SUPREME COURT of KOSOVO

Supreme Court of Kosovo
Ap.-Kz. No. 312/2012
Prishtinë/Priština
31 August 2012

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 31 August 2012 in the Supreme Court building in a panel composed of
EULEX Judge Gerrit-Marc Sprenger as Presiding Judge,
EULEX Judge Dr. Horst Proetel and
Kosovo Supreme Court Judges Nesrin Lushta,
Marije Ademi and
Salih Toplica as panel members
And with EULEX Legal Officer Holger Engelmann as Court Recorder,

Defense Counsel Av. N[redacted] for the defendant A[redacted]
Defense Counsels Av. N[redacted] and H[redacted] for the defendant V[redacted]
Defense Counsel Av. A[redacted] for the defendant D[redacted],
Defense Counsel Av. Z[redacted] for the defendant A[redacted]

In the criminal case number AP-KZ 312/2012 against the defendants:

A[redacted], born on [redacted] in the village of [redacted], Municipality of Gjakove/Djakovica, Kosovo Albanian, last residence in the village of [redacted] father's name [redacted], mother's maiden name [redacted] secondary school education, average economic status, single, in detention on remand since 09 April 2010;

V[redacted] nickname V[redacted] born on 04 October 1974 in the village of [redacted] Municipality of Gjakove/Djakovica, Kosovo Albanian, last residence in the village of [redacted], father's name [redacted], mother's maiden name [redacted] waiter and cook, completed cooking school in Austria, average economic status, married, father of three children, arrested on 08 April 2010 and in detention on remand since 08 April 2010;

D[redacted], born on [redacted] in the village of [redacted] Municipality of Gjakove/Djakovica, Kosovo Albanian, last residence in the village of [redacted] father's name [redacted] mother's maiden name [redacted] construction worker, secondary

school education, average economic status, single, in detention on remand since 09 April 2010;

A[redacted] V[redacted], born on [redacted] in [redacted], last residence in [redacted], Hungary, father's name [redacted] mother's maiden name [redacted] secondary school education, average economic status, divorced, one daughter, in detention on remand since 07 April 2010;

In accordance to the Verdict of the first instance District Court of Prishtine/Pristina in the case no. P. Nr. 252/2010 dated 05 August 2011 and registered with the Registry of the District Court of Prishtine/Pristina on the same day, **the defendants were found guilty of the following criminal offenses:**

A[redacted] S[redacted], A[redacted] V[redacted] D[redacted] S[redacted] and V[redacted] D[redacted] were **found guilty** of the criminal offense of **Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances in co-perpetration**, contrary to Article 23 and Article 229 paragraph 4 (1) in conjunction with paragraph 2 of the CCK, because on 07 April 2010, in the territory of Kosovo, acting as members of a group and in co-perpetration among them, A[redacted] S[redacted] D[redacted] S[redacted] and V[redacted] D[redacted] as the persons who had the material possession of the narcotic substance, V[redacted] D[redacted] also as the person who contacted A[redacted] V[redacted] the individual who was supposed to transport abroad for the group the narcotic substance, possessed and transported with the intent that it shall be distributed, sold or offered for sale outside Kosovo 89 kg and 417.78 grams of narcotic substance (marihuana) containing tetrahydrocannabinol (THC);

A[redacted] S[redacted] was **additionally found guilty** of the criminal offense of **Unauthorized Ownership, Control, Possession or Use of Weapons** contrary to Article 328 paragraph 2 of the CCK, because for an undetermined period of time but surely until 08.04.2010, in the village of [redacted] possessed the following weapons and ammunitions without a valid authorization from a competent institution: an automatic rifle AK-47 of caliber 7,62 x 39 mm with serial number 057826-88, three magazines and 47 bullets of caliber 7,62 mm;

V[redacted] D[redacted] was **additionally found guilty** of the criminal offense of **Unauthorized Ownership, Control, Possession or Use of Weapons** contrary to Article 328 paragraph 2 of the CCK, because for an undetermined period of time but surely until 08.04.2010, in the village of [redacted] possessed the following weapons and ammunitions without a valid authorization from a competent institution: one pistol 'Ekol Special 99' of 9 x 17 mm, with the engraving 'P. Beretta', with serial number EV8121338, one automatic pistol 'Scorpion' of caliber 7,65 x 17 mm, with serial number [redacted] bullets of caliber 7,62 mm, 14 bullets of caliber 7,65 mm, 6 bullets of caliber 6,35 mm.

And were convicted as follows:

The defendant A[redacted] S[redacted] was sentenced for the criminal offense of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances in co-

perpetration, contrary to Article 23 and Article 229 paragraph 4 (1) in conjunction with paragraph 2 of the CCK to six (6) years and six (6) months of imprisonment and a fine of 10.000 Euros and for the criminal offense of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 paragraph 2 of the CCK to one (1) year and six (6) months of imprisonment. Pursuant to Article 71 paragraphs 1 and 2 of the CCK an aggregate punishment of seven (7) years of imprisonment and a fine of 10.000 Euros was determined against him.

