

SUPREME COURT OF KOSOVO
PKL-KZZ- 137/2011
Date: 13 April 2012

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of Mr.Francesco Florit as presiding judge, Ms.Marja Ademi, Ms.Nesrin Lushta, Mr.Salih Toplica and Mr.Martti Harsia as panel members, assisted by the Legal Advisor Mr.Adnan Isufi as recording clerk, in the criminal case against the defendant:

A.B.

[REDACTED]

Convicted for the commission of the criminal offences of Rape in violation of Article 193 paragraph 3 subparagraph 3 in conjunction with paragraph 2 subparagraph 1 and 2 and Unauthorized Ownership, Control, Possession or Use of Weapons, in violation of Article 328 par 2 of the Criminal Code of Kosovo (hereafter "CCK"),

Deciding upon the Request for Protection of Legality filed by the State Prosecutor of Kosovo (hereafter "Prosecutor"), against the Judgment of the District Court of Pristina P nr 461/2006-P 497/2006, dated 27 October 2006, against the Judgment of the Supreme Court of Kosovo, Ap-Kz 127/2007, dated 27 December 2007, to the benefit of the only convicted Agron Bytyqi,

Pursuant to Article 454 paragraph 1 of the Kosovo Criminal Code of Procedure (hereafter "KCCP"), after a session on deliberation and voting held on 13 April 2012, the Supreme Court of Kosovo issues the following:

JUDGMENT

The Request for Protection of Legality filed by the Prosecutor, against the judgment of the District Court of Pristina P nr 461/2006-P 497/2006, dated 27 October 2006 and against the judgment of the Supreme Court of Kosovo, Ap-Kz 127/2007, dated 27 December 2007, is hereby rejected as unfounded and the Judgment of the Supreme Court of Kosovo Ap-Kz 127/2007, dated 27 December 2007, is confirmed according to Art 456 of the KCCP.

REASONING

I. Procedural background

On 5 June 2006, the District Public Prosecutor filed an Indictment against the defendants [REDACTED] and [REDACTED]. The defendant [REDACTED] was

E.S., X.D., B.M., E.S.

charged of the criminal offences of Rape contrary to Article 193 (2) item 3 of the CCK and Threats contrary to Article 161 (2) of the CCK. The defendant [REDACTED] was charged with Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 (2) of the CCK. All the three defendants in this indictment were charged also for having committed the criminal offence of Obstructing Official Person in Performing Official Duties contrary to Article 316 (3) of the CCK. X - D.

On 13 June 2006, the District Public Prosecutor ruled to expand the investigations against the defendant [REDACTED] for having allegedly raped the injured party [REDACTED] by the use of threat with a gun. A . B . A . A

A . B . On 15 June 2006, the District Public Prosecutor filed the indictment against the defendant [REDACTED] (PP 333-4/2006) for the alleged commission of rape, contrary to Art. 193, par. 3, subpar. 3, as read with par. 2 and subpar. 1 and 2 of the CCK; and criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons, pursuant to Art. 328, par. 2 of the CCK. On the same day a request to join the criminal proceedings against [REDACTED] with the proceedings against the three previous defendants was filed with the District Court of Pristina. The two indictments were separately confirmed by the court although later on the two criminal proceedings have been joined.

A . B . On 27 October 2006, the District Court of Pristina (P 461/2006 and P 497/2006) found the defendant [REDACTED] guilty for criminal offences of Rape (Article 193 (3) item 3 and of the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons (Article 328 (2) of the CCK. Also the other defendants were convicted for the crimes listed in the charges against them. [REDACTED] however was acquitted from the charge of rape. E . S . A . B .

The first instance court imposed onto the defendant [REDACTED] an aggregated punishment of three (3) years of imprisonment. The time spent in the detention is credited and included in the punishment.

On 27 December 2007, the Supreme Court of Kosovo rejected the appeal filed on behalf of the defendant Agron Byqtyqi and confirmed the first instance court judgment. A . B .

On 24 July 2009, the defendant [REDACTED] through his defense counsel filed a request for the reopening of the criminal procedure with the District Court of Pristina. The request was rejected as ungrounded by the court.

On 6 July 2011, the Prosecutor filed a request for protection of legality with the Supreme Court of Kosovo. The request, filed against the judgment of the District Court of Pristina dated 27 October 2006 and against the judgment of the Supreme Court of Kosovo dated 27 December 2007 was exclusively in favor of the convicted [REDACTED] A . B .

