SUPREME COURT OF KOSOVO

Pkl-Kzz 103/09
22 April 2010

**IN THE NAME OF THE PEOPLE**

**THE SUPREME COURT OF KOSOVO**, in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, with Kosovo Judges Avdi Dinaj and Emine Mustafa as members of the panel, and in the presence of EULEX Legal Advisor Edita Kusari as recording clerk, in the criminal case Pkl-Kzz nr.103/09 of the Supreme Court of Kosovo

Against:

1. the defendant B. K. father's name mother's name naiden name born on . . in village Municipality of , now residing in . Kosovo Albanian, married, father of two children, Law Faculty graduate, middle economic status, no known previous convictions in Kosovo, currently still in freedom,

2. the defendant XH. D. father's name mother's name maiden name , born on in , now residing in , Kosovo-Albanian, widower, father of three children, Law Faculty graduate, middle economic status,

3. the defendant A. H. father's name mother's name maiden name born on in , residing in " " No. , Kosovo-Albanian, single, middle economic status,

**The defendant** B. K. **convicted in the first instance** by the verdict of the Municipal Court of Prizren, dated 16 January 2009, P. No. 874/08 for having committed the criminal offense of
**Abusing Official Position or Authority**, in co-perpetration with the accused Xhevat Danqe contrary to Article 339 paragraph 2 as read with Article 23 of the Criminal Code of Kosovo (CCK)
**And sentenced 5 (five) months of imprisonment,**

**The defendant** XH. D. convicted in the first instance by the verdict of the Municipal Court of Prizren, dated 16 January 2009, P. No. 874/08 for having committed the criminal offense of
**Abusing Official Position or Authority**, in co-perpetration with the accused Bedri Krasiqi contrary to Article 339 paragraph 2 as read with Article 23 of the Criminal Code of Kosovo (CCK),



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**Falsifying Official Document** contrary to Article 348 paragraph 1 of the CCK,
**Sentenced with an aggregate punishment of 6 (six) months,**

**The defendant** A. H. convicted in the first instance by the verdict of the Municipal Court of Prizren, dated 16 January 2009, P. No. 874/08 for having committed the criminal offense of
**Falsifying Official Documents** as per Article 348 paragraph 1 of the CCK,
**And sentenced with 3 (three) months of imprisonment,**

**With Judgment of the 1st Instance being confirmed in the 2nd Instance** by the Judgment of the District Court of Prizren, Ap. No. 35/2009, dated 02 July 2009,

**Acting upon the Request for Protection of Legality** filed by the Defense Counsel of the defendant B. K. dated 31 August 2009, directed against the Judgments of the Municipal Court of Prizren, dated 16 January 2009, P. No. 874/08 and of the District Court of Prizren dated 02 July 2009, Ap. No. 35/2009,

**And upon request for Protection of Legality** filed by the Defense Counsel of the defendant A. H. dated 14 September 2009, directed against the Judgments of the Municipal Court of Prizren, dated 16 January 2009, P. No. 874/08 and of the District Court of Prizren dated 02 July 2009, Ap. No. 35/2009,

Issues the following

## JUDGMENT

The Request for Protection of Legality of the Defense Counsel of the accused, dated 31 August 2009, directed against the Judgments of the Municipal Court of Prizren, dated 16 January 2009, P. No. 874/08 and of the District Court of Prizren dated 02 July 2009, Ap. No. 35/2009 is

**Partly granted**

as follows:

1. the Judgments of the 1st Instance Court dated 16 January 2009, P. No. 874/08 and the 2nd Instance Court dated 02 July 2009, Ap. No. 35/2009 against the defendant B. K. are annulled and the case is sent back to the Municipal Court of Prizren for re-trial
2. the decision on annulment of the 1st and 2nd Instance Judgments and sending back the case to the Municipal Court of Prizren for re-trial is extended to the co-accused XH. D. according to Article 455 paragraph 2 of the Kosovo Code of Criminal Procedure (KCCP)
3. the enforcement of the final decision of the Municipal Court in Prizren dated 16 January 2009, P. No. 874/08, thus being affirmed by the Judgment of the District



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Court in Prizren dated 02 July 2009, Ap. No. 35/2009 against the defendants B. K. and XH. D. is terminated in accordance with Article 454 paragraph 4 of the KCCP.