The defendant V[redacted] D[redacted] was sentenced for the criminal offense of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances in co-perpetration, contrary to Article 23 and Article 229 paragraph 4 (1) in conjunction with paragraph 2 of the CCK to six (6) years of imprisonment and a fine of 9.500 Euros and for the criminal offense of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 paragraph 2 of the CCK to one (1) year of imprisonment. Pursuant to Article 71 paragraphs 1 and 2 of the CCK an aggregate punishment of six (6) years and three (3) months of imprisonment and a fine of 9.500 Euros was determined against him.

The defendant D[redacted] S[redacted] was sentenced for the criminal offense of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances in co-perpetration, contrary to Article 23 and Article 229 paragraph 4 (1) in conjunction with paragraph 2 of the CCK to five (5) years of imprisonment and a fine of 8.000 Euros.

The defendant A[redacted] V[redacted] was sentenced for the criminal offense of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances in co-perpetration, contrary to Article 23 and Article 229 paragraph 4 (1) in conjunction with paragraph 2 of the CCK to four (4) years and six (6) months of imprisonment and a fine of 7.000 Euros.

The narcotic substance, weapons and ammunition were confiscated pursuant to Articles 54, 60, 229 paragraph 5 and 328 paragraph 5 of the CCK, whilst the time spent in detention on remand from 08 April 2010 until 05 August 2011 was set to be credited against the punishment pursuant to Article 391 paragraph 1 sub-paragraph 5 of the CCK and the defendants were obliged to reimburse costs of the criminal proceedings with exception of the costs for interpretation and translation.

All four defendants were acquitted from the charges regarding the criminal offense of Organized Crime pursuant to Article 274 paragraph 3 of the CCK.

The Defense Counsels of the accused timely filed their appeals. The appeal of the Defense Counsel of defendant A[redacted] S[redacted] Av. N[redacted] Thaqi was filed on 14 February 2012, the appeal of the Defense Counsel of defendant Vilson D[redacted], Av. Nike S[redacted] was filed on 3 February 2012 and the one of Av. H[redacted] Millaku was filed on 22 May 2012, whilst the appeal of the Defense Counsel of defendant D[redacted] S[redacted], Av. A[redacted] A[redacted] was filed on 13 February 2012 and the one of the Defense Counsel of defendant

A[redacted] V[redacted] Av. Z[redacted] J[redacted] was filed on 19 March 2012. All appeals on behalf of the four defendants asserted that the Verdict contains essential violations of the criminal procedure, erroneous and incomplete establishment of the factual state, violation of the criminal code and that the punishment imposed upon the accused was to be challenged. In all cases it was proposed to either change the challenged Verdict as to acquit the defendants from all charges, or to quash the Verdict and return the case to the First Instance Court for re-trial as well as to terminate the detention of the defendant A[redacted] V[redacted].

The Office of Special Prosecutor of Kosovo (SPRK) has timely filed an appeal against the first instance Judgment on 13 February 2012 and asserted violation of the Criminal Code due to the acquittal of four defendants from the charges for Organized Crime pursuant to Article 274 of the CCK and a much too lenient punishment.

The Office of the State Prosecutor of Kosovo (OSPK), with a response dated 26 July 2012 and registered with the Registry of the Supreme Court of Kosovo on 30 July 2012 fully supported the appeal of the SPRK and proposed to have it approved whereas the appeals of the Defense should be rejected as unfounded.

Based on the written Verdict in case P, Nr. 252/2010 of the District Court of Prishtine/Pristina dated 05 August 2011, the submitted written appeals of the respective Defense Counsels on behalf of the defendants, the relevant file records and the oral submissions of the parties during the hearing session on 31 August 2012, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 31 August 2012, hereby issues the following:

JUDGMENT

The appeals of the Defense Counsels filed on behalf of the defendants A[redacted] S[redacted], V[redacted] D[redacted] D[redacted] S[redacted] and A[redacted] V[redacted] as well as the appeal filed by the Special Prosecutor of Kosovo against the Judgment P. No. 252/2010 of the District Court of Prishtinë/Priština, dated 5 August 2011, are REJECTED AS UNGROUNDED.

The aforementioned Judgment of the court of first instance is *EX-OFFICIO* MODIFIED as follows:

The criminal offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances, the defendants A[redacted] S[redacted], V[redacted] D[redacted] D[redacted] S[redacted] and A[redacted] V[redacted] were found guilty of, is re-qualified according to Article 229 paragraph 4 item 1 in conjunction with paragraph 2 of the same Article of the CCK.

Detention on remand against the defendants is upheld.

