecessary delay which is against interest of justice.

Although the enacting clause of the first instance judgment does not fully comply with the relevant legal provisions of the Criminal Procedure Code because it is lacking essential *actus reus* elements the reasoning of the judgment presents the relevant court findings. The reasoning explicitly indicates that E.S. used his influence upon A.B. who followed the order to kill T.R. because he was loyal and obedient to the defendant. Moreover, the court found out that there was a pecuniary motivation because family of A. B. received a payment.

I am of the opinion that any decision to annul a judgment and to send a case for retrial shall be taken only exceptionally, i.e. when the Court of Appeals cannot proceed accordingly to Article 403 of the CPC and modify the impugned judgment.

In the case at hand the Court of Appeals should not avoid judicial review of the merits of the case, i.e. on the actions that should be attributed to the defendant.

In particular the Court of Appeals was obligated:

1. to decide on admissibility of the evidence obtained during the search conducted at E. S. xxx, taking into account the fact that the police acted without a written order of the pre – trial judge and the report as required in accordance with Article 243 (7) of the PCPC is missing;
2. to decide on admissibility of so called “triangulation data” with due consideration given to the defence counsel argumentation based also on the provisions of the Law on Electronic Communication;
3. to decide whether the decision to grant anonymity to witness D was taken in accordance with Article 224 of the CPC.

I also believe that the Court of Appeals should *ex officio* summon Rr.A. in the capacity of a witness. He is accused to be a co-perpetrator of the murder of T. R. and the proceedings against him are pending.

I see no reason why the Court of Appeals should shirk the assessment of the admissibility of the above mentioned pieces of evidence and avoid evaluation of the body of evidence that would remain at hand. The Kosovo Criminal Procedure Code allows for the standard of appellate review and gives appellate judges various instruments to have the evidence collected in a complete way. Sending the case for retrial brings into administration of justice an unnecessary delay as it is highly predictable that the challenged matters would be presented for appellate review again. There are no procedural rules that would prevent the Court of Appeals from amending the impugned judgement and taking decision on guilt or innocence and in case of guilty verdict - on punishment. In general words the Code allows for so called *de novo* review. The appellate court should act as if it were considering the question for the first time, affording no deference to the lower court decision. The Kosovo criminal procedure allows even the accused who was acquitted by the first instance court to be convicted in the second instance. In this latter example, the defendant who was found guilty only by the Court of Appeals has right to appeal against it to the Supreme Court. This is actually the best argument that Kosovo criminal procedure provides for *the novo* appellate standard. Decisions of a lower court on questions of law and evidence should be always reviewed with the use of this standard.

For these reasons I respectfully dissent.

Anna Adamska – Gallant

EULEX Judge

