

SUPREME COURT of KOSOVO

1 June 2009
Prishtine/Pristina
Ap.-Kz No. 106/2007
Pn-Kr 165/2009

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of Eulex Judge Emilio GATTI as Presiding Judge, Eulex Judge Norbet KOSTER and Kosovo National Judges Agim KRASNIQI, Avdi DINAJ and Miftar JASIQI as panel members,

in the criminal proceedings against:

[illegible]

S. I. [redacted] b6
[redacted]
Pake, Albania; citizen of Albania; Sheriff residing at [redacted] 18 in
[redacted]
middle economic status; no previous convictions; in detention [redacted]
[redacted] charged with corruption [redacted]
regulation [redacted]
article [redacted]
(K).

Deciding upon 1) the appeals filed by Defence Counsel M. Q. on behalf of V. U. on 24 September 2007 and by Defense Counsel N. E. on behalf of S. I. on 1 October 2007 and upon 2) the request for protection of legality filed by Defense Counsel B. K. on behalf of S. I. on 18 September 2007 against the Judgment of the Supreme Court of Kosovo in criminal case No. Ap-Kz 478/2005, dated 28 May 2007, rejecting the appeals of the two defendants

and of R.S. against the Judgment of the District Court of Prizren in criminal case P.No. 02/2005 dated 20 July 2005 convicting V.U. for having committed the above mentioned criminal offences of Rape, Facilitating Prostitution and Trafficking in Persons, & S.I. for having committed the above mentioned criminal offences of Trafficking in Persons and R.S. for having committed Falsifying Documents, Rape, Trafficking in Persons.

After having read the opinion and motion of the OSPK Prosecutor Ms. Deborah Wilkinson and Mr. Bademane Sllamniku and after a deliberation and voting held on 1 June 2009.

Acting pursuant to Articles 410, 422 and 456 of the Criminal Procedure Code of Kosovo (PCPCK) renders this

DECISION

The appeal filed by Defence Counsel M.C. in the interest of V.U. on 24 September 2007 is DISMISSED as inadmissible.

The appeal filed by Defense Counsel M.E. in the interest of S.I. on 1 October 2007 is DISMISSED as inadmissible.

The request for protection of legality filed by Defense Counsel B.R. in the interest of S.I. on 18 September 2007 is REJECTED as untounded.

The Judgment of the Supreme Court of Kosovo, dated 28 May 2007, Ap – Kz 478/2005 is AFFIRMED IN ITS ENTIRETY.

The costs of these appellate proceedings shall be borne equally by the two defendants V.U. and S.I.



REASONING

A. Procedural History

1. Defendant **V. U.** was charged under the Amended indictment CC No. 156/04¹ filed 15 June 2005, with findings and sentencing by the Court of first instance in Prizren District Court Judgment P. No. 02/2005 as follows:

- **Rape (Count I)** of 17-years old **X.H.D.** sometime in December 2003; the defendant was found guilty of the criminal offence foreseen by article 78.1 of the CLK as amended by Section 1.4 of UNMIK Regulation No. 2003/1, to him was imposed the punishment of three years of imprisonment;
- **Facilitating Prostitution (Count II)** involving **X.H.D.** in January 2004; the defendant was found guilty of the criminal offence foreseen by article 201.3 of PCCK and sentenced with three years imprisonment;
- **Facilitating Prostitution (Count III)** involving **X.H.D.** between December 2003 and January 2004; the defendant was found guilty of the criminal offence foreseen by article 201.3 of PCCK and sentenced with three years imprisonment;
- **Trafficking in Persons (Count VII)** involving **X.H.D.** between December 2003 and January 2004; the defendant was found guilty of the criminal offence foreseen by Section 2.2 of UNMIK Regulation No. 2001/4 in conjunction with article 22 CC SFRY and sentenced with seven years imprisonment;
- **Rape (count XI)** involving 15-years-old **X.H.L.** on 1 July 2004, from which the defendant was acquitted;
- **Trafficking in Persons (Count XII)** involving **X.H.L.** on 30 June 2004; the defendant was found guilty of the criminal offence foreseen by article 139.2 PCCK in conjunction with article 23 PCCK and sentenced with seven years imprisonment;

with an aggregate punishment pursuant to Article 71.1 PCCK of twelve years imprisonment².