REASONING

Procedural History

After the defendants A[redacted] S[redacted], V[redacted] D[redacted], D[redacted] S[redacted] and A[redacted] V[redacted] were arrested on 08 April 2010 based upon police investigations and kept in detention on remand since 09 April 2010, the SPRK on the 26 August 2010 filed an Indictment with the District Court of Prishtine/Pristina (PPS no. 39/2010) against the aforementioned four defendants and charged all four of them with the criminal acts of Organized Crime pursuant to Articles 274 paragraph 3 of the CCK and Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances in co-perpetration, contrary to Article 23 and Article 229 paragraph 4 (1) in conjunction with paragraph 2 of the CCK and in addition A[redacted] S[redacted] and V[redacted] D[redacted] with Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 paragraph 2 of the CCK as elaborated before.

On 20 October 2010 the Confirmation Judge confirmed the Indictment in its entirety by ruling KA no. 220/10.

The Main Trial commenced in front of the District Court Prishtine/Pristina through altogether 12 sessions on the 08 and 13 April, 18 and 26 May, 21, 22 and 23 June, 11 and 15 July, 03, 04 and 05 August 2011, when the latter the challenged Judgment was pronounced.

The Court examined the defendants A[redacted] S[redacted], V[redacted] D[redacted] D[redacted] S[redacted] and A[redacted] VARGA on 21, 22 and 23 June 2011 and interrogated the witnesses H[redacted] Terdevci (13 April 2011) and K[redacted] G[redacted] (13 and 18 April 2011), A[redacted] and B[redacted] Asllani (26 May 2011), S[redacted] N[redacted] and F[redacted] K[redacted] (03 August 2011) and S[redacted] Bogujevci (04 August 2011).

Numerous pieces of evidence were read into the minutes as follows: report KP DKKO cross border case Vesa no. 2010-DKKO-005 dated 09 April 2010 of KP Officer A[redacted] A[redacted] Official Memorandum Ref. no. 2010-DKKO-005 dated 12 February 2010 of KP Officer S[redacted] H[redacted] report from the Directorate of Forensics, ref.no. 2010-DKKO-005, file no. 2010-009 VN dated 09 April 2010 of KP Officer H[redacted] B[redacted] on the search conducted at Merdare border point on 07 April 2010 against the vehicle 'Renault' van as driven by the defendant A[redacted] V[redacted] photo album ref. no. 2010-DKKO-005, file no. 2010-009 VN dated 07-08 April 2010 and prepared by KP Officer H[redacted] B[redacted] on the search at Merdare border point on 07 April 2010; Official Memorandum ref.no. 2010-DKKO-005 dated 07 April 2010 and prepared by KP Officer K[redacted] C[redacted] on the operation at Merdare border point on 07 April 2010, together with three pictures; report from the Directorate of Forensics, ref. no. 2010-DKKO-005, file no. 2010-009 VN dated 09 April 2010 of KP Officer H[redacted] B[redacted] on the search conducted at Merdare border point on 07 April 2010 with photo album; record of search of residence at F[redacted] S[redacted] house, ref. no. 2010-DKKP-005 dated 08 April 2010, with record of

items confiscated and note ref. no. 2010-DKKO-005 dated 08 April 2010; record of search of residence at [redacted] house, ref. no. 2010-DKKP-005 dated 08 April 2010, with record of items confiscated; Kosovo Police report ref. no. 2010-DKKO-005 regarding [redacted] and his arrest on 08 April 2010 at 10:00 hrs; note ref. no. 2010-DKKO-005 dated 08 April 2010 on confiscated items; note ref. no. 2010-DKKO-005, dated 07 April 2010, on confiscated items of [redacted] Kosovo Police Official Memorandum, report of control, ref. no. DKKO-NJHF 079/2010 dated 08 April 2010; pictures of the items found during the search of [redacted] house; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005 on ballistic report dated 08 April 2010, report of KP Officer ref. no. 2010-DKKO-005 dated 08 April 2010 and pictures; report of KP Officer ref. no. 2010-DKKO-005 dated 08 April 2010; documents regarding the arrest of [redacted] and [redacted] ref. no. 2010-DKKO-005 dated 08 April 2010; documents regarding the arrest of [redacted] ref. no. 2010-DKKO-005 and confiscated items, dated 07 April 2010; minutes of Kosovo Police regarding [redacted] and [redacted] all ref. no. 2010-DKKO-005, dated 08 April 2010; minutes of Kosovo Police regarding [redacted], ref. no. 2010-DKKO-005, dated 09 April 2010; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005 on ballistic report dated 26 April 2010; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005, case [redacted] dated 26 April 2010, report on examination of telephones; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005 dated 26 April 2010; report on analysis of narcotic substances; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005, case [redacted] dated 09 April 2009 (should read 2010), 15-day report on interception of telecommunication on phone number 044-929 991 for the period 23 March until 08 April 2010; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005, case [redacted] dated 04 May 2010, report on extraction of SMS on telephone number 049-126 111; material filed by Defense Counsel [redacted] for defendant [redacted] to SPRK regarding [redacted] vehicle registration, dated 13 May 2010; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005, case Vesa, dated 08 March 2010 (might be wrong date, should read 08 May 2010); report on investigation; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005, case Vesa, dated 22 April 2009 (should read 2010), 15-day report on interception of telecommunication on phone number 049-126 111 for the period 06 until 22 April 2010 and transcriptions of interceptions; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005, case [redacted] dated 12 February 2009 (should read 2010), 15-day report on interception of telecommunication on phone number 044-929 991 for the period 23 January until 06 February 2010; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005, case [redacted] dated 22 February 2009 (should read 2010), 15-day report on interception of telecommunication on phone number 044-929 991 for the period 07 until 21 February 2010; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005, case [redacted] dated 25 April 2009 (should read 2010), report on data extracted from phone number 049-126 111 for the period 06 until 22 April 2010 with 82 pages of telephone numbers and data attached (in English language); DVD with word version of the data extracted from phone number 049-126 111, ref. no. 914-2 dated 11 May 2010; report ref. no. 2010-DKKO-005, lab no. 2010-0871, ref. no. GJPP no. 80/2010, dated 19 May 2010, report on ballistics examination on Beretta gun serial no. EV8121338; automatic Scorpion no. 19336, automatic rifle AK-47 no. 057826, gun serial no. 1824 and shot gun serial no. 14061; Kosovo Police Official

