

DISTRICT COURT OF MITROVICA

K. nr. 33/2010

16 February 2012

IN THE NAME OF THE PEOPLE

THE DISTRICT COURT OF MITROVICA, in the trial panel composed of EULEX Judge Hajnalka Veronika Karpati as Presiding Judge, Judge Ferit Osmani and EULEX Judge Nuno de Madureira as panel members, with the participation of EULEX Legal Officer Chiara Tagliani as Recording Officer in the criminal case against;

Xh. P., charged with the criminal offence of **Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons**, contrary to Article 327, Paragraphs (1) and (2) of the Criminal Code of Kosovo (CCK),

H. A., charged with the criminal offences of **Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons**, contrary to Article 327, Paragraphs (1) and (2) of the CCK and **Unauthorized Ownership, Control, Possession or Use of Weapons**, contrary to Article 328, Paragraphs (2) and (3) of the CCK,

I. A., charged with **Unauthorized Ownership, Control, Possession and Use of Weapons**, contrary to Article 328, Paragraphs (2) and (3) of the CCK,

according to the Indictment of the District Public Prosecutor KT. nr. 64/2010 dated 28 June 2010, as confirmed by the Ruling on Confirmation of the Indictment dated 27 July 2010, and amended by the EULEX Public Prosecutor at the main trial hearings on 14 and 15 February 2012,

After having held the main trial hearing in public on 14, 15 and 16 February 2012, all in the presence of the accused **Xh. P.**, **H. A.** and **I. A.**, their Defence Counsel Betim Shala, Mahmut Halimi and Skender Musa and EULEX Public Prosecutor Adebayo Kareem, after the trial panel's deliberation and voting held on 16 February 2012, pursuant to Article 392 Paragraph (1) of the Criminal Procedure Code of Kosovo (CPCCK) pronounced - on the same day - in public and in the presence of all the Accused, their Defence Counsel and the EULEX Public Prosecutor the following

Judgment

The accused **Xh. P.**, son of E. P. and A. M., born on _____ in _____, Bosnia and Hercegovina, of Bosnian ethnicity, citizen of _____, residing in _____ Str. No. _____, married, father of _____ children, highest education secondary school, taxi driver, of poor economic status, no known previous conviction, in detention since 05 April 2010

is

FOUND GUILTY

- **because** on he transported a large amount of weapons from to after an agreement with an unknown person named M.. At around he was stopped by the customs patrol unit at the , Municipality and in his car, with plate number , pistols and bullets of different calibre were found, that were hidden in the fuel tank as well as in other parts of the car that had been modified for that purpose.

By doing so, the accused **Xh. P.** committed and is criminally liable for the criminal act of

Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons, contrary to Article 327, Paragraphs (1) and (2) of the Criminal Code of Kosovo (CCK),

The **Accused Xh. P.** is

SENTENCED

- to one (1) year and ten (10) months of imprisonment for the criminal act of **Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons**.

The time spent in detention on remand since is credited pursuant to Article 73 Paragraph (1) of the CCK.

Detention on remand of the accused is hereby CANCELLED and his immediate release is ordered in a separate ruling pursuant to Article 393 Paragraph (2) Item 5 of the CPCK.

The charges of **Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons**, contrary to Article 327, Paragraphs (1) and (2) of the CCK and **Unauthorized Ownership, Control, Possession or Use of Weapons**, contrary to Article 328, Paragraphs (2) and (3) of the CCK against the accused **H. A.**, son of H. A. and N. M., born on in the , residing in Str. No. , of A. ethnicity, citizen of Republic of Kosovo, married, father of children, highest education secondary school, of average economic status, in detention on remand between ,

and the charge of **Unauthorized Ownership, Control, Possession or Use of Weapons**, contrary to Article 328, Paragraphs (2) and (3) of the CCK against the Accused **I. A.**, son of H. A. and N. M., born on in the , residing in Str. No. , of A. ethnicity, citizen of Republic of Kosovo, married, father of five children, highest

education university, of average economic status, in detention on remand between ,

are hereby **rejected** pursuant to Article 389 item 1) of the Criminal Procedure Code of Kosovo (CPCK).

The pistols and bullets of different calibre, seized from the car of the accused **Xh. P.**, are hereby confiscated pursuant to Article 327 Paragraph (3) of the CCK.