4. The 1st and 2nd Instance Judgments are upheld against the defendant A. H.

## REASONING

### I. Procedural Background

(1) On 06 September 2007 in the District Court building of Prishtine/Pristina, the defendant B. K. in his capacity as a Confirmation Judge had scheduled a Confirmation Hearing in the criminal case against I. , Q. and I. B. who by Indictment of the District Public Prosecutor in Prishtine/Pristina dated 19 July 2007, PP. no. 855-2/07 were accused, the defendant I. B. of Aggravated Murder pursuant to Article 147 paragraph 4 of the CCK and the defendants Q. and I B. of Bodily Injury pursuant to Article 154 paragraph 1 item 5 of the CCK. All defendants and the Defense Counsel of the defendant I. B. as well as the legal representative of the Injured Parties had been summonsed properly and the defendants as well as the Defense Counsel where present and ready for the hearing, whilst the representative of the Injured Parties did not hold it necessary to attend the Confirmation Hearing. The Injured Parties themselves had not been summonsed.

Before the beginning of the Confirmation Hearing, the defendant B. K. in his capacity as Confirmation Judge asked the defendants of the case to wait in front of his office, whilst in the presence of the Defense Counsel and the defendant XH. D. , who was the Prosecutor in charge, he discussed the Indictment and proposed to modify it due to some gaps and shortcomings, especially in reference to the two accused Q. and I. B. .

According to information taken from the case file, another Indictment was drawn up the same day by omitting references to Q. and I. B. and allegedly this was done based on an agreement between B. K. as a Confirmation Judge and XH. D. as a Prosecutor, whilst the Confirmation Hearing was postponed for a few hours, until the new Indictment would be ready. It also seem that there was no record about the procedure/agreement based on which the Indictment was sent back into the sphere of responsibility of the Prosecutor.

Later on, it seems that the new Indictment (which had the same date and registration number like the previous one) was sealed and filed to the Municipal Court thus bypassing the registry of the Prosecution office. It appears, from the available information, that the registration of the new Indictment with the same number and date as the previous Indictment had was possible due to the activity of the accused



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A. H. who was apparently acting in replacement of the relevant registry clerk and although his normal position would have been the one of a court messenger.

The defendant B. K. as a Confirmation Judge then accepted the new Indictment, which now was filed against I. B. for Aggravated Murder pursuant to Article 147 paragraph 4 of the CCK only and confirmed it by ruling after the Confirmation Hearing was held the same day. The Confirmation Ruling allegedly never was served to the Injured Parties nor to their Legal Representative.

However, the defendant XH. D. in his capacity as Prosecutor also did neither formally terminate any investigation against Q. and I. B. nor formally inform the Injured Parties and their Legal Representative thus enabling them to exercise their eventual role as subsidiary prosecutors according to the law.

At the commencement of the main trial, the Injured Parties realized that the Indictment which the trial was based on was different from the one they had received in the context of the Confirmation Hearing, since the names of the two defendants Q. and I. B. were missing. At that stage, the parties took the opportunity to act as subsidiary prosecutors against the two respective defendants and the Indictment against them was confirmed.

(2) Dated 04 June 2008, an Indictment was filed against the defendants B. K. XH. D. nd A. H. (PP. No. 2549/08), which by ruling KA. No. 168/08 was confirmed by the Municipal Court of Prishtinë/Pristina on 26 June 2008.

(3) On 16 January 2009, the Municipal Court of Prizren under registration number P. No. 874/08 announced a Judgment, within which B. K. was found guilty for having committed the criminal offense of Abusing Official Position or Authority, in co-perpetration with the accused XH. D. contrary to Article 339 paragraph 2 as read with Article 23 of the Criminal Code of Kosovo (CCK) and thus was sentenced 5 (five) months of imprisonment.
The defendant XH. D. who in the respective context was acting in his capacity as District Prosecutor was additionally found guilty for the use of the new Indictment with registration number PP. no. 855-2/07 as genuine and sealed by sending it to the defendant B. K. in his capacity of a Confirmation Judge. The defendant received an aggregate sentence of 6 (six) months of imprisonment, which consists of 5 (five) months for the criminal offense of Abuse of Official Position contrary to Article 339 paragraph 2 of the CCK as committed in complicity with the defendant B. K. and of 3 (three) months "for the criminal offense as in item II of the enacting clause of this judgment".
The defendant A. H. was found guilty for the criminal offense of Falsifying Official Documents as per Article 348 paragraph 1 of the CCK and therefore sentenced with 3 (three) months of imprisonment.