Memorandum, ref. no. 2010-DKKO-005, case V[redacted] dated 28 July 2010, supplementary surveillance report; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005, case Vesa, dated 06 August 2010, supplementary report; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005, case V[redacted] dated 12 August 2010, report regarding the examination of electronic equipment of the four defendants as per SIM cards and lap tops; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005, ref. no. 2010-TIFK-024, dated 21 June 2010, evidence report on Nokia cell phones; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005, ref. no. 2010-TIFK-024, dated 21 June and 14 July 2010, evidence final report regarding confiscated items from defendant A[redacted] V[redacted]; report ref. no. 2010-DKKO-005, lab no. 2010-0871, case no. GJPP No. 80/2010, dated 19 July 2010, forensic report on drugs; Kosovo Police Official Memorandum, ref. no. 2010-DKKO-005, order to return items (single barrel hunting rifle serial no. 14061, owned by A[redacted] D[redacted] one rifle serial no. 1824, owned by G[redacted] D[redacted] returned to their father X[redacted] D[redacted]; Official memorandum, ref. no. 2010-DKKO-005, case V[redacted] dated 09 April 2009 (should read 2010) on the telephone number 044-929 991 of A[redacted] S[redacted] from 23 March until 08 April 2010 and transcripts of telecommunications.

Based on its findings, on 05 August 2011, the District Court announced the challenged Judgment and found the defendants guilty of the criminal offences listed above. Consequently, the Court imposed on the defendants the punishments as also specified above.

The Defense Counsels of the accused timely filed their appeals as outlined before and asserted that the Verdict contains essential violations of the criminal procedure, erroneous and incomplete establishment of the factual state, violation of the criminal code and that the punishment imposed upon the accused was to be challenged. In all cases it was proposed to either change the challenged Verdict as to acquit the defendants from all charges, or to quash the Verdict and return the case to the First Instance Court for re-trial as well as to terminate the detention of the defendant A[redacted] V[redacted]

The Office of Special Prosecutor of Kosovo (SPRK) has timely filed an appeal against the first instance Judgment as elaborated above and asserted violation of the Criminal Code due to the acquittal of four defendants from the charges for Organized Crime pursuant to Article 274 of the CCK and a much too lenient punishment.

The Office of the State Prosecutor of Kosovo (OSPK), with a response dated 26 July 2012 and registered with the Registry of the Supreme Court of Kosovo on 30 July 2012 fully supported the appeal of the SPRK and proposed to have it approved whereas the appeals of the Defense should be rejected as unfounded, also as elaborated before.

On 31 August 2010, the Supreme Court of Kosovo held a session pursuant to Article 410 of the KCCP.

The Defense Counsels confirmed their submissions and requests.

FINDINGS OF THE COURT

A. Substantial violation of the provisions of the Criminal Procedure

The Defense has challenged the 1st Instance Judgment for alleged substantial violation of the provisions of the criminal procedure, since the enacting clause would be inconsistent in itself and with the reasoning. Moreover, the reasoning of the Judgment as such would be in contradiction with the material facts and personal proves administered during the court procedure. Thus, Article 403 paragraph 1 items 12 and 8, paragraphs 2 and 3 of the KCCP would be violated.