The vehicle with plate number is confiscated pursuant to Article 60 Paragraph (1) of the CCK.

All the weapons, parts of weapons and ammunition found in , Str. No. on are hereby confiscated pursuant to Article 489 Paragraph (1) of the CPCK.

The mobile phones and SIM cards, as well as 11000 Euro € and 78 US\$ shall be returned to **H. A.**

mobile phone shall be returned to **I. A.**

The accused **Xh. P.** shall pay one hundred (100) Euro as part of the costs of criminal proceedings and is relieved of the duty of reimbursing the remaining costs pursuant to Article 102 Paragraph (4) of the CPCK,

Pursuant to Article 103 Paragraph (1) of the CPCK, the costs of criminal proceedings under Article 99 Paragraph (2) SubParagraphs 1 through 5 of the CPCK, the necessary expenses of the defendants **H. A.** and **I. A.** and the remuneration and necessary expenditures of their defence counsel, as well as the costs of interpretation and translation shall be paid from budgetary resources.

REASONING

A. PROCEDURAL BACKGROUND

On 30 June 2010, the District Public Prosecutor in Mitrovicë/a filed Indictment nr. PP 64/10, dated 28 June 2010, with the registry of the Mitrovicë/a District Court.

The indictment was filed against the defendants **Xh. P.**, **H. A.**, and **I. A.**. The indictment alleged that the first and the second defendants, **Xh. P.** and **H. A.** committed the criminal offence of Unauthorized supply, transport, production, exchange or sale of weapons under Article 327 Paragraph (2) as read in conjunction with Paragraph (1) of the CCK, in connection with the criminal offense of Organized Crime under Article 274 Paragraph (2) of the CCK. The indictment alleged that the defendant **H. A.** also committed the criminal offence of Unauthorized ownership, control, possession or use of weapons under Art. 328 Paragraph (3) of CCK. Finally, the indictment alleged that the third defendant, **I. A.**, also

committed the criminal offence of Unauthorized ownership, control, possession or use of weapons under Art. 328 Paragraph (3) of the CCK.

After holding the confirmation hearing on 27 July 2010, a local judge of the District Court of Mitrovicë/a issued the ruling on confirmation of indictment, confirming all counts apart from the legal qualification of organized crime against the defendants **Xh. P.** and **H. A.**.

On 24 January 2011, the accused **Xh. P.** requested the case to be taken over by EULEX judges, because of his age and health conditions and the subsequent urgency of speeding up and terminating proceedings. After holding a takeover hearing in the presence of the parties, on 09 February 2011 the President of the Assembly of EULEX judges allocated the case to EULEX Judges of the District Court of Mitrovicë/a.

The case was assigned to the EULEX Public Prosecutor (the EULEX Prosecutor) on 09 February 2012.

The main trial sessions hearings were held on 14, 15 and 16 February 2012. During the session of 15 February 2012 the EULEX Prosecutor dropped the charges against the second and the third defendants.

B. COMPETENCE OF THE COURT

Under Article 23 Item 1) i) of the CPCK, district courts are competent to hear criminal cases involving charges for which the law allows the imposition of a penal sentence of at least five years. Pursuant to Article 27 Paragraph (1) of the CPCK, territorial jurisdiction is proper with the court in the district where a crime is alleged to have been committed.

The charges in this case concerns Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons, contrary to Article 327, Paragraphs (1) and (2) of the CCK and Unauthorized Ownership, Control, Possession or Use of Weapons, contrary to Article 328, Paragraphs (2) and (3) of the CCK.

Article 327 Paragraph (1) of the CCK states that “Whoever, without authorization, supplies, transports, produces, exchanges or sells weapons shall be punished by a fine of up to 7500 EUR or by imprisonment of one to eight years”. Paragraph (2) of the same Article states that “when the offence provided for in Paragraph 1 or 2 of the present Article involves a large amount of weapons, the perpetrator shall be punished by imprisonment of one to ten years”.

In relation to the charge of Unauthorized Ownership, control, possession or use of weapons, Article 328 Paragraph (2) of the CCK states that: “Whoever owns, controls, possesses or uses a weapon without a valid weapon Authorization Card for that weapon shall be punished by a fine of up to 7500 EUR or by imprisonment of one to eight years”. Paragraph (3) of the same Article states that: “When the offence provided for in

Paragraph (2) of the present Article involves a large amount of weapons, the perpetrator shall be punished by imprisonment of one to ten years”.

