SUPREME COURT of KOSOVO

Pkl – Kzz – 26/2010
25 May 2010
Prishtinë/Priština

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Emilio Gatti as Presiding Judge, with EULEX Judge Gerrit-Marc Sprenger and Supreme Court Judges Avdi Dinaj, Emine Kaçiku and Emine Mustafa as panel members,

in the criminal proceedings against:

N. G., nickname N. , Kosovar Albanian, in detention since 4 July 2005; charged by the indictment PP. No. 348-4/2005 as amended on 12 June 2006, with committing two criminal offences of Unauthorized Production and Sale of Narcotics (Count 1 and sub count (vii) of Count 3 as defined in Article 245 paragraphs 1 and 2 in conjunction with Article 22 of the Criminal Code of the SFRY, as made applicable by section 1.1 of UNMIK Regulation no.1999/24), one criminal offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances (Count 2 as defined in Article 229 paragraphs 1, 2, 3 and 4 in conjunction with Article 23 of the CCK) and the criminal offence of Organized Crime (Counts 1, 2 and sub count (vii) of Count 3 as defined in Article 274 paragraph 3 of the CCK).

H. G., Kosovar Albanian, in detention since 1 July 2005; charged by the Indictment PP. No. 348-4/2005 as amended on 12 June 2006, with committing the criminal offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances (Count 2 as defined in Article 229 paragraphs 1, 2, 3 and 4 in conjunction with Article 23 of the CCK) and the criminal offence of Organized Crime (Count 2 as defined in Article 274 paragraph 2 of the CCK).

Deciding upon the request for protection of legality, filed on 9 March 2010 by the State Prosecutor of Kosovo to the detriment of defendants N. G. and H. G. against the Judgment of the Supreme Court of Kosovo Ap.-Kž. No. 394/2007, dated 2 July 2009 which, in partial modification of the Judgment of the District Court of Prishtinë/Priština in case P. Mr. 740/05 dated 27 April 2007, convicted 1) N. G. of having committed two criminal offences of Unauthorized Production and Sale of Narcotics contrary to Article 245 paragraph 2 of the Criminal Code of the SFRY, as made applicable by UNMIK Regulation no.1999/24, (Count 1 and Count 3 sub count (vii) of the Verdict), the criminal offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 paragraph 3 of the CCK (Count 2 of the Verdict) and the criminal offence of Organized Crime contrary of Article 274 paragraph 3 of the CCK and 2) H. G. of having committed the criminal offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 paragraph 3 of the CCK (Count 2 of the Verdict) and the criminal offence of Organized Crime contrary of Article 274 paragraph 3 of the CCK (Counts 1, 2 and Count 3 sub count (vii) of the Verdict).

After having read the Supplement to the Request for Protection of Legality, submitted on 11 March 2010 by the State Prosecutor, the reply dated 17 March 2010 by Defence Counsel Destan Rukiqi on behalf of defendant H. G. and the reply dated 18 March 2010 by Defence Counsel Naser Peci on behalf of defendant N. G. and after a deliberation and voting held on 25 May 2010.

Acting pursuant to Articles 454 and 456-457 of the Criminal Procedure Code of Kosovo (KCCP) renders this

JUDGMENT

The request for protection of legality filed on 9 March 2010 by the State Prosecutor of Kosovo to the disadvantage of the defendants N. G. and H. G. is PARTIALLY GRANTED and it is determined:
that the verdict of the District Court of Prishtinë 27 April 2007 P.nr. 740/2005 and the verdict of the Supreme Court of Kosovo dated 2 July 2009 Ap.-Kz. No. 394/2007 violate articles 6, 71 and 274 paragraphs (2) and (3) of the CCK and articles 391 paragraph 1 item 3 and 403 paragraph 2 item 1 of the KCCP, because no legal punishment was imposed upon the defendants N. G. and H. G. respectively for the criminal offences of organized crime as described in Counts 1, 2 and 3 (vii) of the verdict for N. G. and in Count 2 of the verdict for H. G..

The request for protection of legality filed by the State Prosecutor of Kosovo is REJECTED as unfounded in the remaining parts.