As to the defendant V[redacted] D[redacted] the Court had erroneously based its guilty find upon movements of the defendant, which in fact are not sufficient to incriminate him at all. Moreover, the *actus rea* of the defendant had not been verified as requested by the law. Last but not least the Judgment would not consider certain facts in favor of the defendant, as there is i.e. the fact that there are uncertainties regarding the number plates of the observed Mercedes car that was used on the critical day.
As to the defendant D[redacted] S[redacted] it was challenged that the Court had not objectively assessed the testimonies of the witnesses and in particular of H[redacted] Terdevci, Kadri Gashi, Ali Beka, B[redacted] A[redacted] A[redacted] A[redacted] S[redacted] N[redacted] Fadil Kamberi and Sabri Bogujevci as given during the Main Trial. The Court had not paid enough attention to the version of events as presented by the defendant. Finally, the decisive facts had not been described in a sufficient manner.
As to the defendant A[redacted] V[redacted] the Defense has challenged that the Judgment regarding the guilty find for Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances in co-perpetration, contrary to Article 23 and Article 229 paragraph 4 (1) in conjunction with paragraph 2 of the CCK was based not only upon inconsistent witness statements of the interrogated police officers, but also upon telephone interceptions which had not been approved by the competent judge or which would not show court stamps as provided by law. Despite that the challenged Judgment would lack reasons on decisive facts; the Court had not thoroughly assessed the versions of events as presented by the Defense.
As to the defendant A[redacted] S[redacted] it was stressed that allegedly the challenged Judgment would not only be unclear, but also would lack proper reasoning and that it's enacting clause would be in contradiction with the reasoning provided. Moreover, the Judgment would not be based upon the facts established in the Main Trial, since the involvement of the defendant in Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances was objected by the defendant and other persons. Moreover, the Judgment would be based upon inadmissible evidence, since SMS messages and telephone interceptions had been obtained in an unlawful manner and in particular no explanation was given to the Defense, why the respective Court Order GJPP No. 36/10, dated 23 January 2010 on telephone interception between 23 January and 06 February 2010 was not in the case file and not accessible to the Defense before it was handed over by the Prosecutor during the Main Trial session.

I. ALLEGED INCONSISTENCY OF THE CHALLENGED JUDGMENT AS TO IT'S ENACTING CLAUSE AND REASONING

The Supreme Court finds that no inconsistency of either the enacting clause internally or the with the reasoning of the challenged Judgment can be established in the case at hand.

1. Internal consistency of the complete enacting clause:

The enacting clause of the 1st Instance Judgment contains all elements as required by Article 396 paragraphs 3 and 4 as read with Article 233 paragraph 1 and Article 391 of the KCCP. It reflects not only all relevant personal data of the defendants, but also clearly describes the criminal acts which the defendants have been found guilty for together with facts and circumstances indicating the criminal nature of the acts committed and relevant for the application of the referred provisions of the criminal law, everything as required by Article 391 paragraph 1 item 1 of the KCCP. The latter applies to the guilty finds of all four defendants for Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances in co-perpetration, contrary to Article 23 and Article 229 paragraph 4 (1) in conjunction with paragraph 2 of the CCK as well as to the individual guilty finds of the defendants A[redacted] S[redacted] and V[redacted] D[redacted] for Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 paragraph 2 of the CCK, as outlined in the enacting clause of the challenged Judgment *(p.2 and 3 of its English version)*.

2. The decision on partial acquittal of the defendants:

As to the acquittal of all four defendants from the charges for Organized Crime as per Article 274 paragraph 3 of the CCK, the Supreme Court notes that indeed the three lines of decision as provided by the enacting clause do not fully meet the requirements of Article 396 paragraph 3 of the KCCP, according to which in case of acquittal *the enacting clause shall contain a description of the act with which he or she was charged.*

However, the challenged Judgment in the relevant part of its enacting clause makes clear reference to the fully confirmed Indictment, which was submitted to all defendants and their respective defense counsels and moreover elaborates on the issue more detailed in its reasoning part *(p. 19 of its English version)*. Since a judgment needs to be read as one whole entire document, the Supreme Court in the case at hand is satisfied that the – as to a minimum – the challenged Judgment is in line with the law also regarding the acquittal decision.

3. Inconsistencies between the enacting clause and the reasoning:

No inconsistencies have been established between the enacting clause and the reasoning of the challenged Judgment, nor have they been substantiated by any of the appeals.

4. Inconsistencies of the reasoning:

As much as alleged inconsistencies of the reasoning are asserted, the Supreme Court finds that the reasoning of the 1st Instance Judgment – although made up in a merely unusual manner and thus difficult to follow – thoroughly assesses and analyzes the evidence presented and fully reflects all the evidence presented to the Main Trial panel.

a. Alleged wrong or incomplete assessment of evidence presented to the Main Trial panel:

Although the assessment of evidence is in the first place part of a possible erroneous and incomplete determination of facts, the issue may have already impact on a proper and consistent reasoning as challenged in the case at hand.