Based on the filed indictment, the alleged criminal offence has taken place within the Municipality of .

Therefore, considering the penal sentence foreseen for the above charges and the district where the criminal offence has allegedly taken place, the Mitrovicë/a District Court is the competent judicial body to hear this criminal proceeding.

Pursuant to Article 3.3 of Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo: “Before the commencement of the relevant stage of the proceeding, upon petition of the EULEX Prosecutor assigned to the case or working in the mixed team identified in Articles 9 and 10 of this law, or upon petition of any of the parties to the proceeding, or upon a written request of the President of the competent court, the President of the Assembly of EULEX Judges will have the authority, for any reason when this is considered necessary to ensure the proper administration of justice, to assign EULEX judges to the respective stage of a criminal proceeding, according to the modalities on case selection and case allocation developed by the Assembly of the EULEX Judges and in compliance with this law, for the following crimes:

o) Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons (Art. 327, PCCK);”.

During the take over hearing held on 09 February 2011 it was ascertained that all necessary elements for EULEX to have competence and take over the case were met. Firstly, one of the parties to the proceeding, namely the defendant **Xh. P.**, requested EULEX to take over the case. Secondly, “Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons” is one of the charges in the case. Thirdly, it was established that, taking into consideration the special situation of the District Court of Mitrovicë/a, the seriousness of the criminal offence, the time already spent in detention on remand by the defendant **Xh. P.** and the principle of the right to a fair trial within a reasonable time, assigning the case to EULEX judges was necessary to ensure the proper administration of justice

Therefore, EULEX Judges assigned to the District Court of Mitrovicë/a are competent to try this criminal case.

The panel was composed of EULEX Criminal Judge Hajnalka Veronika Karpati as presiding judge, local judge Ferit Osmani and EULEX Judge Nuno Madureira as panel members. All three judges are assigned to the District Court of Mitrovicë/a.

None of the parties objected to the panel composition.

C. THE MAIN TRIAL

The main trial sessions were held on 14, 15 and 16 February 2012 at the Municipal Court of .

All sessions were open to the public and they were all held in the presence of the accused **Xh. P.**, **H. A.** and **I. A.**, their Defence Counsels Betim Shala, Mahmut Halimi and Skender Musa, and the EULEX Prosecutor Adebayo Kareem.

In accordance with Article 15 of the CPCK, international interpreters provided simultaneous interpretation of all court proceedings, and all court documents relevant to the trial were translated from and into Albanian, Serbian and English

D. EVIDENTIAL PROCEDURE

i) Evidence indicated at the time of the filing of the indictment

When filing the indictment the following evidence was indicated by the District Public Prosecutor:

- The Police report no. of 05.04.2010;
- The Forensic Directorate Report No. of 06.04.2010;
- The crime scene Sketch in the case file with number of 06.04.2010;
- The Photo Documentation in the case file with number of 06.04.2010 ;
- The Supplementary Report nr. of 06.04.2010;
- Forensic Directorate Preliminary Report No. ;
- Two certificates of items seized from **H. A.** No. 2010-DKKO-026 of 06.04.2010;
- The Certificate of items seized from **I. A.** No. 2010-DKKO-026+ of 06.04.2010;

ii) Evidence presented during the course of the main trial

During the main trial session of 14 February 2012, Defence Counsel Betim Shala proposed to summon as witnesses two police officers who were investigative officers at the time of the traffic accident in which **P.** was involved in .

After deliberation the panel approved the request. The motion to summon the two police officers was granted, because the Court pertained relevant their testimonies in order to explain the circumstances in which the first defendant, **P.**, and the second defendant, **H. A.**, met. The defence wanted to prove that **P.** was reliable when he stated that he knew **H.** based on the traffic accident event and not because he was supposed to provide him with weapons in . The events are not linked to each other, but in order to verify the statement of the accused, the Court agreed with the defence counsel that the testimony of the witnesses would have been important in order for the defence to prove their standpoint. However, following the Prosecutor's withdrawal of the charges against the **A.** brothers, as reported below, the motion was withdrawn by the same defence counsel during the trial session of 15 February 2012.

Therefore, during the course of the proceedings at the main trial no witnesses were summoned to appear and testify in the case.