II. Proceedings before the Supreme Court of Kosovo

On 14 March 2012, the President of the Supreme Court of Kosovo requested the President of the Assembly of EULEX Judges to take over the case into competence and responsibility of EULEX Judges.

On 19 March 2012 the President of the Assembly of EULEX Judges pursuant to Article 3.6 of the Law on Jurisdiction, requested the parties of the proceedings to submit their opinions on the matter indicating that anyone who does not comment within a week from the moment of the receipt of the order is assumed to join in the request.

On 29 March 2012, after review of the submitted opinions, the President of the Assembly of EULEX Judges decided to take over the case into competence and responsibility of EULEX Judges to decide on the request for protection of legality. The decision of takeover of the case was sent to the parties on the same date.

III. Subject Matter

The request for protection of legality alleges substantial violations of the provisions of the criminal procedure code pursuant to the combined reading of Article 451 (1), items 2 and 3, Article 451 (3), Article 403 (1), item 8 and Article 403 (2) of the KCCP, as read in conjunction with Article 387 (1) and (2) and Article 396 (7) of the KCCP and with Article 14 of the 1966 International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) as interpretative tools according to Article 22 of the Constitution of Kosovo.

A.B. The Prosecutor claims that in the course of the main trial the court failed to assess relevant evidence in favour of the defendant [REDACTED] and that therefore the court's assessment was based on evidence which does not meet the standard of guilt "beyond any reasonable doubts" needed for a conviction.

A.B. The Prosecutor also claims that there is no sufficient evidence to ground the conviction of the defendant [REDACTED] for the crime of Unauthorized Ownership, Control, Possession or Use of Weapons (ref Article 403 (1) item 8 of the KCCP).

The described failures, in the Prosecutor's position, constitute a breach of the rule which should guide the judge in the assessment of evidence, imposing on the judge the duty to assess conscientiously each item of evidence separately and relation to other pieces (items) available (art.387.1 KCCP). Therefore, the argument goes, they are errors in law. The erroneous evaluation of the factual situation is only the consequence of the wrong application of the rules of judgment.

A.B. By failing to follow the said rule, it is alleged, the Court has reached a decision of guilt against [REDACTED] in violation of the standard that imposes to find the guilt beyond any reasonable doubt.

A.B. The Prosecutor therefore proposes the modification of the challenged judgments and the acquittal of the convicted [REDACTED] from all the charges (Article 457 (1) of the KCCP) or to annul in part the challenged judgments of the District Court of Pristina (P 461-497/2006) and of the Supreme Court of Kosovo (Ap-Kz 127/2007), or the judgment of the Supreme Court of Kosovo only, and return the case for a new decision or retrial to the court of first instance or the higher court (Article 457 (2) of the KCCP).

IV. Supreme Court Findings

The request for protection of legality is admissible. The request is filed by a person authorized to and with the competent court pursuant to Article 454 par 1 of KCCP.

The common interpretation of the provision of article 454 KCCP allows the Prosecutor to file a request for protection of legality without any time limit. Therefore, also in the present case, where the decision became final some years ago, the request is admissible.

The Supreme Court of Kosovo decided in a session as prescribed by Article 454 paragraph 1 of the KCCP. The parties' notification of this session was not required.

In the challenged judgments, the Supreme Court of Kosovo finds no procedural error, which should be taken into account *ex officio*. Therefore, pursuant to Article 455 of KCCP, the Supreme Court of Kosovo shall confine itself to examining those violations of law which the requesting party alleges in his request.

In reviewing the request, the Court finds that the Prosecutor does not allege an erroneous or incomplete determination of the factual situation. The prosecutor explicitly indicates that the request is not based on the ground of an erroneous determination of the factual situation. As a result, the court shall refrain from assessing the point.

Additionally, it is important to underline that there is no space, in the present case, for a decision of the Supreme Court in the terms foreseen by article 458 KCCP, since there is not a situation of 'considerable doubt' (the standard indicated by the law) as to the accuracy of the factual determination, as would be required in order to annul the decision and order a new main trial. Indeed, what is alleged by the same Prosecutor is the insufficiency of evidence (not sufficient to oust a reasonable doubt about the guilt of the defendant) and not the absence or the misinterpretation of the available evidence. 'Considerable doubt' is a more significant and substantial uncertainty than 'reasonable' doubt. The presence of such critical and extensive doubt in the present case is not even alleged by the Prosecutor and there is no indication that may induce the Supreme Court to re-examine *ex officio* the entire evidence.