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**(4)** On 24 February 2009 the previous Defense Counsel of the defendant XH. D. timely appealed the 1st Instance Judgment and proposed to either acquit the defendant or annul the respective Judgment and send the case back to the Municipal Court for re-trial. Another appeal was filed by another Defense Counsel on 04 March 2009, thus also requesting to either acquit the defendant or annul the respective Judgment and send the case back for re-trial.

**(5)** The 1st Instance Judgment was timely appealed by the Defense Counsel of the accused B. K. Whilst dated 02 March 2009 the Defense Counsel filed an appeal thus proposing to either acquit the defendant B. K. or annul the 1st Instance Judgment and send the case back to the Municipal Court for re-trial.

**(6)** The Defense Counsel of the defendant A. H. timely appealed the 1st Instance judgment on 03 April 2009 thus also proposing to either acquit the defendant A. H. or annul the 1st Instance Judgment and send the case back to the Municipal Court for re-trial.

**(7)** Also the Municipal Prosecutors Office timely filed an appeal dated 20 March 2009 and requested a more severe punishment for all three defendants.

**(8)** On 02 July 2009, the District Court in Prizren as a 2nd Instance Court announced its Judgment AP. No. 35/2009, thus rejecting the appeals filed the Defense Counsels of the three defendants and fully affirming the 1st Instance Judgment.

**(9)** Dated 31 August 2009, the Defense Counsel of the defendant B. K. filed a Request for Protection of Legality to the Supreme Court of Kosovo for violation of the criminal law and essential violation of provisions of the criminal procedure thus proposing to either:

- acquit the accused B. K.
  or
- annul completely the Judgment rendered by the 1st Instance Court and that of the 2nd Instance Court and to return the case for re-trial to the 1st Instance Court.

**(10)** The Defense Counsel of the defendant A. H. filed a request for Protection of Legality to the Supreme Court of Kosovo dated 14 September 2009 for essential violations of the criminal procedure and violation of the criminal law in the detriment of the adjudged, thus proposing to:

> annul the Judgment of the Municipal Court in Prizren , P. No. 874/08 dated 16 January 2009 and the 2nd Instance Judgment of the District Court in Prizren, P. No. 35/2009 dated 02 July 2009 and return the case to the 1st Instance Court for re-trial.



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**(11)** No request for Protection of Legality was filed in the interest of the defendant XH. D.

**(12)** Dated 12 April 2010, the Office of the State Prosecutor of Kosovo (OSPK) submitted its opinion thus proposing that the request of the defendant B. K. is

- partially granted in terms of the requested annulment of the 1st Instance Judgment and the order on re-trial of the case
- and that the Supreme Court decision is extended, according to Article 454 paragraph 2 of the KCCP to the defendant XH. D.

**(13)** Dated 25 March 2010 the Defense Counsel of the defendant B. K. filed a request to the President of the Assembly of the EULEX Judges (PEJ) and asked for adjudication of the case by EULEX Judges, which was granted. None of the other defendants and/or their Defense Counsels proposed for this as well, but on request of the Supreme Court, the Defense Counsel of the defendant A. H. explained on the telephone that he had filed a request for Protection of Legality only to the Supreme Court and would not mind whether EULEX or Kosovo Judges will handle the case. He underlined his sole interest to have a fast and proper decision.

**(14)** The defendant XH. D. according to telephone information with the respective Correctional Centre, is serving his sentence since 22 February 2010 in the Detention Centre Pejë/Pec but is currently under medical care in the University Clinical Centre of Prishtinë/Pristina (Vascular Surgery) and the defendant A. H. is serving his sentence in the Detention Centre in Lipjan/Lipljane since 06 April 2010, whilst the defendant B. K. according to available information has not yet started to serve his sentence.

## II. Supreme Court Findings

Notwithstanding the fact that according to art 457 par. 2 of the KCCP, the Supreme Court of Kosovo shall not interfere in the final decision of the second instance panel even in case the Request for Protection of Legality, thus being filed to the disadvantage of the defendant, turns out to be well-founded, the Supreme Court finds the following:

### 1. Admissibility of the Requests for Protection of Legality

The Requests for Protection of Legality are admissible. Both of them were filed with the competent court pursuant to art. 453 of the KCCP and within the deadline of Article 452 paragraph 3 of the KCCP.