During the main trial session of 14 February 2012, Defence counsel Betim Shala requested the court to acquire *ex officio* from the Minor Offences Court of Mitrovicë/a the case file documents in relation to the above mentioned minor offence incident. The Court allowed the motion and the evidence was obtained and administered as follows:

- Exhibit 2: Ruling by the Minor Offences Court in Mitrovicë/a, dated 14 January 2010 and imposing a fine of 70 Euros on the accused **Xh. P.** for violation of the law on traffic safety; entered into evidence during the main trial session of 15 February 2012;
- Exhibit 3: Police report nr. on the traffic violation information; entered into evidence during the main trial session of 15 February 2012;

During the main trial session of 14 February 2012, the following evidence was submitted by Defence Counsel Mahmut Halimi and entered into evidence:

- Exhibit 1: Procredit Bank Account statement for **H. A.** issued by the Bank on 13 February 2012 and referring to the movements in **H. A.**'s account from ; entered into evidence during the main trial session of 14 February 2012;

The EULEX Prosecutor posed objections to the relevance of exhibit 1. However, the Court deemed relevant its administration.

During the main trial session of 14 February 2012, the EULEX Prosecutor asked that the following documents be read into evidence:

- The documents on page 89 of the case file, English version, an Official Memorandum;
- the documents on page 93 of the case file, English version, an Official Memorandum;
- the documents at page 98 of the case file, the Information Report on the house search of the second and third defendants, which includes documents from page 98-111;
- The police forensic report at page 112 of the case file, English version;
- The supplementary forensic report at page 122 of the case file, English version;
- The list of evidences on page 130 of the case file, English version;
- the totality of the photo album, namely from page 149 to page 245 of the case file;
- the documents relating to the ballistic report at pages 245-250;
- The criminal report at pages 313-344 of the case file;
- The receipt of the temporary confiscation of the defendants' items, pages 345-349 of the case file;
- The forensic unit report at page 353 of the case file;
- The cash documents pertaining to the cash deposits, page 357-363 of the case file;
- The application for the metering of the telephone calls, page 364 of the case file;
- Documents pertaining to the rights of the first defendant when he was arrested, contained at page 368-373 of the case file;

During the main trial session of 14 February 2012, defence counsel Mahmut Halimi, in consultation with the other two defence counsels, Betim Shala and Skender Musa, challenged the admissibility of the following evidence:

- page 102, namely the police report on the details of the house search, and, in particular, Paragraph **2a** of the document in the section under “reason of entry and search” and concerning the verbal court order, Article 245 Paragraph (3) of the CPCK.

Consequently, the defence counsels also challenged the admissibility of all pieces of evidence obtained during the house search. Namely:

- The report of the crime scene inspection, page 112-116 of the case file, English version, and 117-121 of the case file, Albanian version;
- The preliminary report, page 122-125 of the case file, English version, and 126-129 of the case file, Albanian version;
- The list of evidence, page 130-139 of the case file, English version, and 140-148 of the case file, Albanian version;
- The photo documentation, from page 150 to page 245 of the case file;
- The police report at pages 98-99;
- The report at pages 89-90;
- The report at pages 93-94;
- The list of confiscated items, pages 345-349 of the case file.

In relation to this, the EULEX prosecutor motioned the court to summon the District Public Prosecutor Njazi Rexha in capacity of witness, concerning the verbal authorization of the house search.

After deliberation, the panel rejected the motion. Nevertheless, the Court requested the EULEX Prosecutor to acquire evidence of the existence of the verbal authorization given by the pre-trial judge.

Due to the impossibility of the EULEX Prosecutor to submit proof of the authorization to the search by a pre-trial judge and due to the impossibility of the Court to acquire such evidence *ex officio*, after deliberation, the panel declared the above referred evidence as inadmissible, since the search was carried out in breach of Article 245 Paragraph (3) of the CPCK.

During the main trial session of 14 February 2012, after reading the Indictment, the first accused **Xh. P.** pleaded partially guilty, while the second and the third accused, **H.** and **I. A.**, pleaded not guilty. During the hearing of 15 February 2012 **Xh. P.** pleaded guilty to the charges and he agreed to give a statement. During the main trial session of 16 February 2012, the accused **Xh. P.** gave his statement in his closing speech. The accused **H. A.** and **I. A.** did not give any statement.

iv) Question of admissibility of evidence

The Court had to thoroughly address the issue of admissibility of evidence raised by the defence counsels during the hearing of 14 February 2012.