REASONING

I

Procedural history

1. With the Indictment PP No.348-4/2005 filed with the District Court of Prishtinë/Priština on 19 December 2005 the International Prosecutor charged the defendants N. G. and H. G. with the criminal offences of Unauthorized Production and Sale of Narcotics (contrary to Article 245 paragraph 1 and 2 as read with Article 22 of the Criminal Code of SFRY), Unauthorized Purchase, Possession and Distribution of Dangerous Narcotics Drugs and Psychotropic Substances (contrary to Article 229 paragraphs 1, 2, 3 and 4 of the PCCK in relation to Article 23 of the PCCK), Organized Crime (contrary to Article 274 paragraph 3 of the PCCK and contrary to Section 2.4 of UNMIK regulation 2001/22) and Attempted Murder (contrary to Article 147 paragraphs 7 and 9 of the PCCK).
The Indictment was confirmed by the Confirmation Judge on 20 January 2006. On 13 June the International Public Prosecutor filed the Amended Indictment PP No.348-4/2005 in which the charges of attempted murder against each of the accused were withdrawn; the amended indictment was accepted by the District Court.

2. N. G. has been held in detention on these charges since 4 July 2005 and H. G. since 1 July 2005 until now.

3. The main trial before the District Court of Prishtinë/Priština was held between 13 June 2006 and 27 April 2007. During the main trial, following a request for international legal assistance issued by the District Court, seven witnesses were heard in Germany between 29 January and 2 February 2007.

4. In the Judgment P. Nr. 740/05, dated 27 April 2007 the District Court found N. G. guilty as follows:
- **(Count 1) Unauthorized Production and Sale of Narcotics** contrary to Article 245 paragraph 1 and 2 as read with Article 22 of the Criminal Code of SFRY committed on or about January 24 in 2004 and sentenced to seven years of imprisonment;
- **(Count 2) Unauthorized Purchase, Possession and Distribution of Dangerous Narcotics Drugs and Psychotropic Substances** contrary to Article 229 paragraphs 1, 2, 3 and 4 of the PCCK in relation to Article 23 of the PCCK committed on or about June 13 in 2004 and sentenced to five years of imprisonment;
- **(Count 3 sub count i) Unauthorized Production and Sale of Narcotics** contrary to Article 245 paragraph 1 and 2 as read with Article 22 of the Criminal Code of SFRY committed in June 2003 and sentenced to three years of imprisonment;
- **(Count 3 sub count ii) Unauthorized Production and Sale of Narcotics** contrary to Article 245 paragraph 1 and 2 as read with Article 22 of the Criminal Code of SFRY committed in June – July 2003 and sentenced to three years of imprisonment;

- **(Count 3 sub count iii) Unauthorized Production and Sale of Narcotics** contrary to Article 245 paragraph 1 and 2 as read with Article 22 of the Criminal Code of SFRY committed between June and August 2003 and sentenced to three years of imprisonment;
- **(Count 3 sub count iv) Unauthorized Production and Sale of Narcotics** contrary to Article 245 paragraph 1 and 2 as read with Article 22 of the Criminal Code of SFRY committed between September 9 and 15 2003 and sentenced to seven years of imprisonment;
- **(Count 3 sub count v) Unauthorized Production and Sale of Narcotics** contrary to Article 245 paragraph 1 and 2 as read with Article 22 of the Criminal Code of SFRY committed in September 2003 and sentenced to five years of imprisonment;
- **(Count 3 sub count vi) Unauthorized Production and Sale of Narcotics** contrary to Article 245 paragraph 1 and 2 as read with Article 22 of the Criminal Code of SFRY committed in September 2003 and sentenced to five years of imprisonment;
- **(Count 3 sub count vii) Unauthorized Production and Sale of Narcotics** contrary to Article 245 paragraph 1 and 2 as read with Article 22 of the Criminal Code of SFRY committed in October 2003 and sentenced to five years of imprisonment.

The First Instance Court imposed for all sub counts in Count 3 an aggregate punishment of twelve years of imprisonment and finally for all Counts an aggregate punishment of fifteen years pursuant to Article 71 paragraphs 1 and 2 of the PCCK.

5. In the above-mentioned Judgment H. G. was found guilty of **Unauthorized Purchase, Possession and Distribution of Dangerous Narcotics Drugs and Psychotropic Substances (Count II)** contrary to Article 229 paragraphs 1, 2, 3 and 4 of the PCCK in relation to Article 23 of the PCCK committed on or about June 13 in 2004 and sentenced to five years of imprisonment.