¹ The original Indictment dated 23 November 2004 did not contain Counts II and III involving the criminal charge of facilitating prostitution. Counts II and III above were included in the Amended Indictment as the result of trial testimony. The original indictment dated 26 November 2004 was also amended during trial by the deletion of criminal charges against **V. U.** for enabling prostitution involving **O.S.** and trafficking in persons involving **A.B.** because the sole witness for those criminal acts, **CH.P.**, was not available for trial.

² Judgment of the District Court of Prizren in P. No. 02/2005 rejected, pursuant to Article 389, Paragraph 1 of the PCCK, the charge under article 139 Paragraph 1 of PCCK against **V. U.** of trafficking in persons (**A.B.**) which was alleged to have occurred early in 2003, said charge being set forth in the original indictment filed 26 November 2004. It also rejected the charge under Article 201, paragraph 3 of PCCK against **V. U.** of facilitating prostitution (**O.S.**) which was alleged to have occurred early in 2003, said charge being set forth in the original Indictment filed 26 November 2004.

2. Defendant **S. J.** was charged under Amended Indictment CC No. 156/04 filed 15 June 2005, with findings and sentencing by the Court of first instance in Prizren District Court Judgment P. No. 02/2005 as follows:

- **Trafficking in Persons (Count VII)** involving **XH.D.** between December 2003 and January 2004; the defendant was found guilty of the criminal offence foreseen by Section 2.2 of UNMIK Regulation No. 2001/4 in conjunction with article 22 CC SFRY and sentenced with seven years imprisonment;
- **Rape (count XI)** involving 15-years-old **XH.L.** on 1 July 2004, from which the defendant was acquitted;
- **Trafficking in Persons (Count XII)** involving **XH.L.** on 30 June 2004; the defendant was found guilty of the criminal offence foreseen by article 139.2 PCCK in conjunction with article 23 PCCK and sentenced with seven years imprisonment;

with an aggregate punishment pursuant to Article 71.1 PCCK of ten years imprisonment.

3. Defendant **R. S.** was charged under Amended Indictment CC No. 156/04³ filed 15 June 2005, with findings and sentencing by the Court of first instance in Prizren District Court Judgment P. No. 02/2005 as follows:

- **Falsifying Documents (Count IV)** involving **XH.P.** the defendant was found guilty of the criminal offence foreseen by article 332.1 PCCK and sentenced with one year imprisonment;
- **Rape (Count V)** involving 17-years-old **XH.P.** December 2003; the defendant was found guilty of the criminal offence foreseen by article 74.1 of CLK as amended by Section 1.1 of UNMIK Regulation Ni. 2003/1 and sentenced with five years imprisonment;
- **Trafficking in persons (Count VI)** involving **XH.D.** in December 2003; the defendant was found guilty of the criminal offence foreseen by Section 2.2 of UNMIK Regulation No. 2001/4 in conjunction with article 22 CC SFRY and sentenced with seven years imprisonment;
- **Trafficking in Persons (Count VIII)** involving **XH.L.** in June 2004; the defendant was found guilty of the criminal offence foreseen by article 139.2 PCCK and sentenced with seven years imprisonment;
- **Falsifying Documents (Count IX)** involving **XH.L.** the defendant was found guilty of the criminal offence foreseen by article 332.1 PCCK and sentenced with one year imprisonment;
- **Rape (Count X)** involving 15-years-old **XH.L.** on 30 June 2004; the defendant was found guilty of the criminal offence foreseen by article 193 Paragraph 1 and Paragraph 2 items 1 and 3 PCCK and sentenced with five years imprisonment;
- **Rape (count XI)** involving 15-years-old **XH.L.** on 1 July 2004, from which the defendant was acquitted;

³ The original Indictment filed 24 November 2004 did not contain Counts IV, V, VI, VIII and X involving falsification of documents involving **XH.L.**, rape of both **XH.D.** and **XH.L.** and trafficking in persons involving both **XH.D.** and **XH.L.**. Counts IV, V, VI, VIII and X were included in the Amended Indictment as a result of trial testimony.

with an aggregate punishment pursuant to Article 71.1 PCCK of twelve years imprisonment.

4. The main trial before the District Court of Prizren occurred jointly against the three defendants.

The three defendants filed timely their appeals before the Supreme Court of Kosovo, which held its session on 28 March 2007 and, after the deliberations on the same day and on 24 and 28 May 2007 issued a judgment through which rejected in their entirety the appeals proposed in favor of the three defendants and consequently affirmed in its entirety the Judgment of the District Court of Prizren.