The fairness of the trial proceedings in criminal proceedings is guaranteed by Article 6.1 of the European Convention on Human Rights (ECHR) which states that: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. When analyzing the issue of how to declare evidence inadmissible and whether to exclude inadmissible evidence from consideration, the European Court of Human Rights (ECtHR) holds the position that it should be left to national courts to decide on the issue. Nonetheless, the Court ruled that: “The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.”(See *P.G. and J.H. v. the United Kingdom*, judgment of 25 September 2001).

The Court finds that the provisions contained in the Criminal Procedure Code of Kosovo, the applicable law in the national courts of Kosovo, are extrinsically clear.

Article 245 Paragraph (3) of the CPCK states that: “Exceptionally, in exigent circumstances, if a written order for a search cannot be obtained in time and there is a substantial risk of delay which could result in the loss of evidence or of danger to the lives or health of people, the judicial police may begin the search pursuant to the verbal permission of a pre-trial judge”. Article 153 of the CPCK states that: “(1) Evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Code or other provisions of the law expressly so prescribe. (2) The court cannot base a decision on inadmissible evidence.” Article 154 of the CPCK states that: “(1) The court shall rule on the admissibility of evidence upon an application by a party or *ex officio*. (2) A party shall raise an issue relating to admissibility of evidence at the time when the evidence is submitted to the court and in particular in the proceedings on the confirmation of the indictment. Exceptionally it may be raised later, if the party did not know such issue at the time when the evidence was submitted or if there are other justifiable circumstances. The court may request that the issue be raised in writing. In the absence of an application by a party, the court must rule on the admissibility of evidence *ex officio* if at any time during the proceedings a suspicion arises about the legality of evidence. (3) The court shall give reasons for any ruling it makes on the admissibility of evidence.”

The Court ascertained that the law is very clear in this regard and that there is no room for discretion or interpretation of this provision. The strict rules of the CPCK that govern the acquiring and admissibility of evidence are in fact intrinsically correlated to ensure that the fundamental rights of persons whose personal integrity, houses and/or premises are searched, are upheld by the investigative authorities. This is why there cannot be exceptions to the already exceptionality of authorizing searches pursuant to the verbal permission of a pre-trial judge, under Article 245 Paragraph (3) of the CPCK.

Article 246 of the CPCK is also straightforward and it does not allow space for exceptions when it states that: “Evidence obtained by a search shall be inadmissible if: 1)

the search was executed without an order from a pre-trial judge in breach of the provisions of the present Code; 6) The search was conducted in breach of Article 245 Paragraphs 1,3,4 and 5 of the present Code”.

Therefore, pursuant to Article 153 Paragraph (1), Article 154 Paragraphs (1) and (4), and Article 246 items 1 and 6, the Court had to declare the following evidence as inadmissible:

- The police report on the details of the house search, pages 102-106;
- The police reports at pages 89-90, 93-94 and 98-99;
- The report of the crime scene inspection, pages 112 to 116;
- The preliminary report, pages 122-125
- The list of confiscated items, pages 345, 347 and 348;

Consequently, evidence obtained against **H. A.** for the criminal offences of Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons, contrary to Article 327, Paragraphs (1) and (2) of the CCK and Unauthorized Ownership, Control, Possession or Use of Weapons, contrary to Article 328, Paragraphs (2) and (3) of the CCK and obtained during the illegal house search, had to be declared inadmissible and separated from the case file.

Also evidence against **I. A.** for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons, contrary to Article 328, Paragraphs (2) and (3) of the CCK and obtained during the illegal house search, had to be declared inadmissible and separated from the case file.

With regard to the evidence contained in pages 130 -139, namely the Directorate of Forensics List of Evidences, and in pages 150 – 245, namely the photo album, the Court deemed that they could not be declared inadmissible since the documentation in question contains evidence relating to the first defendant and, therefore, it cannot be separated from the file and sealed, since it is subject of consideration in connection to the charges against the defendant **Xh. P.** However, the Court reasserted that the part of evidence within these pages that refers to the evidence illegally obtained against the second and the third defendant would not be subject of review by the Court.