6. The District Court acquitted N. G. of committing three acts, described in the Amended Indictment under Count 3 as cases a), b) and c), of the criminal offence of Unauthorized Production and Sale of Narcotics as defined in Article 245 paragraph 1 and 2 as read with Article 22 of the Criminal Code of SFRY. Furthermore the District Court acquitted N. G. and H. G. of committing the criminal offence of Organized Crime as described in Counts 1 through 3 and as defined in Article 274 paragraph 3 of the PCCK and Section 2.4 of UNMIK regulation 2001/22.

7. Both defendants and the Public Prosecutor filed timely their appeals to the Supreme Court of Kosovo which held its session on 30 June 2009 and, after the deliberations on the same day and on 2 July 2009 issued Judgment Ap. – Kz. No. 394/2007.
In its Judgment the Supreme Court partly granted the appeal of the Public Prosecutor filed to the detriment of the defendants, partly granted the appeal filed in favor of N. G. and rejected the appeal filed in favor of H. G. and consequently modified the Verdict of the District Court by:
- modifying the legal qualification of the criminal offences for which N. G. had been found guilty by the District Court (Count 1 became Unauthorized Production and Sale of Narcotics contrary to article 245 paragraph 2 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, CC SFRY, Count 2 became Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and

Psychotropic Substances, contrary to article 229 paragraph 3 of the Criminal Code of Kosovo, Count 3 sub count (vii) became Unauthorized Production and Sale of Narcotics contrary to article 245 paragraph 2 of CC SFRY);
- modifying the legal qualification of the criminal offence for which H. G. had been found guilty by the District Court (Count 2 became Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to article 229 paragraph 3 of the Criminal Code of Kosovo);
- acquitting N. G. of committing six criminal offences of Unauthorized Production and Sale of Narcotics contrary to Article 245 paragraph 1 and 2 as read with Article 22 of the Criminal Code of SFRY as described in Count 3 sub counts (i)-(vi) of the Verdict;
- finding N. G. and H. G. guilty of committing the criminal offence of Organized Crime as described in Counts 1 through 3 contrary to Article 274 paragraph 2 (as to H. G.) and paragraph 3 (as to N. G.) of the PCCK;
- while affirming the remaining part of the Verdict of the District Court.

8. The Judgment of the Supreme Court of Kosovo, dated 2 July 2009 was served to the Public Prosecutor on 31 July 2009.

9. A request for protection of legality to the detriment of N. G. and H. G. was filed by the State Prosecutor of Kosovo on 9 March 2009.
A supplement to his request was filed by the State Prosecutor of Kosovo on 11 March 2010.

10. The Defense Counsels submitted their responses, dated 17 March and 18 March 2010, on behalf of the defendants.

11. The Supreme Court held its session on 25 May 2010.

II

The admissibility of the Request for Protection of Legality

12. As seen before, the verdict of the Supreme Court was delivered to the Office of the State Prosecutor on 31 July 2009 and the request for protection of legality was filed by that Office on 9 March 2010.
The lawyers of the two defendants in their opinion deem the request for protection of legality of the Prosecutor as belated and move for the Court to dismiss it because it was filed beyond the deadline of three months from the service of the final judicial decision to the OSPK, as foreseen by Article 452 paragraph 3 of the KCCP.

13. In the supplement of his request for protection of legality the State Prosecutor, while referring to the jurisprudence of the Supreme Court of Kosovo, maintains that the Public Prosecutor is not bound to the three month deadline as provided by Article 452 paragraph 3 of the KCCP. The State Prosecutor states that, according to article 457 paragraph 2

KCCP, a request for protection of legality filed to the detriment of the defendant will not have any practical negative impact on any of the individual's rights even if the request was successful but will only benefit the legal system. Furthermore the State Prosecutor asserts that a different interpretation of Article 452 of the KCCP could even have a negative impact on the rights of a convicted person in cases where the Prosecutor would like to file a request in favour of that person.

14. This Court is of the opinion that the request for the protection of legality here examined is admissible because in the Procedural Code is no foreseen any deadline for the filing of this extraordinary legal remedy by the Prosecutor.

The relevant provision is article 452 KCCP, whose first paragraph foresees the possibility to file the request for protection of legality for both parties: the Public Prosecutor for Kosovo and the defendant or his defense counsel.
The same paragraph provides the defendant with another safeguard: **upon his death** the request can be filed **on behalf of the defendant** by other persons, listed in the final sentence of article 443 paragraph 1[1].
The second paragraph of article 452 indicates that the Public Prosecutor for Kosovo may file this extraordinary legal remedy "either to the disadvantage or in favor of the defendant".
The third paragraph provides the deadline, **within three months of the service of the final judicial decision on the defendant**.
This paragraph specifies, however, that this deadline is foreseen for "the defendant and his or her defense counsel and the persons listed in the final sentence of article 443 paragraph 1 of the present Code".