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## 2. Procedures followed by the Supreme Court

The Supreme Court panel has decided in a session as described by Article 454 paragraph 1 of the KCCP. Parties have not been notified of the session, since according to Article 451 through 460 of the KCCP there is no obligation for the Supreme Court to notify the parties.

## 3. On the merits of the Requests for Protection of Legality

### a. Request for Protection of Legality filed in the interest of the defendant B. K. :

The Request for Protection of Legality is partly founded.

### aa. Alleged violations of the criminal law

The Defense Counsel in his request for Protection of Legality has stressed violation of the criminal law through both, the 1st and 2nd Instance Judgments since the guilt of the defendant B. K. just was assumed and the defendant sentenced for Abuse of Official Position or Authority contrary to Article 339 paragraph 1 and 2 as read with Article 23 of the CCK.

The Supreme Court of Kosovo finds that the request for Protection of Legality insofar is founded.

Article 339 paragraph 1 of the CCK reads as follows:

*"An official person who, with the intent to obtain an unlawful material benefit for himself, herself or another person or a business organization or to cause any damage to another person or business organization, abuses his or her official position, exceeds the limits of his or her authorizations or does not execute his or her official duties shall be punished by imprisonment of up to one year".*

Article 339 paragraph 2 of the CCK reads as follows:

*"When the offense provided for in paragraph 1 of the present Article results in a damage exceeding 2.500 EUR or a grave violation of the rights of another person, the perpetrator shall be punished by imprisonment of up to three years. When the offense provided for in paragraph 1 of the present Article results in a damage exceeding 5.000 EUR, the perpetrator shall be punished by imprisonment of up to five years".*

Although without any doubts the defendant B. K. in his capacity as Confirmation Judge in the respective case was an official person in the means of the law, also conducting official duties, it is already quite questionable, if he has abused his official position, exceeded the limits of his authorization or not (properly)



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executed his official duties up to a level of criminal quality as required by the respective law.

There is no commentary available on the respective provision of the CCK itself. Nevertheless, the provision on Abuse of Office as regulated by Article 242 of the Criminal Code of Serbia (CCS) was commented and sheds some light on the questions at stake. Although according to that the term abuse of office, i.e. abuse of official authority is not uniform, it is undisputed that the respective alleged perpetrator thus being an official person while conducting his or her official duties needs to also act illegally and that the criminal legal sense of abuse of office may be understood in a general or in a special manner. Since in the case at hand a special form of abuse of office, which requires the commission of a criminal act as prescribed by the law, is not given, it needs to be considered whether or not a general form of abuse of office can be established. The latter may consist in three alternatives, as there is (a) abuse of official position, (b) exceeding the limits of authorizations or (c) non-execution of official duties (*Srentic Nikola – Ljubisa Lazarevic, Commentary of the Criminal Code of Serbia 1995, 5th Edition "Savremena Administracija", Belgrade, Article 242 item 1. through 3.* ).

**(a)** Abuse of official position, according to referred commentaries is given, when an official is taking advantage of his or her office or authority and while acting within the scope of this authority he or she achieves some gain for him/herself or somebody else or harms somebody else's interests. Moreover, from the respective commentaries on Article 243 of the CCS, which regulates a special form of the Abuse of Office, it can be understood that an illegal action of a judge as required by the law can be verdicts, judgments, orders and other decisions passed in the course of a court procedure, which contradict the Constitution. Thus, the provision is based on a broad understanding of the terms of "illegal act" and "law".

However, as of the objective criteria of Article 339 of the CCK, in the case at hand neither the 1st nor the 2nd Instance Judgment have established sufficiently for the defendant B. K. to have taken advantage of his official position as required.

The only motivation of the defendant as communicated through the documents of the file was to keep the face for him and for the prosecutor, thus conducting the already scheduled Confirmation Hearing with an amended/modified Indictment.

**(b)** Breach of official authority exists when an official carries out official operations that fall outside of the scope of his/her official authority.

In the case at hand, neither the 1st nor the 2nd Instance Judgment have elaborated on the question if and how the defendant B. K. through his respective activities could have breached his authority as a Confirmation Judge, thus operating outside the scope of this authority.



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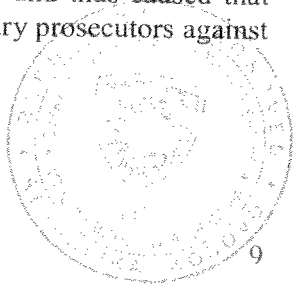
It can be understood from the documents of the file that the defendant B. K. was acting in his capacity of a Confirmation Judge but did not have in mind to exceed this authority by finding decisions, which are not under the respective responsibility.