Following the decision on the inadmissibility of evidence, during the main trial session of 15 February 2012 the EULEX Prosecutor fully withdrew the charges against the **A.** brothers.

iv) Evaluation of the Administered evidence

The Court had to establish what the proven facts are on the basis of the admissible evidence submitted against **Xh. P.** for the criminal offence of Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons, as well as on the basis of his guilty plea.

Upon the evidence presented and administered during the course of the main trial, the Court considered the following relevant facts as proven.

From the list of evidence of the Directorate of Forensics, forensic file 2010-008 within the investigation file _____, pages 130 to 139 of the case file, English version, and based on the photo album with the same reference number, pages 149 to 245 of the case file, it is proven beyond reasonable doubt that on _____ the accused **Xh. P.** was stopped in the of _____, _____ Municipality by the Customs Unit and, during the search of his vehicle model “ _____”, of _____ colour, plate number _____ from _____, he was found in possession of the following large amount of weapons: _____ pistols and _____ bullets of different calibre. The weapons were hidden in the vehicle’s fuel tank.

During the interview carried out on _____ at the police station and during his interview in front of the District Public Prosecutor on _____, the accused admitted that he agreed to transport weapons on behalf of a person called M. from _____ in exchange of a money reward of 300 Euro (250 Euro for the transport and 50 for the border insurance). He admitted to be the only owner of the vehicle. He further admitted that the person called M. took his car for a few hours and filled the fuel tank with ammunition. During the main trial session of 15 February 2012, the defendant pleaded guilty, reserving himself the right to give a statement in his closing statement during the session of 16 February 2012. In his closing statement the accused rejected the accusation of having transported weapons when he visited Kosovo for the first time in _____. He, however, admitted to have agreed with the person called M. to transport weapons into Kosovo in _____, when he was stopped by the police and arrested.

Concerning the **A.** brothers, based on the inadmissibility of evidence and the Prosecutor’s withdrawal of the charges, no facts were proven against them.

E. LEGAL QUALIFICATION. Criminal Liability and Intent

According to Article 2 Paragraph (1) of the CCK: “The law in effect at the time a criminal offence was committed, shall be applied to the perpetrator”. The criminal offence of Unauthorized Supply, Transport, Production, Exchange or Sale of Weapon was committed on _____. At that time, the Criminal Code of Kosovo, which entered into force on 06 April 2004 under the name of Provisional Criminal Code of Kosovo and amended on 06 November 2008 with the current name of Criminal Code of Kosovo, was the applicable law. There has been no change in the law prior to this verdict that would be more favourable to the Accused, pursuant to Article 2 Paragraph (2) of the CCK.

According to Article 6 of the CCK a Criminal offence is “an unlawful act which is defined by law as a criminal offence, the characteristics of which are defined by law and for which a criminal sanction or a measure of mandatory treatment is prescribed by the law”. Article 327 Paragraphs (1) and (2) of the CCK, when describing the criminal offence of Unauthorized Supply, Transport, Production, Exchange or Sale of Weapon, states that: “(1) Whoever, without authorization, supplies, transports, produces, exchanges or sells weapons shall be punished by a fine of up to 7.500 EUR or by imprisonment of one to eight years. (2) When the offence provided for in Paragraph 1 or 2 of the present Article involves a large amount of

weapons, the perpetrator shall be punished by imprisonment of one to ten years”. Article 11 Paragraph (1) of the CCK states that: “A person is criminally liable if he or she is mentally competent and has been found guilty of the commission of a criminal offence. A person is guilty of the commission of a criminal offence when he or she commits a criminal offence intentionally or negligently”.

The mental capability of the accused was never an issue of dispute during the proceedings. Therefore, the Court asserted that **P.** is and was, at the time of the offence, mentally competent.

Based on the proven facts reported above, the Court established beyond reasonable doubt that the accused **Xh. P.** has committed the criminal offence he is charged with, namely the Unauthorized Supply, Transport, Production, Exchange or Sale of Weapon, Article 327 of the CCK Paragraphs (1) and (2).