From the above mentioned legal provisions it can be concluded that the time limit of three months is foreseen by the Criminal Procedural Code only for the defendant, his defense counsel and the persons who act on behalf of the defendant in case of his death, but not for the Public Prosecutor acting in the interest of the legal system.
This is clear by comparing paragraph 3 where the dead line is foreseen for the defendant, his defense counsel and the persons who act **on behalf of the defendant upon his death** with paragraph 2 where for the activity of the Public Prosecutor there is no time limit.
Also the provision according to which the time limit starts from the moment of the service of the final decision **on the defendant** (paragraph 3) corroborates the proposed interpretation.
In fact, the possibility that the Prosecutor receives the service of the final decision **after** the defendant would result in an unreasonable limitation of his right to file a request for protection of legality.

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[1] Article 443 is dedicated to the extraordinary legal remedy of reopening of criminal proceedings and its first paragraph lists the persons entitled to request this legal remedy (the parties and the defense counsel).
The final sentence of article 443 paragraph 1 foresees that "**after the death of the convicted person**, the reopening may be requested by the public prosecutor or by the spouse, the extramarital spouse, a blood relation in a direct line to the first degree, an adoptive parent, an adopted child, a brother, a sister or a foster parent of the convicted person".

The proposed interpretation finds an important precedent in the Law on Criminal Procedure of Yugoslavia whose provisions (article 416 and following articles) enabled only the "competent public prosecutor" to file a request for protection of legality without any deadline.
The rationale behind the lack of any deadline for the Public Prosecutor was correctly indicated in the supplement to the request for protection of legality filed by OSPK on 11 March 2010.
The Public Prosecutor's request can be filed either in favor of the defendant, thus not affecting the human rights of the latter, or to the detriment of the same but in the last hypothesis it can not have on the challenged verdict an impact which prejudices the defendant himself[2].
In other words, whenever it is filed to the detriment of the defendant (article 452 paragraph 2 KCCP) the request for protection of legality of the Public Prosecutor resolves itself in a legal remedy to the benefit of the legal system.
It falls within the core competences of the Public Prosecutor to act always in favor of the legality of the judicial decisions.
A wrong judicial decision constitutes a precedent which in the future can affect new verdicts.
This explains the interest of a legal system to remove wrong decisions at any time.

The Court acknowledges that the question may arise as to whether the given interpretation is in full compliance with the requirements of a *fair trial* as envisaged by Article 5 of KCCP and, especially, by Article 6 of the European Convention of Human Rights (ECHR).
Here come in evidence the principles of the reasonable delay and that of *equality of arms* between the parties of a criminal proceeding.
As to the reasonable delay it could be asserted that the lack of any deadline for the Prosecutor would expose the defendant to the risk of an endless proceeding.
This fact however has no practical consequences for the defendant because the request for protection of legality filed by the Prosecutor to the detriment of the defendant can not interfere in the final decision and thus can not have a negative impact on his human rights.
Moreover this is an extraordinary legal remedy that can be filed against a decision which is already "final" and the jurisprudence of the European Court of Human Rights[3] recognizes that the time of the proceeding that must fulfill the requirement of the reasonability lasts until the decision becomes final.
In general terms, the principle of *equality of arms* between the parties implies that same legally prescribed periods of time should apply to all parties.
However the nature of this extraordinary legal remedy filed by the Public Prosecutor as a remedy for protection of the legality of the system without any interference in the final

[2] Article 457 paragraph 2 KCCP states that: "if the Supreme Court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well founded, it shall only determine that the law was violated but shall not interfere in the final decision".
[3] See i.e. ECHR in the case Yagci and Sargin v. Turkey, judgment 8 June 1995, Series A, No. 319-A, paragraph 58.

decision appears to justify a derogation to that principle without infringing the human rights of the defendant.