However, the Supreme Court finds that the District Court has thoroughly assessed all witness statements as well as other evidence as available in the case file and that the Judgment – notwithstanding its unusual format – contains both individual and general assessment of presented evidence.

In particular as to the charges on Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances in co-perpetration, contrary to Article 23 and Article 229 paragraph 4 (1) in conjunction with paragraph 2 of the CCK (as well as regarding the charges on Organized Crime pursuant to Article 274 paragraph 3 of the CCK), the District Court has not only heard all relevant witnesses, as there are in particular H[redacted] T[redacted] K[redacted] C[redacted] A[redacted] B[redacted] E[redacted] A[redacted] N[redacted], F[redacted] K[redacted] and S[redacted]. The Court has interpreted the witness statements in relation to other corroborating evidence, as there are the SMS messages sent between the defendants as well as the results of telephone interception.

The District Court is not obliged to preferably believe one group of witnesses to the detriment of the other but is free to assess the evidence presented and draw its own conclusions in regard to the credibility of witnesses. The first instance court has considered this question sufficiently and has arrived at a comprehensible and reproducible conclusion.

In difference to what the Defense appeals allege, the District Court has very thoroughly assessed the versions of the relevant events as described by the defendants *(p.19 of the English version)*, but has come to the conclusion that these alternative versions are not reliable and thus not valid to effectively challenge the evidence as presented by the Prosecutor. Although the final result as presented at p.19 of the English Judgment is quite isolated, the 1st Instance Court has given a proper reasoning as to why they have found the defendants' versions lacking credibility, as it can be read up at p.19 of the English Judgment as well.

b. Alleged insufficiency regarding description of decisive facts:

As much as – in a quite unsubstantiated manner – an alleged insufficiency regarding description of decisive facts in the course of the reasoning was asserted, reference is made to what was stated before under point I.1. of this Judgment.

II. ALLEGED INADMISSIBILITY OF SMS AND TELEPHONE INTERCEPTION

The Defense Counsels particularly of the defendants A[redacted] V[redacted] and A[redacted] S[redacted] have stressed that the results of SMS and telephone interception are inadmissible evidence, since measures had not been approved by the competent judge respectively would lack needed court stamps as provided for by law.

The Supreme Court finds that the allegations are without merits. Checking through all the orders for initiation of covert measures and their respective extensions, the Supreme Court has found that the orders for covert photographic or video surveillance in public places have been issued by the Public Prosecutor and thus in line with Article 258 paragraph 1 item 1 of the KCCP, whilst the orders for on telephone interception have been issued by the Pre-Trial Judge, as requested by Article 258 paragraph 2 item 4 of the KCCP.

It does not illuminate, why the Pre-Trial Judge should not have been the competent judge to approve the respective orders, as challenged by the Defense. In particular the lacking of court stamps in some Albanian version of such document as stressed by the Defense does not harm the validity of the orders, since they contain the signature of the competent Judge.

As to the issue raised by the Defense Counsel of defendant A[redacted] S[redacted], Av. N[redacted] T[redacted] that allegedly the District Court order GJPP No. 36/10 dated 23 January 2010 on telephone interception between 23 January and 06 February 2010 was not accessible to the Defense as until the session on 08 April 2012, the Supreme Court makes full reference to what the District Court has already decided in this regard. No substantial violation of the provisions of the criminal procedure can be established in this way.

After the Presiding Judge of the District Court panel has recommended to the Defense in the session on 08 April 2012 to ask for a copy of the document and after the Defense obviously has received such a copy upon his request during the session on 13 April 2012 *(Main Trial minutes from 13 April 2012, p.3)*, the District Court has decided in the session on 13 April 2012 as well and made clear that the wrong date of 2009 as contained in the challenged interception orders is obviously a typing mistake.

B. Erroneous and incomplete determination of the factual situation

The Defense of all four defendants has challenged that the 1st Instance Court had not properly determined the facts. The Court had established their guilt regarding the criminal offense of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances; although the defendant had denied that they ever had been aware of being involved in criminal activities of that kind. In particular the Defense Counsel of the defendant A[redacted] V[redacted] has stressed again that according to the statements of the defendant the latter was not aware that narcotic substances had be deposited in the trunk of his vehicle, when he crossed Kosovo borders on 07 April 2010, but that he came to Kosovo that day only because he wanted to sell chocolates here.

Reference is made to what was said under point A. of this Judgment. The Supreme Court finds that no erroneous and incomplete determination of facts can be established in the case at hand. The District Court has thoroughly assessed all evidence available as foreseen by the law and drawn its conclusions.