Based on the statement of the accused, the Court found proven beyond reasonable doubt that **P.** intentionally transported the mentioned weapons. Article 15 of the CCK, when describing the notion of intent, states that: “(1) A criminal offence may be committed with direct or eventual intent. (2) A person acts with direct intent when he or she is aware of his or her act and desires its commission. (3) A person acts with eventual intent when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission and he or she accedes to its occurrence”. The Court did not deem relevant the fact that the accused claimed to not know the exact amount of weapons placed inside the car. Since he was fully aware of the fact that weapons would have indeed been placed inside his own vehicle, the Court considered that the accused consciously acted with full intent.

Therefore, the Court found **Xh. P.** fully liable for the entire criminal offence he is charged with and he is, thereby, criminally liable for Unauthorized Supply, Transport, Production, Exchange or Sale of Weapon, under Article 327 Paragraphs (1) and (2) of the CCK.

Based on the inadmissibility of evidence against the accused **H. A.** and based on the Prosecutor’s withdrawal of the charges, pursuant to Article 389 Paragraph (1) of the CPCCK the Court rejected the charges against the accused for the criminal offences of Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons, contrary to Article 327, Paragraphs (1) and (2) of the CCK and Unauthorized Ownership, Control, Possession or Use of Weapons, contrary to Article 328, Paragraphs (2) and (3) of the CCK.

Equally, based on the inadmissibility of evidence against the accused **I. A.** and based on the Prosecutor’s withdrawal of the charges, pursuant to Article 389 Paragraph (1) of the CPCCK the Court rejected the charges against the accused for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons, contrary to Article 328, Paragraphs (2) and (3) of the CCK.

Therefore, the accused **H. A.** and **I. A.** were not found criminally liable for the criminal offences they have been charged with.

F. DETERMINATION OF PUNISHMENT

According to Article 34 of the CCK: “The purposes of punishment are: 1) to prevent the perpetrator from committing criminal offences in the future and to rehabilitate the perpetrator; and 2) to deter other persons from committing criminal offences”.

According to Article 64 of the CCK “The Court shall determine the punishment of a criminal offence within the limits provided for by law for such criminal offence, taking into consideration the purpose of the punishment, all the circumstances that are relevant to the mitigation or aggravation of the punishment (*mitigating and aggravating circumstances*) and, in particular, the degree of criminal liability, the motives for committing the act, the intensity of danger or injury to the protected value, the circumstances in which the act was committed, the past conduct of the perpetrator, the entering of a guilty plea, the personal circumstances of the perpetrator and his or her behaviour after committing a criminal offence. The punishment shall be proportionate to the gravity of the offence and the conduct and circumstances of the offender”.

For the criminal offence of Unauthorized Supply, Transport, Production, Exchange or Sale of Weapons, contrary to Article 327, Paragraphs (1) and (2) of the CCK, the law foresees a punishment of imprisonment of one to ten years.

As aggravating circumstances, the Court considered the seriousness of the criminal offence. Acknowledging the fact that the accused transported a large amount of weapons, the Court agreed with what stated by the EULEX Prosecutor in his concluding remarks. The Court is indeed aware of the adverse effects that supply and smuggling of weapons have in any society, but particularly in a country like Kosovo, still subjects to inter-ethnic tensions and with widespread organized crime activities. The Court herein accredited the gravity of the criminal act.

As mitigating circumstances, the Court had to take into consideration several factors. Firstly, the accused pleaded guilty. The guilty plea was accompanied by a statement of remorse that was considered as truly genuine by the Court.

Secondly, the Court considered the involvement of the accused in the criminal offence. **Xh. P.** acted on behalf of a person named M., who was not subject of the investigation and charges in this case. However, from the course of the proceedings it resulted as accepted that the person called M. had the leading role in organizing the transport of weapons, whereas the accused **P.** acted as a supporting actor towards the realization of the criminal act.

Thirdly, the Court had to take into evaluation the following factors: the age of the accused, the distance from his family and the difficulty of receiving visits, the fact that he has not-know previous convictions and his health problems, as it can be proven from the report on hospitalization contained in the case file and from what asserted by the accused in his closing speech.

Furthermore, the Court had to consider the time already spent in pre-trial detention.

The right to personal liberty is one of the most fundamental human rights, because it protects an individual's physical freedom and it is linked to the fundamental principle of presumption of innocence until proven guilty. Article 5.3 of the ECHR reads that: "Everyone arrested or detained in accordance with the provisions of Paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial". The concept of being entitled to trial within reasonable time or to be released pending trial comes as a protection of the right to be presumed innocent, and therefore free, until proved guilty and as a guarantee of the fact that deprivation of liberty should be only used as an exceptional measure.