III

Issues raised in the State Prosecutor's request

15. The request for protection of legality filed by the State Prosecutor of Kosovo contains the following claims related to the violation of law:

a. substantial violations of the provisions of the criminal procedure – article 403, paragraph 1, item 12 of the Kosovo Code of Criminal Procedure (KCCP);
b. substantial violations of the provisions of the criminal procedure that influenced the rendering of a lawful and proper judgment – article 391 paragraph 1 item 3 combined with article 403 paragraph 2 item 1 KCCP;
c. violation of the criminal law particularly of article 274 paragraph 3 of the Criminal Code of Kosovo (CCK);
d. substantial violation of the provisions of the criminal procedure that influenced the rendering of a lawful and proper judgment – article 396 paragraph 5 KCCP combined with article 403 paragraph 2 item 1 KCCP.

Each point will be examined and decided as follows.

16. In the first point of his request the State Prosecutor alleges the violation of article 403, paragraph 1, item 12 KCCP because the enacting clause of the appealed Judgment is "incomprehensible or internally inconsistent" and the "judgment lacked any grounds" in the part related to the acquittal of the defendant N. G. from the charges of Unauthorized Production and Sale of Narcotics pursuant to article 245 paragraphs 1 and 2 as read with article 22 CCSFRY contained in sub counts from (i) to (vi) of Count 3 of the first instance verdict.

The State Prosecutor recalls that in the challenged verdict the Supreme Court found that the above-mentioned sub counts (i) to (vi) of Count 3 were vague and did not eliminate the doubts as to the description of the time, the material elements of the crime and the circumstances in which these crimes were perpetrated.
On the contrary the State Prosecutor maintains that the first instance Verdict contained a clear indication of the criminal acts of which the defendant was found guilty and that all of the aforementioned six counts indicated the role of the defendant, his material conduct and his subjective intention.
Moreover the State Prosecutor claims that in the challenged verdict the Supreme Court did not give any grounds of its decision and "did not elaborate properly as to which are, allegedly, the "minimum criteria of precision and clearness" which should have been complied with by the first instance court in its enacting clause".

17. This point of the request for protection of legality filed by the State Prosecutor is not grounded.

As already mentioned in previous judgments of this Supreme Court[4], according to the combined reading of articles 396 paragraph 4 and 391 paragraph 1 KCCP in case of conviction the enacting clause must contain as "necessary data", among others, the act of which the defendant has been found guilty together with facts and circumstances indicating the criminal nature of the act committed and facts and circumstances on which the application of pertinent provisions of criminal law depends.
The enacting clause is obviously a fundamental even though synthetic part of the judgment.
This means that the above mentioned elements must be expressed in a very clear way and with exclusion of any ambiguity so that the defendant and all interested persons can understand the charge of which the defendant is found guilty.
It belongs to the basic rights of any defendant to be put in condition to understand the charge and the verdict issued against him.
The enacting clause expresses these elements in a synthetic way because it is the reasoning part (the statement of grounds) which is assigned by the law (article 396 paragraphs 6 and 7 KCCP) to "state clearly and exhaustively which facts it considers proven or not proven, as well as the grounds for this".

Certainly, within the above mentioned factual elements the role of the defendant, his material conduct and his subjective intention appear to be of fundamental importance as correctly observed by the State Prosecutor.
It is up to the higher Court, however, to assess **if** the description of these elements contained in the enacting clause of the challenged verdict is sufficiently determined or not.

In this case it can firstly be observed that, contrary to the claim of the State Prosecutor, the challenged verdict of the Supreme Court contains the indication of the grounds for which N. G. was acquitted from the charges taken by sub counts from (i) to (vi) of Count 3.
The Court of Second Instance (page 3) explains the criteria which lead its decision by reminding that the counts and the legal qualification of the crimes "should be precise and clear as to the time, the material elements of the crime and the circumstances in which these crimes were perpetrated" and this in order to allow the Court to understand the facts and the defendant to be able to defend his case in an appropriate and proper way.
According to these principles the Court of Second Instance assessed as devoid of the minimum criteria of precision and clearness those six sub counts and acquitted the defendant "due to the vagueness and doubts" raised by those charges.

Given these criteria the evaluation made by the Second Instance Court about the determination of the six sub counts from (i) to (vi) of Count 3 does not appear to contain any legal or logical mistake.
The time, the material elements (as i.e. the quantity of the drug, the route and the destination of the transport) and the circumstances of the perpetration of the charged criminal offence should come out very clearly in the enacting clause.

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[4] See i.e. Supreme Court of Kosovo judgment of 21 July 2009 Ap-Kz 481/2008 O. Zyberaj and S. Shala.