In particular as to the defendant A[redacted] and his version of events on 07 April 2010 it is realized that the aspect of selling chocolates in Kosovo never was in the focus of investigations, neither during the investigation phase nor during the Main Trial. Nevertheless and instead, the 1st Instance Court has elaborated in detail on the telephone conversations between the defendants A[redacted] S[redacted] and V[redacted] D[redacted] and has assessed extensively the question of lack of fuel and of leaking oil with regards to the vehicle driven by the defendant A[redacted] V[redacted] on the respective day. Based upon all the evidence presented and assessed, the Court has concluded that it was A[redacted] V[redacted] the defendants A[redacted] S[redacted] and V[redacted] D[redacted] were communicating about and were aiming to meet with *(challenged Judgment, p.14-17 of the English version)*.

The Supreme Court of Kosovo repeatedly has pointed out that it is neither under the competence of the appeal panel nor possible in fact to replace the findings of the First Instance Court by its own, especially not without taking all the evidence again. For the first time in the case *K[redacted] A[redacted] and D[redacted] Supreme Court of Kosovo, AP-KZ 477/05 dated 25 January 2008, page 20)*, the Supreme Court of Kosovo in this context has pointed out that *"appellate proceedings in the PCPCK rest on principles that is for the trial court to hear, assess and weigh the evidence at trial [...]. Therefore, the appellate court is required to give the trial court a margin of the deference in reaching its factual findings. It should not disturb the trial court's findings to substitute its own, unless the evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of factor where its evaluation has been 'wholly erroneous' "*.

The latter does not apply in the case at hand, which is why there is no room for the Supreme Court to step in and replace the assessment results of the District Court or to order to the 1st Instance on how to assess the evidence available.

C. Substantial violation of the Criminal Law

All Defense Counsels conclude that the aforementioned alleged weaknesses of the 1st Instance Judgment with regards to the criminal procedure and in particular the alleged erroneous and incomplete determination of the factual situation necessarily led to the result that the criminal law was violated by finding the defendants guilty and sentencing them in the way as it was pronounced by the District Court.
Also the SPRK – as supported by the OSPK – has challenged the 1st Instance Judgment for substantial violation of the criminal law, since all four defendants have been acquitted from the charges regarding the criminal offense of Organized Crime as per Article 274 paragraph 3 of the CCK, although all requirements of the law were met and proven by the Prosecutor.

The Supreme Court finds that the assertions of the Defense are without merits, given that all appeals only conclude on substantial violation of the criminal law as a result of alleged violation of the criminal procedure and erroneous and incomplete determination of the facts. Reference is made to what was said in the respective contexts above. Since none of the alleged violations has been established before and no further violation of the criminal law was substantiated by the Defense, there is no need to elaborate deeper onto the issue.

As to the allegations of the SPRK and the OSPK, the Supreme Court agrees with the legal assessment as provided by the District Court *(p.19 of the challenged Judgment in its English version)*. The Court in particular has found that *"the presented evidence is not sufficient in order to found a judgment of culpability as to the existence of the criminal offense of Organized Crime. In fact what the prosecution has proven is that the four defendants [...] acted together in order to import from Albanian and to transport outside Kosovo the narcotic substance.* [...T]*he prosecution did not prove the existence of a structured group existing for a period of time and acting in concert with the aim of committing crimes".*

Definitions on 'organized crime' and 'organized criminal group' as referred to by Article 274 paragraph 3 of the CCK are provided by Article 274 paragraph 7 items 1 and 2 of the CCK, according to which the *"term 'organized crime' means a serious crime committed by a structured group in order to obtain, directly or indirectly, a financial or other material benefit"*, whereas the *"term 'organized criminal group' means a structured group existing for a period of time and acting in concert with the aim of committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit".*

Whilst the Indictment, dated 26 August 2010, as to the charges against all four defendants on alleged Organized Crime pursuant to Article 274 paragraph 3 of the CCK makes reference to telephone conversations between the defendant A[redacted] and a person called B[redacted] H[redacted] on 23 January 2010 and the drug transportation activities of the defendant A[redacted] on 06/07 April 2010, which are subject to the challenged Judgment as well, the District Court has thoroughly assessed the movements of all

defendants on the 07 April 2010 (p.8-9 of the challenged Judgment in its English version) and extensively considered the – quite cryptic - telephone and SMS interception results of the mobile phones of the defendants as provided in the case file. Nevertheless the Court has not been able to prove anything else than that on the 06/07 April 2010, i.e. on a single occasion, an amount of 89 kg and 417,78 grams of marihuana have been trafficked by the defendants. In particular, no sufficient proof was brought for the existence of an organized group with a clear chain of command and division of tasks, existing for a measurable time period with aim of committing serious crimes, as required by the law.

Therefore, the Supreme Court finds that the *in dubio pro reo* decision of the District Court regarding the charges on Organized Crime is correct and in line with the findings of the Court and with the law.