Following from the principle that justice delayed is justice denied, in *Bottazzi Vs. Italy*, the ECtHR, while referring to the concept of trial within reasonable time enshrined also in Article 6.1 of the Convention, said that the object of the provision in Article 6.1 is to "protect the individual concerned from living too long under the stress of uncertainty and, more generally, to ensure that justice is administered without delays which might jeopardize its effectiveness and credibility" (see *Bottazzi Vs. Italy*, Judgment of 28 July 1999).

The Court asserted that, while acknowledging that judges in Kosovo do not have discretion as far as increased crediting for the time spent in detention on remand is concerned, nonetheless national courts do have discretion in the way pre-trial detention can be considered as a mitigating circumstance in the calculation of the punishment.

The Court ascertained that the conditions did not allow for the release of the accused pending trial, because of the intrinsic risk to flee, as it can be found in the reasoning of the several rulings on extension of detention on remand. However, the Court recognized that the time spent in pre-trial detention was long and was a consequence of a very difficult situation that the rule of law and the delivery of justice have to face in the north of Kosovo. Therefore, while accepting that the Court did not have any other choice but to keep the detainee in detention, the Court considered that the long time spent by the detainee in pre-trial detention had to be credited in his favour.

Taking into consideration all of the above mentioned circumstances, the Court found a sentence of one (1) year and ten (10) months of imprisonment appropriate to serve the purpose of punishment under Articles 34 and 64 of the CCK.

The time spent in detention on remand since [redacted] was credited pursuant to Article 73 Paragraph (1) of the CCK. Subsequently, having already fully served the sentence, the Court ordered the immediate release of the accused. In fact, according to Article 393 Paragraph (2) of the CPCK: "The trial panel shall always cancel detention on remand and order the release of the accused if: item 5) Due to the inclusion of detention on remand in the amount of punishment he or she has already served the sentence".

G. CONFISCATION

Pursuant to Article 327 Paragraph (3) of the CCK, the Court has ordered the confiscation of the pistols and bullets of different calibre, seized from the car of the accused **Xh. P.**

Pursuant to Article 60 Paragraph (1) of the CCK, the Court also ordered the confiscation of the vehicle with plate number ownership of the accused **Xh. P.** In his final speech, Defence counsel Betim Shala requested the restitution of the vehicle to the accused. In reply to this motion, the Court found that, due to the way the vehicle was modified to serve the illegal purpose of transportation of weapons, and therefore being already arranged and predisposed towards this end, if returned the car could have again been used as a mean of illegally activity, namely unauthorized transport of weapons.

Pursuant to Article 489 Paragraph (1) of the CPCK, the Court also ordered that all the weapons, parts of weapons and ammunition found in , Str. No. on be confiscated, because of the danger that they pose to public safety and the threat that they might be used in a criminal offence.

Finally, the Court ordered the restitution of the mobile phones and SIM cards, as well as 11000 Euro €and 78 US\$ to the accused **H. A.**, as well as mobile phone to the accused **I. A.**

H. COSTS OF PROCEEDINGS

The Court found the accused **Xh. P.** guilty of the charges to him ascribed. However, pursuant to Article 102 Paragraph (4) of the CPCK the Court decided to partially relieve the defendant from the costs of proceedings due to his poor economic status, hereby establishing that he shall pay one hundred (100) Euro as part of the costs of criminal proceedings, while being relieved of the duty of reimbursing the remaining costs

The Court also established that, pursuant to Article 103 Paragraph (1) of the CPCK, the costs of criminal proceedings under Article 99 Paragraph (2) SubParagraphs 1 through 5 of the CPCK, the necessary expenses of the defendants **H. A.** and **I. A.** and the remuneration and necessary expenditures of their defence counsel, as well as the costs of interpretation and translation shall be paid from budgetary resources.

District Court of Mitrovica
K. nr. 33/2010

Recording Officer:
Chiara Tagliani

Presiding Judge
Hajnalka Veronika Karpati

Legal remedy:

Authorized persons may file an appeal in written form against this judgment to the Supreme Court of Kosovo through the District Court of Mitrovica within fifteen (15) days from the date the copy of the judgment has been received, pursuant to Article 398 Paragraph (1) of the CPCK.