Otherwise the defendant will not be able to defend himself and the Court (of Second Instance) will not be able to properly assess the seriousness of the crime (this for instance is related to the quantity of the transported drug from which it is possible to conclude if that drug is destined to be sold).
From the text of the enacting clause of the First Instance verdict (District Court of Pristina 27 April 2007) it results that those six sub counts were not determined and precise enough.
Count 3 sub count [i] indicates that the conduct took place in **June** 2003 and was related to a transportation of **unspecified** quantity of heroin from Kosovo to **Italy**.
This sub count appears to be generic because three factual elements are not enough specified: time with the indication of a quite long period as it is a whole month, quantity of drug and the final destination of the transport, because Italy is quite a big Country and it is different for the defendant to defend himself against a charge to have transported drug in a place more than in another.
The same considerations as to the **indeterminate quantity** of heroin and the indeterminate final **destination** (Italy) are valid for Count 3 sub counts [ii] and [iii] where in addition **time** is still more indeterminate (in June – July 2003, sub count [ii] and between June and August 2003, sub count [iii]).
Count 3 sub count [iv] remains **indeterminate** as to the **time** (between the period September 9 and 15 2003) and as to the **destination** of the transport (Italy).
Count 3 sub counts [v] and [vi] remain **indeterminate** as to the **time** of the conduct, both of them being related to **September** 2003.
All the above mentioned factual elements appear to be vague and indeterminate because contain a certain level of ambiguity, thus not allowing the defendant to submit different explanations as i.e. an alibi.

The necessary elements don't result in enough way neither from the remaining part of the verdict.
From the reasoning part of the verdict the charged facts can not be better specified with exception for the destination of the transports, indicated in the towns of Brescia – sub count (i) -, Verona – sub count (ii) -, Pisa – sub count (iii) -, Padova – sub counts (iv) – and Milano – sub counts (v) and (vi).
The other factual elements, as mentioned above, remain however indeterminate and this does not allow to consider satisfied the requirements foreseen by the procedural code.
Moreover from the case file and the verdict of the First Instance Court it comes out that investigation against the defendants and their group in relation to drug shipments started in November 2003 that is after the commission of the crimes listed in Count 3.
It is also clear that the investigation related to the facts listed in Count 3 sub counts from [i] to [vi], committed from June to October 2003, were based on testimonies (of C. for Count 3 sub count [i], of P. for Count 3 sub counts from [ii] to [vi], of V. and C. K. for Count 3 sub count [iv] and of M. for Count 3 sub counts [v] and [vi]) without other and corroborating evidence as i.e. direct observation by the Police or seizure of drug.
This means that the charges, based only on the memory of the witnesses, can not be substantiated and made clearer to the defendant by different pieces of evidence. Thus the

lack of clarity in the charges, observed by the challenged verdict, can not be solved through the documents of the case file.

18. The second and the third points of the request for protection of legality are strictly linked to each other and therefore can be dealt with together.
With the second point the State Prosecutor contends substantial violations of the provisions of the criminal procedure (according to the combined reading of article 391 paragraph 1 item 3 with article 403 paragraph 2 item 1 KCCP), because the Second Instance Court – despite finding both the defendants N. G. and H. G. guilty of the criminal offence of Organized Crime (as described in Counts 1, 2 and 3 sub count (vii)) – did not increase their punishments due to an alleged absence of an appeal of the Public Prosecutor on the penalty as such.

With the third point, the State Prosecutor claims that the appealed Judgment was in violation of criminal law because the Supreme Court did not sentence N. G. also to a fine as it is provided by the offence of Organized Crime according to Article 274 paragraph 3 of the PCCK.
The State Prosecutor recalls that in the challenged verdict the Supreme Court found that, although the defendants were found guilty also on the Count of Organized Crime, their penalty could not be raised "because of the absence of an appeal of the Prosecutor on the penalty as such" (page 5 of the verdict English version).
The State Prosecutor opposes this conclusion arguing that the appeal of the District Public Prosecutor filed against the acquittal by the First Instance Court for the charge of Organized Crime implicitly contained a request to punish the defendants according to the law.
In this case the appeal of the Public Prosecutor was not a simple appeal on the imposed punishment but, rather, an appeal for violation of the criminal law.