Further, the prosecutor does not claim the inadmissibility of any administered piece of evidence in the main trial.

As said, the Prosecutor rather argues insufficiency of the evidence required for a final conviction of the defendant. The prosecutor claims that the courts of both instances failed to comply with the "*beyond any reasonable doubt*" standard of proof that must be satisfied to convict an accused in a criminal proceeding. The Prosecutor specifically submits "*if the statement of an alleged victim of rape in front of a court, not corroborated by any other evidence (with the exception of a hearsay evidence from another witness- [REDACTED] was enough "beyond any reasonable doubt" for conviction of the defendant [REDACTED] especially that the victim did not claim any crimes committed against her by [REDACTED] in the immediate early stages of the investigation (police statements collected in May 2006) and her allegations against the same [REDACTED] were evolving and increasing over the time*". In addition, the prosecutor asks whether "*the absence of any medical examination or*

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A . B . reports related to the alleged rape suffered by ██████████, the absence of any physical evidence or of any other substantial corroborating evidence concerning the alleged rape and other crime for which ██████████ was convicted, the fact that none of the police officers were interviewed in regards to the rape allegedly suffered by ██████████ (and how and if they became aware of it), the absence of any attempt of the court to try to verify whether ██████████ was in Albania when the rape was allegedly committed, were elements to be disregarded in convicting ██████████. A . B .

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The Supreme Court in first place observes that the standard 'beyond any reasonable doubt' is, in the context of the Kosovo legislation, an addition that comes from a different legal tradition. Of course, it is not contested the validity of the standard, which represent a fundamental parameter for the assessment of guilt in the Common Law legal system and somewhere else (the principle has been introduced in the Italian Code of Criminal Procedure, art.533.1, in 2006 by statute 20 Feb. 2006, n.46 – the first case in the family of civil law systems), but it must be remarked that the Prosecutor gives for granted and motivates his entire motion arguing on the base of a standard ('beyond any reasonable doubt') that he states as implicit but that cannot be found in the legal instruments that prosecutor quotes. So, why to mention something that is not a legal standard in Kosovo, only because it is a common legal expression that has become familiar in the legal jargon but not in the legal system of Kosovo? Wouldn't it be enough to say that, in order to issue a decision of conviction, the defendant must be found guilty, without the addition 'beyond any reasonable doubt'?

To state that the principle is implicit in the ECHR is not correct: quoting from the commentary on the Law of the European Convention on Human Rights (Harry, O'Boyle and Warbrick – Oxford, 2009), pg.302: 'As to the standard of proof, there is no clear statement that there is a requirement of proof of guilt beyond reasonable doubt; in *Austria v Italy* (6YB740 at 784 (1963) Com Rep; CM Res DH (63)3) the Commission stated that Article 6(2) requires that a court find the accused guilty only on the basis of evidence 'sufficiently strong in the eyes of the law to establish guilt'.

The same goes for article 14 of ICCPR (International Covenant on Civil and Political Rights), where the formulation is similar to art.6 ECHR, i.e. 'to be presumed innocent until proved guilty according to law'.

Addressing these points in relation to the specific case, the Supreme Court of Kosovo acknowledges that, as a matter of due legal process, a person charged with a criminal offense, can be found guilty only after the prosecution has proven in the criminal procedure conducted by the competent court every elements of the crime and of the criminal liability of the perpetrator. The court shall comply with the legal rules that guarantee that no innocent person shall be convicted, and that a punishment or any other criminal sanction shall only be imposed on a person who commits a criminal offence under conditions of the

law which provides for criminal offences and on the basis of a procedure conducted lawfully and fairly, after a careful assessment of the evidence.

With respect to the case at hand, the first instance court held that in August or September of 2005 at approximately 22:00hrs, under use of threat the defendant intentionally forced
A.A. the victim [REDACTED] to perform sexual intercourse with him in a manner that after he picked her up with his car Audi 80, at Vranjevc neighborhood in Prishtina, he pulled out his gun, which he was carrying without a valid permit, forced her to stay inside the vehicle, and told her the following: "tonight you will do whatever I tell you to do, otherwise you are dead", while when the victim tried to reach for her cell phone to call the accused [REDACTED] E.S.