5. The written Judgment of the Supreme Court 28 May 2007 was served to the defendants and to the defense counsels between 27 August and 10 September 2007.

An appeal in favor of Y.U. was filed by his defense counsel M.C. on 24 September 2007.

An appeal in favor of S. I. was filed by defense counsel N.E. on 1 October 2007.

A request for the Protection of Legality in favor of S. I. was filed by defense counsel B.K. on 18 September 2007.

6. The OPPK filed its opinion on 16 January 2009 and on 7 May 2009

7. The Supreme Court held its session on the legal remedies above mentioned on 1 June 2009.

B. Court findings

As seen above, against the judgment of the Supreme Court on 28 May 2007 the following legal remedies have been filed.

I

1. Appeal in favor of Y.U. filed by his defense counsel M.C. on 24 September 2007, pursuant to article 430 PCPK.

The appeal is filed outside the cases foreseen by the law because:

1. to the defendant was not imposed a punishment of long-term imprisonment (art. 430.1 no. 1) but an aggregate punishment of twelve years of imprisonment;
2. the court of second instance did not conduct an hearing and did not make a different determination of the factual situation from the court of first instance (art. 430.1 no. 2);
3. the court of second instance did not modify a judgment of acquittal (art. 430.1 no. 3) but confirmed the first instance judgment of conviction.

The Judgment of the Supreme Court of Kosovo of 28 May 2007 is a final decision, against which can be proposed only an extraordinary legal remedy.

The legal remedy proposed on behalf of the defendant has not only the name of appeal but also the reference to the legal provision (art. 430 PCPCK) related to the appeal against a judgment of a court of second instance.

Thus, there is no doubt on what kind of legal remedy was proposed and that this legal remedy is not permitted under the law.

For these reasons this Court considers the proposed **appeal** as filed in a case not permitted by the law, it must therefore be dismissed according to article 422 PCPCK.

II

2. Appeal in favor of ' *S. I.* ' I filed by defense counsel ' *N.E.* ' on 1 October 2007.

The appeal is filed outside the cases foreseen by the law because:

1. to the defendant was not imposed a punishment of long-term imprisonment (art. 430.1 no. 1) but an aggregate punishment of twelve years of imprisonment;
2. the court of second instance did not conduct an hearing and did not make a different determination of the factual situation from the court of first instance (art. 430.1 no. 2);
3. the court of second instance did not modify a judgment of acquittal (art. 430.1 no. 3) but confirmed the first instance judgment of conviction.

The Judgment of the Supreme Court of Kosovo of 28 May 2007 is a final decision, against which can be proposed only an extraordinary legal remedy.

The legal remedy proposed on behalf of the defendant has not only the name of appeal but also the reference to the legal provision (art. 430 PCPCK) related to the appeal against a judgment of a court of second instance.

Thus, there is no doubt on what kind of legal remedy was proposed and that this legal remedy is not permitted under the law.

For these reasons this Court considers the proposed **appeal** as filed in a case not permitted by the law, it must therefore be dismissed according to article 422 PCPCK.

III

3. Request for the Protection of Legality in favor of ' *S. I.* ' I filed by defense counsel ' *B.K.* ' on 18 September 2007.

The defense counsel claims:

- a) essential violation of the criminal proceeding provisions:
 - the verdict of first instance is grounded on inadmissible evidence, that means on statements of witnesses given to the Police, which should have been separated from the documents of the case file since they are only information that the Police has used to raise the criminal report;

- the enacting clause of the first instance verdict is incomprehensible and in contradiction with the reasoning part;
 - the reasoning part of the first instance verdict limits itself to the description of the statements of suspects and witnesses without containing any ground or fact essential to establish the administered evidence;
 - the reasoning of the first instance verdict lacks any determination of evidence which were used to establish the state of facts and about reliability of used evidence;
 - the same claimed essential violations of the criminal proceedings are present in the verdict issued in second instance by the Supreme Court which rejected the appeal;
- b) violation of criminal law:
- the request explains that the defendant has denied the charges and his defense was supported by the injured parties at the main trial, therefore no single evidence were brought to establish his guilt.