19. This point of the appeal is grounded.
According to article 415 paragraph 1 KCCP the scope of appellate review is determined by the appeal, in this case of the Public Prosecutor.
In her appeal, dated 10 June 2007 in case PP No. 348 – 4/05, the Public Prosecutor challenges the Verdict on the ground of substantial violation of criminal law in so far as it acquitted the defendants of the charge of Organized Crime on all Counts and, in view of the grounds presented in the appeal, the prosecution proposes that the defendants be found guilty of Organized Crime under relevant Counts of the Amended Indictment.
The question is whether in her appeal the Public Prosecutor did in fact include a proposal to increase the punishments, although this was not explicitly expressed in the wording of the appeal.
In other words, if the District Court's decision on punishment was within the scope of appellate review of the Second Instance Court on the basis of the appeal of the Public Prosecutor.

The general principles contained in the criminal code of Kosovo (CCK) don't allow any doubt on the fact that according to the law any criminal offence must have as a consequence its specific punishment.

Article 6 CCK defines a criminal offence as an unlawful act whose characteristics are defined by the law and "for which a criminal sanction ... is prescribed by the law".
Article 71 CCK provides the ruling in the case a perpetrator commits several criminal offences by saying that "the court shall first pronounce the punishment for each act and then impose an aggregate punishment for all of these acts".
It is clear that according to the criminal code each criminal offence is provided with its punishment.
In case of plurality of criminal offences the court will finally aggregate the different punishments imposed in a first moment for **each** crime.
It can be added that according to article 379 of the Kosovo Code of Criminal Procedure (KCCP) at the end of the main trial in his final speech the Prosecutor presents his proposal as to the criminal liability of the defendant but he is not entitled to ("may not") propose the amount of the punishment.
From the system, therefore, come two principles: 1. each criminal offence has as a legal consequence one sanction, 2. the punishment derives directly from the law and it is applied by the court without any proposal of the Prosecutor.
In the first instance the request of the Prosecutor to find the defendant guilty of a criminal offence has, as an implicit content, the request to impose him the punishment foreseen by the law.
The two above mentioned principles are valid and have to find application not only in the first instance but also during the second instance trial.
What is observed on this point by the challenged verdict, that is the absence of an appeal of the Prosecutor on the penalty as such can not be considered as correct.
This is because the Prosecutor filed an appeal asking that both defendants be found guilty of organized crime according to article 274 CCK and this appeal surely includes also the request for the legal punishment for this crime.
The reasons are, as seen before, that each criminal offence has as a legal consequence a criminal sanction and that the Prosecutor is not entitled to propose the amount of this punishment.
Thus, the fact that the appeal of the Prosecutor does not contain an explicit request to apply a specific punishment to the criminal offence of organized crime does not weaken the nature of his appeal, which is aimed to obtain the declaration of criminal liability and the consequence of this declaration as foreseen by the law: that is the punishment of the convicted defendant.
Moreover, in this case can not find application the prohibition – envisaged by article 417 KCCP – to modify the judgment to detriment of the defendant when it is filed only an appeal in his favor because the Prosecutor filed timely an appeal to the detriment of the defendant.
The Second Instance Court omitted to apply articles 6, 71 and 274 paragraphs 2 and 3 CCK and article 391 paragraph 1 item 3 KCCP and this omission influenced the rendering of a lawful and proper judgment (article 403 paragraph 2 item 1 KCCP).

20. The conclusion is that the verdict of the Supreme Court of Kosovo dated 2 July 2009 Ap.-Kz. No. 394/2007 violates the law, articles 6 and 71 CCK, because did not apply the legal punishment to the defendants N. G. and H. G. for the criminal

offences respectively a) of organized crime according to article 274 paragraph (3)[5] as described in Counts 1, 2 and 3 (vii) of the verdict and b) of organized crime according to article 274 paragraph (2)[6] as described in Count 2 of the verdict.
Violated here are, beyond the above mentioned legal provisions of the criminal code, article 391 paragraph 1 item 3 and article 403 paragraph 2 item 1 of the KCCP.
This violation affects also the verdict of the District Court of Prishtinë 27 April 2007 P. no. 740/2005, to which the verdict of the Second Instance Court is strictly linked.

21. With his fourth point the State Prosecutor contends substantial violations of the provisions of the criminal procedure (according to the combined reading of article 396 paragraph 5 with article 403 paragraph 2 item 1 KCCP), because the Supreme Court of Kosovo, despite convicting both defendants for Organized Crime and acquitting N. G. for the six sub counts contained in Count 3 of the first instance Verdict, neither indicated in the enacting clause the punishment determined for each separate criminal offence, nor the aggregate punishment.
According to the State Prosecutor the Supreme Court had to "indicate the punishment for Organized Crime, had to recalculate the punishment for Count 3 and had to specify the aggregate sentence therefore applied" and "a proper calculation of the punishment would have surely headed to a harsher punishment of the defendants".