D. Qualification of the criminal offence committed

The Supreme Court of Kosovo had *ex-officio* to re-qualify the offence committed by A[redacted] S[redacted], V[redacted] D[redacted] D[redacted] S[redacted] and A[redacted] V[redacted] as per count two of the indictment. The court of first instance had found all four defendants guilty for having committed the criminal offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances in co-perpetration, contrary to Article 23 and Article 229 paragraph 4 sub-paragraph 1 in conjunction with paragraph 2 of the CCK.

However, the qualifying element "...as a member of a group" of Article 229 paragraph 4 sub-paragraph 1 of the CCK already contains the element of co-perpetration and as *lex specialis* for this particular criminal offence takes precedence over the general provision of Article 23 of the CCK. It is not possible to apply both provisions cumulatively since this would amount to a double conviction for the same qualifying circumstance. Consequently, the court had to remove the element of co-perpetration pursuant to Article 23 of the CCK from the convicting part of the enacting clause.

E. Decision on the punishment

Whilst all Defense Counsels are of the opinion that due to the alleged mistakes of the 1st Instance Court and the weaknesses of the challenged Judgment their clients need to be acquitted, the SPRK, as supported by the OSPK, are convinced that the punishment is much too lenient, not only given that the defendants also should have been found guilty for the criminal offense of Organized Crime as per Article 274 paragraph 3 of the CCK, but also having in mind that allegedly the Court had failed to consider aggravating circumstances .

The Supreme Court of Kosovo finds that the decision on the punishment is fair. The First Instance Court in accordance with the framework of possible punishments given by the relevant laws has imposed separate punishments to each of the defendants, A[redacted] S[redacted] V[redacted] D[redacted] D[redacted] S[redacted] and A[redacted] V[redacted] for their respective criminal acts in

accordance with the frames provided by the referred criminal law provisions and under assessment of the weight of contributions and individual guilt regarding the crimes committed. In the cases of A[redacted] S[redacted] and V[redacted] D[redacted] and based on the separate punishments imposed against them, aggregate punishments of altogether seven (7) years of imprisonment in the case of A[redacted] S[redacted] and of six (6) years and three (3) months in case of V[redacted] D[redacted] were imposed according to Article 71, paragraphs 1 and 2, item (2) of the KCCP, whilst in accordance with the law the fines of 10,000 € in the case of Anton SYLA and 9,500 € in the case of V[redacted] imposed are upheld.

The Supreme Court of Kosovo considers that the First Instance Court correctly and completely has taken into consideration all the circumstances that influence in severity of punishment and has fairly evaluated those circumstances. In continuation of what was said regarding possible violations by the 1st Instance Court as alleged by the Defense, no reason can be seen to acquit the defendants or at least lower their punishments. Since the Supreme Court agrees with the assessment of the District Court to acquit the defendants from the charges regarding Organized Crime as per Article 274 of the CCK, at the other side no possibility was seen to increase the punishment as requested by the Prosecution.

The Supreme Court of Kosovo does not find that the legal requalification of the committed offence required a new determination of the punishments. The removal of the legal element of 'co-perpetration' concerned only the correction of a legal mistake. The mentioned general element is already contained in the qualification of Article 229 paragraph 4 sub-paragraph 1 of the KCCP ("...as a member of a group"). The mentioned provision as *lex specialis* takes precedence over the general provision of Article 23 of the KCCP, which cannot apply cumulatively together with the first-mentioned provision. However, the degree of criminal liability remains the same for all defendants.

Taking also into consideration the level of social risk as reached by the commission of the criminal offenses at hand as well as the level of responsibility of the defendants, the punishments are proportionate to the gravity of the offences committed and the respective individual circumstances and degrees of criminal liability established for each of them.

F. Continuation of the detention on remand until the judgment becomes final

The Defense Counsel of A[redacted] V[redacted] in his written appeal and all other Defense Counsels during their closing statements have proposed to release the defendants from Detention on Remand.

The Supreme Court of Kosovo finds that that there is no reason to release the defendants from Detention on Remand, since a grounded suspicion against all four defendants is clearly established by the fact that they have been found guilty by the 1st Instance Court and that the challenged judgment was confirmed by the Supreme Court and considering that the situation on the ground has not changed in any of the cases, so that all detention reasons remain to exist.

For the foregoing reasons the Supreme Court decided as in the enacting clause.

Members of the panel:

Valdete Daka
Supreme Court Judge

Dr. Horst Proetel
EULEX Judge

Nesrin Lushta
Supreme Court Judge

Emine Kaqiku
Supreme Court Judge

Presiding Judge:

Gerrit-Marc Sprenger
EULEX Judge

Recording Clerk

Holger Engelmann
EULEX Legal Officer

SUPREME COURT OF KOSOVO
Ap.-Kž. No. 312/2012
Prishtinë/Priština
31 August 2012

Legal Remedy

Pursuant to Article 430 of the KCCP, no appeal is possible against this Judgment.