A.B. [REDACTED] the accused [REDACTED] did not let her and drove off towards the Lake of Batilava, then stopped at a forest, pulled out his gun, pointed it to the victim's head and told her: "take off your clothes or I will kill you but not at once, I will rather only wound you and leave you to bleed here in the mountain with the wolves tonight until you go mad", after which he took off her pants, her underwear, then he laid the co-driver's seat down, mounted over her and had sex with her twice.

The court concluded that the statement of the injured [REDACTED] A.A. regarding the criminal offense for which the accused [REDACTED] was found guilty, was convincing, truthful and objective and as such the court gave the witness full confidence. The declaration of the injured party was corroborated by the statement of the witness [REDACTED] M.A. [REDACTED] who testified that the injured party herself had told her on the phone and in person that she had been raped by the accused [REDACTED] A.B.

Grounding a conviction on these elements is enough, provided that there is sufficient and non-contradictory motivation.

The arguments used by the Prosecutor in order to state that the evidence is not sufficient are contradictory, inconclusive and not convincing.

There is contradiction, because when the Prosecutor asks rhetorically *if the statement of an alleged victim of rape in front of a court, not corroborated by any other evidence (with the exception of a hearsay evidence from another witness- [REDACTED] was enough, he does not consider that, on the contrary, the statement of the victim was in fact corroborated* (the statement of [REDACTED] is hearsay in relation to the description of the rape, but it is a direct confirmation that the victim reported the rape to her friend in a time that was not suspected). M.A. M.A.

The arguments of the prosecutor are inconclusive and not convincing, because when it comes to a rape committed with the described modalities, it is meaningless to expect that any trace of physical violence be found (there was no physical violence, the victim surrendered for threat).

The same goes for the modalities and time in which the denunciation was made (one year after the commission of the rape): it's absolutely normal that the victim of a rape finds the courage to denunciate the aggressor only once the risk of revenge against the denouncer (the same [REDACTED] in the current case) has ceased.

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All the argument used by the Prosecutor in the attempt to discredit the deposition of [REDACTED] do not amount to more than generic formulation that can easily be opposed: the fact that the deposition and the number of details of the rape increase with time, the fact that [REDACTED] was investigated only at the end of the main investigation against [REDACTED] and his acolytes, and so on, are features that are common in many investigation and that usually do not have a specific significance in the assessment of the testimony. On the contrary, they could be taken as indicators of credibility of the witness who would have acted more cunningly, had she intended to denunciate falsely [REDACTED]

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The discussion that proceeds, on the evidence presented in the course of the trial and on its sufficiency to ground a decision of guilt of the defendant, exposes another weakness of the request for protection of legality filed by the Prosecutor.

In reality, the Prosecutor has filed a (not allowed in this case) further appeal and not a protection of legality.

If also alleging the violation of the rule of judgment, the Prosecutor has in truth contested the result of the application of the said rules and so, has practically asked a further (a third) assessment of the available evidence.

The protection of legality should be aimed to redress a mistake in the interpretation and the application of the law and not an assumed error in the interpretation of the facts.

To confirm that the request was based on a mere preconception, more than on a exigency of restoration of legality, it is worth considering that the request itself does not bother to indicate any passage of the challenged decision that is assumed faulty or contradictory not to expose any insufficiency of the motivation or to quote any passage where the motivation may be deficient. On this base, the assertion of the Prosecutor that the evidence is insufficient to ground a conviction is simply a tautological axiom.

IV. Conclusion of the Supreme Court of Kosovo

In light of above, the Supreme Court of Kosovo concludes:

The Request for Protection of Legality filed by Applicant, against the judgment of the District Court of Pristina P nr 461/2006-P 497/2006, dated 27 October 2006 and against the

judgment of the Supreme Court of Kosovo, Ap-Kz 127/2007, dated 27 December 2007, is unfounded.

In light of the above, the Supreme Court of Kosovo has decided as in the enacting clause of this judgment.

SUPREME COURT OF KOSOVO

PKL-KZZ 137/2011, date 13 April 2012

Presiding judge:

Francesco Florit

EULEX Judge

Recording clerk:

Adnan Isufi

EULEX Legal Advisor

Members of the panel:

Nesrin Lushta

Supreme Court Judge

Salih Toplica

Supreme Court Judge

Marije Ademi

Supreme Court Judge

Martti Harsia

EULEX Judge