22. This point of the request for protection of legality is not grounded.
The Court of second instance partially modified the verdict of first instance and concluded to affirm the remaining part.
The amendments relevant here are related both to the conviction of the defendants for a criminal offence (organized crime) for which they had been acquitted in the first instance and the acquittal of N. G. from six sub counts (from (i) to (vi)) of Count 3.
The first amendment (the conviction of the defendants for organized crime) had indeed to move the Second Instance Court to impose an additional punishment.
This was not done and represents a violation of the criminal law and a substantial violation of the criminal procedure as seen in the previous paragraphs 18 – 20.
The additional violation of article 396 paragraph 5 KCCP raised by the State Prosecutor in relation to this part of the verdict of the Second Instance Court is however absorbed in the substantial violation of the criminal procedure indicated before (article 391 paragraph 1 item 3 and article 403 paragraph 2 item 1 of the KCCP) and there is no need of his specific declaration.

As to the part with which the Second Instance Court acquitted N. G. from six sub counts (from (i) to (vi)) of Count 3 this Court is of the opinion that the challenged verdict does not contain any substantial violation of the criminal procedure.
The First Instance verdict sentenced N. G. as follows:

- Count 1 to a term of imprisonment of 7 years,
- Count 2 to a term of imprisonment of 5 years.

As to Count 3 the first verdict provided the following punishment for each sub count:

[5] Which provides for a punishment of a fine of up to 500.000 EURO and of imprisonment of seven to twenty years.
[6] Which provides for a punishment of imprisonment of at last five years.

- Count 3 sub count (i) to a term of imprisonment of 3 years,
- Count 3 sub count (ii) to a term of imprisonment of 3 years,
- Count 3 sub count (iii) to a term of imprisonment of 3 years,
- Count 3 sub count (iv) to a term of imprisonment of 7 years,
- Count 3 sub count (v) to a term of imprisonment of 5 years,
- Count 3 sub count (vi) to a term of imprisonment of 5 years,
- Count 3 sub count (vii) to a term of imprisonment of 5 years.

The First Instance Court then aggregated the punishment for all sub counts of Count 3 in a term of imprisonment of 12 years.
Finally the different punishments for each Count were aggregated in a term of imprisonment of 15 years.

The Second Instance Court acquitted N. G. from the first six sub counts of Count 3 and, apart from other amendment which are not relevant here, affirmed the verdict of the District Court in the remaining part which contains also the amount of the punishments imposed to this defendant.
As to this part the claim of the State Prosecutor is not grounded because the challenged verdict does not contain any substantial violation of the criminal procedure.
In fact, the acquittal of the defendant from the charges indicated in sub counts from (i) to (vi) eliminates obviously the related punishments and accordingly makes superfluous the first aggregation among the punishments imposed for all sub counts of Count 3.
What is left is the punishment to a term of imprisonment of 5 years for sub count (vii) which must be aggregated to the punishments imposed for Count 1 (7 years) and Count 2 (5 years) pursuant to article 71 paragraph 1 and 2 item 2 KCCP.
By confirming on this point the verdict of the First Instance Court the Second Instance Court confirmed and accepted the final aggregation made by the first one.
Even after the acquittal from sub counts from (i) to (vi) the imposed punishments and their aggregation don't violate the criminal procedure because the aggregate punishment (15 years) is higher than each individual punishment and lower than their sum (17 years).
Perhaps it could have been clearer if the Second Instance would have specified its reasoning on the aggregation of the punishments but this omission does not represent a substantial violation of the criminal procedure because it did not influence the rendering of a lawful and proper judgment.

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

Dated this 25th day of May 2010.
Pkl.-Kzz. No. 26/2010

Prepared in English, an authorized language.

Presiding Judge

Emilio Gatti

Member of the Panel

Gerrit-Marc Sprenger

Member of the Panel

Avdi Dinaj

Member of the Panel

Emine Kaçiku

Member of the Panel

Emine Mustafa

Recording Clerk

Sampsa Hakala

Legal Remedy

Another request for protection of legality may not be filed against this decision (Article 451 paragraph 2 of the KCCP).