(c) Finally, as a third possible form of abuse it can be considered an intentionally or unintentionally committed failure to carry out one's obligatory official duties.

Such would be the case i.e. of an official who fails to pass a bylaw he is obliged to pass or to issue a certificate to a citizen on request or similar. It also could be given when the respective official finally acts but with such a long delay that his obligatory action does not longer generate the expected legal effects.

In the case at hand, the defendant B. K. has checked the respective first Indictment and found that it partly did not fulfill the conditions to be confirmed. He has informed the Prosecutor and recommended to get the Indictment properly amended/modified. Both, the 1st and 2nd Instance Court have established that the defendant B. K. while being in his office, has handed the file to the Prosecutor who took it back. Therefore, the Indictment went not through the Court Registry and the Prosecutors Registry as required. It was also established that after the Indictment was "amended" by deleting two out of originally three defendants, it was not registered in the Prosecutors Office again but only in the Court. There, the date and registration number of the previous Indictment were kept unchanged and the document was sealed. Then the defendant B. K. as Confirmation Judge has held the Confirmation Hearing in the presence of the remaining defendant and his Defense Counsel as well as the Prosecutor and finally confirmed the amended/modified Indictment but missed to serve the Confirmation Ruling to the Injured Parties and their Legal Representative.

At the current stage it needs to be left open by the Supreme Court whether or not the described handling of the file by the defendant B. K. already meets the standards of criminal behavior. It in this context it needs to be considered that the Judge at least has shown a serious reluctance, when he was handling the issue. This allegedly was based on common bad habits in the District Court of Prishtine/Pristina and maybe also on long lasting collegial relationship with the prosecutors. As a result of the fact that the respective document was not properly registered, when it left the Court, entered the Prosecutors Office and was returned afterwards grave confusion regarding the documents verification and the transparence of Court actions were caused.
Moreover, the defendant Bedri Krasniqi in his capacity as Confirmation Judge never fulfilled his obligation to serve the Injured Parties and their Legal Representative with the Confirmation Ruling on the amended/modified Indictment and thus caused that the latter were not informed about their rights to act as subsidiary prosecutors against the two defendants Qamush and Isuf Bekteshi.





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Only the latter behaviour of the defendant B. K. may – under certain circumstances – be considered as relevant action under the meaning of Article 339 paragraph 1 of the CCK as to the required non-execution of official duties.

However, at the current stage there is no need to decide the abovementioned issue right away, since what mainly is at stake for the defendant B. K. in the case at hand is the *mens rea* as shown below. In any case, the behaviour of the defendant B. K. at least may be an issue for disciplinary bodies to look into.

Subjectively, Article 339 paragraph 1 of the CCK requires the intention of the perpetrator to obtain an unlawful material benefit for himself, herself or another person or a business organization or to cause any damage to another person or business organization. The required intent only can be the one of *dolus directus* or *dolus specialis*.

In the case at hand, as said before, the main question at stake is the one of the cases' *mens rea*. Neither the 1st nor the 2nd Instance Court has sufficiently established what the intent of the defendant B. K. was about.

The 1st Instance Court in its reasoning to the Judgment just concluded *"that in the deeds of accused* XH. D. *and* B. K. *are created all essential elements of criminal offense of Abusing Official Position in complicity pursuant to Article 339 paragraph 2 as read with Article 23 of PCCK"* (p. 9 of the English translation). Moreover it found that with respect to the arguments of the Defense, according to which the deeds of both defendants are rather professional violations mainly justified with being overloaded in the court and prosecution, *"the Court did not have credit on them and the same were rejected as their tendency aiming to avoid criminal-juristic liability"* 10 of (p. the English translation).

The Municipal Court does not loose a single word on the intents of the defendants. In this respect it is worth mentioning that statistically private and subsidiary prosecution are much less successful that state prosecution. Therefore, inquiring the Injured Parties, who have not been aware of the amended Indictment until they learned about it during the main trial and thus until that time have been prevented from their right to act as subsidiary prosecutors against the other two defendants, could be of help as well as information on the results of the trial against the two defendants Qamush and Isuf Bekteshi.