The defense counsel proposes therefore to annul the verdicts of first and of second instance and to return the case in the part concerning S. I. to the first instance court for retrial.

4. The request for the protection of legality proposed in favor of S. I. is ungrounded.

The alleged violations of the criminal proceedings are groundless.

- The statements given by witnesses to the Police are deemed as admissible evidence in the Court by article 156.2 PCPCK "only when the defendant or defense counsel has been given the opportunity to challenge it by questioning that witness during some stage of the criminal proceedings".

This means that the statements of witnesses to the Police are considered by the code as pieces of evidence and not only as pieces of information for the further activity of the Police.

In this case the witnesses and injured parties XH.D. and XH.L. gave their statements to the Police.

The first one was examined not only by the Police but also by the District Public Prosecutor on 4 September 2004, at this act were present also the defense counsels of the three defendants who cross examined the witness.

XH.D. was examined and cross examined during the main trial as well.

After being examined by the Police, XH.L. was examined by the District Public Prosecutor on 31 July 2004 at the presence of the defense counsels of the three defendants.

She was examined and cross examined during the main trial too.

This satisfies the requirements provided for by article 156.2 as to the admissibility of the Police statements of these two witnesses.

- The points of the request for protection of legality related to essential violations of the criminal proceedings by the first instance judgment can be examined here when

considering that the claimer affirms that the same violations were repeated by the Supreme Court of Kosovo by rejecting the appeals.

However these points are ungrounded because the verdict of the Supreme Court went through the challenged judgment and examined on one side the clarity of the enacting clause and its consistency with the reasoning (pages 18-19) and on the other side the existence and the reliability of factual findings or evidence used to establish the charged facts (pages 19 - 44).

The Supreme Court in its judgment examines not only the statements of suspects and witnesses as well as other material evidence (as medical or scientific examinations) considered as a description of the factual situation, but goes also through the issue of the reliability of this evidence as to the credibility of the witnesses (page 24), as to the lack of considerable discrepancies in the testimony of ~~X.H.D.~~ page 26), as to the identification of the three defendants made by the same witness (page 42), as to the possession by ~~V.U.~~ of a copy of the judicial order granting anonymity to ~~X.H.D.~~, as to the fact that entry stamps were routinely not placed in passport on entry from Albania to Kosovo or vice versa (pages 41 and 42), as to the credibility of the different statements of ~~X.H.D.~~ (pages 28 - 38), as to the credibility of the other testimonies, as to the value to attribute to the statements of the defendants (pages 38 - 44).

In the reasoning of the verdict both of the Supreme Court and of the first instance judge (pages 7 - 13) there is a complete assessment of the collected evidence and of their value as to the factual reconstruction of the situation.

The final result appears to be correct and free from the violations of the legal provisions denounced by the defense.

5. The alleged violation of the criminal law, as proposed by the defense counsel in his request, is in fact a way to claim the existence of an erroneous determination of the factual situation in the judgment of first and second instance.

Actually the existence of evidence, the importance and the correct interpretation to give to the statements of the injured parties, the assessment of an alibi of the defendant and of his defense on the merits of the cause are all elements of the factual situation, whose examination is prohibited through the request for protection of legality by article 451.2 PCPCK.

III

6. The Judgment of the Court of Second Instance is affirmed in its entirety.

The confirmation of the Second Instance Judgment has effect on the costs of the proceedings of this Instance which shall be borne equally by the two defendants ~~X.~~
~~U.~~ and ~~S.I.~~

For these reasons it is decided as in the enacting clause.

Dated this 1st day of June 2009.

Pkl.-Kzz No. 106/2007

Pn-Kr 165/2009


Prepared in English, an authorized language.

International Presiding Judge

Emilio Gatti

International Judge

Norbert Koster


International Recording Officer
Annette Andersen

Kosovo National Judge

Agim KRASNIQI

Kosovo National Judge

Aydi DINAJ

Kosovo National Judge

Miftar Jasiqi

Legal Remedy

Against the part of this Judgment deciding upon the request for protection on legality filed on behalf of *S. I.* it is not possible to file another request for protection of legality (art. 451.2 KCPCK).

Against the part of this Judgment deciding upon the inadmissibility of the appeals of *X.U.* and *S. I.* it is possible to file a request for the protection of legality, to be filed with the court which rendered the decision in the first instance, within 3 months of the service of this decision (art. 451 – 460 KCCP).