

SUPREME COURT OF KOSOVO

Pkl.-Kzz. nr. 38/2011

04 May 2012

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Francesco Florit as Presiding Judge, and EULEX Judge Horst Proetel and Kosovo Judges Emine Mustafa, Salih Toplica and Nazmije Ibrahimimi as members of the panel, and in the presence of Tara Khan as recording clerk, in a session held on 04 May 2012 in the criminal case against:

I. G., nickname "**...**", father's name **B.** mother's maiden name **H. Xh.**, Kosovo-Albanian, born **date of birth...** in **Place...**, permanent residence at **address...** Malmoe, Sweden, financial consultant, currently in detention at Dubrava Detention Center;

Convicted by the District Court of Peja/Pec¹ of War Crimes Against the Civilian Population contrary to Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia ("CC SFRY") and Articles 3 and 147 of the Fourth Geneva Convention² and Article 4 of Additional Protocol II³, and affirmed on appeal by the Supreme Court of Kosovo⁴;

Acting upon the Request for Protection of Legality filed by Defence Counsel **M. H.** on 13 April 2011;

Pursuant to Articles 451(1) and 456 of the Kosovo Code of Criminal Procedure ("KCCP"), in a session held on 04 May 2012, issues the following:

JUDGMENT

The Request for protection of legality filed on 13 April 2011 by Defence Counsel **M.H. is REJECTED as UNFOUNDED.**

REASONING

I. Procedural background

Indictment PP. nr. 36/2006, as confirmed, charged **I. G.** with the criminal offence of War Crimes Against the Civilian Population contrary to Article 142 of the

¹ Judgment P. nr. 329/2009 dated 19 November 2009.

² Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.

⁴ Judgment Ap.-Kz. nr. 108/2010 dated 25 November 2010.

CC SFRY.⁵ He was convicted of the criminal offence by judgment P. nr. 537/2007 of the District Court of Peja/Pec on 22 June 2007. On 02 June 2009, the Supreme Court annulled the District Court judgment and returned the case for retrial in Appeal Judgment Ap.-Kz. nr. 465/2008.

Upon retrial, **I.G.** was convicted of War Crimes Against the Civilian Population by the District Court of Peja/Pec in Judgment P. nr. 329/2009 dated 19 November 2009 and sentenced to fourteen years of imprisonment. On 25 November 2010, the Supreme Court rejected the defendant's appeal against the District Court verdict as unfounded in Appeal Judgment Ap.-Kz. nr. 108/2010.

The defendant filed the Request for Protection of Legality on 13 April 2011.

II. Legal Analysis

A. Issues raised in the Request for Protection of Legality

The Request alleges that there has been a substantial violation of the criminal procedure, specifically under item (8) of Article 403(1) of the KCCP, in that the District Court judgment was based on inadmissible evidence. The evidence in question consists of the prior statements of witness **A.K.** who should have been treated as a "cooperative witness", rather than a regular "witness", in both the first and second trials before the District Court. For this reason, the Request submits that all of his prior statements are inadmissible and should have been separated from the case file.

The Defence proposes that the Supreme Court either modify the final judgment and acquit **I.G.** since it has not been proven that the defendant committed the criminal offence, or quash the District Court and Supreme Court judgments and return the case for retrial.

B. OSPK Reply to the Request

The OSPK filed a Reply on 06 June 2011 proposing that the Request be partially granted by modifying the enacting clause of the Supreme Court Judgment by removing the reference to Article 147 of the Fourth Geneva Convention. The Reply further proposes that the remainder of the Request is rejected as unfounded, as **A.K.** rightly held the status of a regular "witness" during the retrial due to the termination of the criminal investigation against him filed by the Public Prosecutor on 15 October 2009. Further, there were no references made to the prior statements of **A.K.** dated 17 December 2002 and 11 August 2005 which had been declared inadmissible by the District Court and separated from the case file. Only the prior statements of 30 January 2006 and 16 May 2007, which are admissible evidence, were considered during the retrial.

⁵ Indictment PP. nr. 36/2006 filed by UNMIK Prosecutor Robert L. Dean on 08 February 2007, as confirmed by Ruling PP. nr. 36/2006 of the District Court of Peja/Pec on 23 March 2007.

C. Supreme Court Findings

1. *Permissibility of the Request*

The Request for Protection of Legality was timely filed by Defence Counsel **M.H.** and alleges a substantial violation of the criminal procedure pursuant to Article 451(1) item (2) of the KCCP. Therefore the Request is permissible.

2. *Admissibility of the Prior Statements of **A.K.***

As was sufficiently and clearly reasoned by the Supreme Court in its first Appeal Judgment dated 02 June 2009, the status of **A.K.** during the initial trial was as a “cooperative witness” despite the omission of the formal legal procedure to establish such status. In its Judgment, the Supreme Court also clearly specified why the prior statements of **A.K.** were not rendered inadmissible due to this error, but must be considered by the District Court in the context of statements of a cooperative witness subject to Article 157(4) of the KCCP. It was for this reason that the District Court judgment P. nr. 537/2007 was annulled and the case returned for retrial.