Also the 2nd Instance Judgment just referred to the 1st Instance Court and pointed out that the defendants were found guilty, *"since the Court confirmed that the defendants* XH. D. *and* B. K. *with their joint actions with intent of serious violation of the Injured Parties rights ... have abused their official positions..."* (p.9 of the English translation).

Finally it needs to be stressed that the 1st Instance Court thus being confirmed by the 2nd Instance Court has sentenced the defendant B. K. for Abusing Official



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Position according to Article 339 paragraph 2 of the CCK, which is a qualification of paragraph 1.

However, it was not sufficiently established that the activities of the defendant have resulted in a damage exceeding the amount of 2.500 EUR or in a grave violation of the rights of another person (here probably the injured parties). As it can be read from the commentaries (*Srentic Nikola – Ljubisa Lazarevic, Commentary of the Criminal Code of Serbia 1995, 5th Edition "Savremena Administracija", Belgrade, Article 242 item 4.*) , there is no clear definition, when a violation of rights is qualified as "grave", which – being a factual matter – needs to be assessed on a case-to-case basis. The challenged Judgments are lacking such an elaboration at all. In this context it might also be taken into consideration that the injured parties finally during the main trial have learned about the fact that two out of the originally three defendants have not been prosecuted so far. They immediately have taken the opportunity to act as subsidiary prosecutors and as a result have filed an Indictment which was confirmed and meanwhile also ended in a main trial. Also here it might be of help to consider the results of the prosecution of the respective defendants Qamush and Isuf Bekteshi and – depending on whether they were sentenced or acquitted - to elaborate on the reasons for the respective court decisions.

**bb. Alleged violations of Article 403 par. 1 sub-par. 10 of the KCCP**

There is no violation of art. 403 par. 1 sub-par. 10 of the PCPCK/KCCP.

The Defense Counsel in his request for Protection of Legality has stressed that the 1st Instance judgment by re-qualifying the charge of the Indictment on Issuing an Unlawful Judicial Decision according to Article 346 of the CCK into Abuse of Official Position according to Article 339 of the CCK has exceeded the scope of charge as to Article 386 paragraph 1 of the KCCP.

The Supreme Court of Kosovo finds that the requirements of Article 386 of the KCCP for exceeding the scope of charge are not met by the 1st Instance Court.

Paragraph 1 of the respective provision reads as follows:

*"The judgment may relate only to the accused and only to an act which is the subject of a charge contained in the indictment as initially filed or as modified or extended in the main trial".*

Different from that, paragraph 2 of the respective provisions reads:

*"The court shall not be bound by the motions of the prosecutor regarding the legal classification of the act".*

On this background, the spirit of the law clearly can be understood as to restrict the respective court to the act, meaning the doings being defined by the indictment as



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subject of charge. Nevertheless, the court is free to do a re-qualification of the legal classification of these acts as fulfilling the requirements of a certain criminal offense provision different from the one the prosecutor has defined in the indictment.

The Municipal Court of Prizren in its Judgment has pointed out that although *"according to the indictment the accused B. K. was charged for commission of the criminal offense of Issuing Unlawful Judicial Decisions pursuant to Article 346 of the PCCK, from the affirmed factual situation and issued evidence this Court did not affirm that in his deeds were fulfilled elements of the criminal offense with which he was charged ..."* but that *"in the deeds of the accused* (are fulfilled the requirements) *of the criminal offense of Abuse of Official Position in complicity pursuant to Article 339 paragraph 2 as read with Article 23 of the PCCK"* (p. 10 of the English translation).

The reasoning shows clearly that the 1st Instance Court has applied Article 386 paragraph 2 of the KCCP and thus has decided in accordance with the requirements of the law for the re-qualification of the act in question in difference from the indictment. The Supreme Court therefore shares the opinion as pointed out by the 2nd Instance Court that "the Indictment was not exceeded in the sense of violation conform to the provision of Article 403 paragraph 1 sup-paragraph 10 of the KCCP".

**cc. Alleged violations of art. 403 par. 1 sub-par. 12 of the KCCP**

The Defense Counsel also has stressed that the Judgment of the 2nd Instance Court is internally inconsistent and logically incomprehensible when it comes to the reasoning on material legal interpretation of the deeds of the defendant Bedri Krasniqi under the requirements of the criminal law.

No violation of Article 403 paragraph 1 sub-paragraph 12 of the KCCP was found by the Supreme Court of Kosovo as stressed by the Defense Counsel.

**(a)** With regards to the re-qualification of the deeds of the defendant B. K. as Abuse of Official Position or Authority contrary to Article 339 paragraph 1 of the CCK, the District Court of Prizren has stated:

> *"... the judge's violation of the law presents Abusing Official Position or Authority and it contains the same crucial elements of obtaining personal material benefit or causing harm to others, while the perpetrator of such criminal offences is an official person himself, as to Article 339 par. 1 of the CCK. Therefore, claiming that the defendant B. K. was found guilty as a co-perpetrator with the defendant XH. D. ; based on the facts which were confirmed in the main trial, does not necessarily mean that the Judgment has exceeded the scope of charge"* (p.8 of the English version).



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**(b)** As to the qualification of the deeds of both co-defendants, B. K. and Xh. D. while changing the contents of the previous Indictment by removing two of the originally three defendants, the 2nd Instance Court has stated:

> *"Removal of the other two defendants was not realized with withdrawing from prosecution of the defendant – Public District Prosecutor Xhevat Danqa and apart from this, the injured party was not advised to proceed with prosecution as a subsidiary prosecutor, i.e. by removing the other two defendants from Indictment, as of 06 September 2007, when the indictment was amended and when the Confirmation Judge – the defendant Bedri Krasniqi did not advise until 08 November 2007 the injured parties about their rights that as subsidiary claimants can continue with criminal prosecution against the other two defendants who were acquitted from the indictment"* (p. 7 of the English version).

Although the wording, especially as quoted under (b)., should be done in a much better and clearer language, the intention of the Court is very clear and easy to understand. The reasoning – despite from the question whether or not it is correct in terms of interpretation of the material criminal law - especially is not inconsistent or illogical.

**b. The rights situation of the defendant X D :**

Although no request for Protection of Legality was filed in the interest of the defendant Xh. D. , the Supreme Court finds that the same reasons for deciding in favor of the defendant B. K. also exist with respect to the defendant Xh. D. and thus in accordance with the proposal of the OSPK applies Article 455 paragraph 2 of the KCCP. Therefore, the defendant Xh. D. has to be treated as if he timely had filed a request for Protection of Legality as well.

**aa. Violation of the criminal law and essential violation of the criminal procedure as to the alleged co-perpetration with the defendant Bedri Krasniqi:**

As far as the defendant Xh. D. was found guilty for Abuse of Official Position or Authority in co-perpetration with the defendant B. K. contrary to Article 339 as read with Article 23 of the CCK, the Supreme Court of Kosovo fully refers to the concerns, which were pointed out in relation with an alleged criminal involvement of the defendant B. K. . Under the aforementioned aspects also evidence and legal qualification with respect to the defendant Xh. D. need to be re-considered.

In this context and with respect to the duties of the defendant Xh D as Prosecutor it also should be focused on the fact that almost all continental European



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law systems know the principle of mandatory prosecution. Therefore as a question of logics it is the duty of the Prosecutor to inform the Injured Parties about the (partial) withdrawal of the Indictment in order to enable them to act as subsidiary prosecutors.

**c. Request for Protection of Legality filed in the interest of the defendant A. H.**

**aa. Essential violation of the criminal procedure:**

The Defense Counsel of the defendant A. H. in his request for Protection of Legality has stressed that the 1st and 2nd Instance Judgments essentially have violated Article 403 paragraph 1 item 12 of the KCCP, since the Courts had not considered that the respective technical actions of the defendant would represent just irregularities with respect to the registering of the amended Indictment and that such technical errors easily can be corrected according to Article 397 paragraph 1 and 2 of the KCCP.

No essential violation of the criminal procedure was found.

The Supreme Court of Kosovo finds that Article 397 of the KCCP clearly refers to errors which includes as a requirement of the law that the respective mistakes must have been committed by some kind of negligence.

In the case at hand it is undisputed that the defendant A. H. intentionally has sealed the amended Indictment with the Court seal but put the date and the registration number of the previous Indictment. The defendant also knew through the Court Courier of the District Prosecutors Office in Prishtine/Pristina that there was an error in the Indictment which was rectified and it was to be registered with the same date. The defendant A. H. registered the modified Indictment in the Court Registry thus using the old date and the stamp of the Court.

In this context it especially needs to be notified that the date of the indictment refers to the 04 June 2006, whilst the respective actions where taken by the defendant on 06 September 2006. It would be far from every kind of life experience to believe that the defendant was not aware of this.