Prior to the commencement of the retrial, on 15 October 2009, the Public Prosecutor terminated the criminal investigation against **A.K.** Therefore, during the retrial he held the status of a regular “witness” and not as a “cooperative witness”. This fact was highlighted in both the District Court Judgment (P. nr. 329/2009 at page 32-33) and the Supreme Court Appeal Judgment (Ap.-Kz. nr.108/2010 at page 5).

During the course of the retrial, two of the prior statements of **A.K.** – dated 17 December 2002 and 11 August 2005 – were ruled inadmissible by the District Court and separated from the case file. Neither of these statements was considered by the District Court in its judgment. The prior statement of **A.K.** given to the Public Prosecutor on 30 January 2006 and his prior testimony during the initial trial before the District Court on 16 May 2007 thus remained admissible evidence, to be considered in light of his status as a suspect and cooperative witness at the times the statements were made. This is clearly established in both the District Court Judgment (P. nr. 329/2009 at page 33) and the Supreme Court Appeal Judgment (Ap.-Kz. nr.108/2010 at page 5).

Thus, there is no merit to the argument presented in the Petition for Protection of Legality that the statements of 30 January 2006 or 16 May 2007 should be declared inadmissible. Nor is there any ambiguity in the District Court’s use of the admissible statements as alleged in the Petition. Therefore the Supreme Court finds that there has been no violation of Article 403(1) item (8) as read with Article 451(1) item (2) of the KCCP.

3. *Use of **A.K.**’s Prior Statements*

Article 157(4) of the KCCP prescribes that the court shall not find any person guilty based solely on the evidence of testimony given by a cooperative witness. As already explained, **A.K.**’s statements on 30 January 2006 and 16 May 2007 were

admissible and when testifying during the retrial, he held the status of an ordinary witness.

It is clear from the District Court verdict that its finding of guilt was based not solely on A.K.'s statements, but on the totality of the evidence which included corroborating statements of witnesses H.B., C.K., A.U., D.H., H.V., and Z.H., as well as defendant I.G.'s own statements and admissions.⁶ The Supreme Court finds that A.K.'s statements and testimony were considered correctly by the District Court, and were not the sole basis for the finding of guilt. Therefore, there has been no violation of Article 157(4) of the KCCP.

4. *Determination of the Factual Situation*

A majority of the pages in the defendant's Request is dedicated to a reconstruction of the factual situation. A claim of erroneous or incomplete determination of the factual situation may not be the basis for a Request for Protection of Legality.⁷ However, Article 458 of the KCCP requires the Supreme Court to review whether "considerable doubt" arises as to the accuracy of the factual determination of the challenged judgment.

Upon review of the case file and the Judgment, the Supreme Court concludes that considerable doubt does not arise as to the determination of the factual situation by the District Court.

5. *OSPK's Proposal to Modify the Enacting Clause*

In its reply, the OSPK proposes that the Supreme Court modify the enacting clause of the Judgment by removing the reference to Article 147 of the Fourth Geneva Convention because the article applies to grave breaches in the case of an *international* armed conflict. Such an amendment would amount to a requalification of the criminal offence, which is beyond the Supreme Court's scope of review in deciding upon a Request for Protection of Legality.

The Supreme Court notes that the reference to Article 147 appears only once throughout the District Court judgment, in the enacting clause, and its inclusion or deletion is of no consequence. Should its citation in the enacting clause be the result of a technical error, it falls to the Presiding Judge to issue a Ruling on corrections pursuant to Article 397 of the KCCP.

Additionally, the only party who filed a request of protection of legality in the present case is the defendant himself; the request of the Prosecutor is introduced in a reply. In application of Article 455 of the KCCP ('the Supreme Court of Kosovo shall confine itself to examining those violations of law that the requesting party alleges in his or her request'), the lamented violation can not be taken in consideration.

⁶ See pp. 6-17, 20-31 of judgment P. nr. 329/2009.

⁷ Article 451(2) of the KCCP.

II. Conclusion

In light of all the above, and pursuant to Article 456 of the KCCP, the Supreme Court concludes that the Request for Protection of Legality is ungrounded and thereby rejected.


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Prepared in English, an authorized language.

Presiding Judge



Francesco Florit

Panel Member



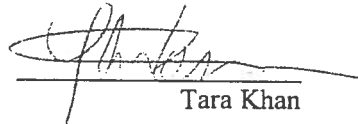
Horst Proetel

Panel Member




Salih Toplica

Legal Officer



Tara Khan

Panel Member



Emine Mustafa

Panel Member



Nazmije Ibrahim