Although this aspect alone indeed could be based on pure typing or writing mistake, it is very unlikely that in the same document also mistakenly the registration number of the previous Indictment is used again. In addition, the witness statement of the Reception Clerk in the District Court Prishtine/Pristina Ms. Burbuqe Korca, dated 03 December 2008 and given in front of the Municipal Court in Prizren, sheds some light on the case. The witness in the here relevant context especially has stated that the defendant A. H. 's one out of three Court Messengers, who *"usually replace"* her, which on the respective day was the case due to the fact of her being sick. Thus it can be understood that the defendant – although not properly trained on



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the job – did not fulfill the tasks of a registrar the first time and thus must have known what he was doing.

Therefore, the Supreme Court finds that the 1st and 2nd Instance Judgment have not violated criminal procedure by non-consideration of Article 397 of the KCCP.

**bb. Violation of the criminal law:**

The Defense Counsel also has stressed that the actions of the defendant A. H. would *"not represent elements of the criminal offense for which he is adjudicated"* (which is Falsifying Official Documents contrary to Article 348 paragraph 1 of the CCK), since he had only produced a technical error that can be corrected according to the law. It especially would not be possible to be *"said with total certainty that* (the defendant) *has committed a criminal offense of falsification, since it is the prosecutor who is in command of the indictment whereas the pre-trial judge is responsible for the decisions adopted in the procedure"*.

The Supreme Court finds that there is no violation of the criminal law as alleged by the Defense Counsel.

Article 348 paragraph 1 of the KCCP reads as follows:

*"An official person or a responsible person who, in an official or business document, official register or file, enters false information or fails to enter essential information or with his or her signature of official stamp certifies an official or business document, register or file which contains false data or enables the compilation of such document, register or file with false contents shall be punished by imprisonment of three months to three years".*

Although it may be disputed whether or not the defendant A. H. who is employed as a Court Messenger, was acting as an "official person" in the means of the law, when he was substituting the Court Registrar and thus proceeded with the Indictment in question in the described way, it goes without saying that he during that time was the "responsible person". This becomes additionally clear considering the fact that according to the referred witness statement of the Court Registrar, Ms. B. K. , the defendant together with two other persons usually was replacing the Court Registrar during her absence.

The defendant moreover has entered into the amended Indictment of the Prosecutor, which doubtless is an official document, a date of issuance and a registration number, which in combination belonged to the previous Indictment in the same case. He thus has entered false information into the document and fulfilled the relevant required condition of the respective law.

He then additionally as stamped the Indictment with the official stamp of the Court and thus also fulfilled the respective alternative condition of the respective law.



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It was already elaborated before that moreover it is far from any kind of life experience to believe that the defendant should not have been aware of the actual date, which was 06 September 2006 instead of the date put into the indictment, which was 04 June 2006. Since he also has put the registration number of the respective previous Indictment it can be excluded that the wrong date is based just on a typo. Therefore, the Supreme Court is convinced that the defendant has acted intentionally within the form of *dolus directus*.

Finally, as to the imposed punishment of 3 (three) months of imprisonment it needs to be stressed that the 1st and 2nd Instance Court already have decided for the lowest punishment possible and thus considered the reduced role and responsibility of the defendant in the whole respective context.

**5. Termination of the enforcement of final judicial decision:**

The termination of the enforcement of all decisions of the Municipal and District Court in Prizren against all respective defendants is ordered according to Article 454 paragraph 4 of the KCCP due to the fact that re-consideration of the evidence and legal qualification is needed.

## III. Conclusion of the Supreme Court of Kosovo

For the abovementioned reasons, the Supreme Court concludes that the Request for Protection of Legality is partly founded. Therefore, the respective Judgments are annulled and the case is send back to the Municipal Court of Prizren as 1st Instance Court for re-trial.

Due to that, the enforcement of the Judgments is terminated until final decision. Consequently, the Supreme Court of Kosovo decides on the respective requests for Protection of Legality as in the enacting clause, based on art. 457 paragraph 1 item 2 of the KCCP.

SUPREME COURT OF KOSOVO IN PRISHTINË/PRISTINA
Pkl-Kzz 103/09, 22 April 2010

Panel Member

Aydi Dinaj

Panel Member

Emine Mustafa

Recording Clerk

Edita Kusari

Presiding Judge

Gerrit-Marc Sprenger



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