

BASIC COURT OF MITROVICA

P.nr. 42/2012

25 March 2013

IN THE NAME OF THE PEOPLE

THE BASIC COURT OF MITROVICA, in the trial panel composed of EULEX Judge Roxana Comsa as Presiding Judge, EULEX Judge Katja Dominik and EULEX Judge Timo Vuojolahti, with EULEX Legal Officer John Gayer as the Recording Officer in the criminal case against:

RB, FT, AC, FA and **LK**, charged under the Public Prosecutor's amended Indictment PP. 117/2011 dated 16 July 2012 and amended on 21 January 2013 and filed with the Registry of the Basic Court of Mitrovica confirmed by the Ruling on Confirmation of Indictment dated 26 July 2012 with co-perpetration of the **Unauthorised purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and analogues** under Articles 23 and 229(4)(1) of the Criminal Code of Kosovo (CCK) or Articles 31 and 273(2) of the Criminal Code of the Republic of Kosovo (CCRK).

After having held the main trial hearing, open to the public, on 21 to 24 January and 28 January 2013 all in the presence of the Accused **RB, FT, AC, FA** and **LK**

their respective Defence Counsel Vehbi Beqiri Estat Gutaj, Abit Asllani, Kadri Osai and Rexhep Kaçaniku, and EULEX Public Prosecutor Nina Grande, after the trial panel's deliberation and voting held on 29 January 2013, pursuant to Articles 363 to 366 of the Criminal Procedure Code of Kosovo (CPC), pronounced in public and in the presence of the Accused, his Defence Counsel and the EULEX Public Prosecutor the following:

JUDGMENT

The Accused

RB

He was held on remand from 18 March 2012 to 17 September 2012 before being placed on house detention until 17 January 2013

And

FT

He has no previous convictions and he was held on remand from 18 March 2012 to 17 September 2012 before being placed with house detention until 17 January 2013.

Are

FOUND GUILTY

Because,

The Accused together and in co-perpetration with at least one other unknown person, have arranged the purchase of 5546.4g (net weight) of marihuana and its transportation from Smrekovnika to Mitrovica with a view to further distribution and dispatch. The Police seized the quantity on 18 March 2012 in Mitrovica.

Hence

The Defendant RB and FT are Guilty of the criminal charge of co-perpetration by a group of the Unauthorised purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and

analogues under Articles 31, 273(2) and 281(1.1) of the CCRK pursuant to Article 3(2) of the CCRK, pursuant to Article 365 of CPC.

The Accused are sentenced:

SENTENCING

RB is sentenced to a fine of 30 euro and imprisonment of 1 year and 6 months in accordance with Articles 74(3.10), 76(1.3), 273(3) and 281(1) of the CCRK.

FT is sentenced to a fine of 20 euro and imprisonment of 1 year in accordance with Articles 74(3.10), 76(1.3), 273(3) and 281(1) of the CCRK.

In accordance with Article 83(1) of the CCRK the period held on detention on remand and in house detention must be included in any calculation of punishment. Both the Accused were held on detention on remand and house detention from 18 March 2012 until 17 January 2013.

The Accused

AC

He is held on
detention on remand since 6 April 2012.

And,

FA

He was on detention on remand from 6 April 2012 to 17 September 2012 before being placed on house detention until 17 January 2013.

Are

FOUND NOT GUILTY

The Defendants AC and FA are Not Guilty and are acquitted of the criminal charge of **co-perpetration by a group of the Unauthorised purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and analogues** under Articles 31, 273(2) and 281(1.1) of the CCRK pursuant to Article 3(2) of the CCRK, pursuant to Article 364(1.3) of CPC.

The Accused

LK

He was on remand detention from 18 March to 11 May 2012, and since been under house detention until 17 January 2013.

Has the,

CHARGE REJECTED

The Defendant **LK** has the criminal charge of **co-perpetration by a group of the Unauthorised purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and analogues** under Articles 31, 273(2) and 281(1.1) of the CCRK pursuant to Article 3(2) of the CCRK rejected, pursuant to Article 363(1.1) of CPC.

COSTS IN CRIMINAL PROCEEDINGS

Pursuant to Article 453(1) and (3) of the CPC, the Accused **RB** and **FT** are liable for 70 euro each for the costs of criminal proceedings.

Pursuant to Article 451(1) of the CPC, the necessary expenses of the Defendants **AC, FT** and **LK** ; and the remuneration and necessary expenditures of his Defence Counsel, as well as the costs of interpretation and translation shall be paid from budget resources.

CONFISCATION

In accordance with Article 69 of the CCRK the following are ordered confiscated:

1. 5546.4g (net) of drugs seized. This shall be destroyed.
2. White Mercedes car (registration 02-197-AG)
3. Black Samsung phone (IMEI 352025/04/978394/2)
4. IPKO SIM for no.049 425 895 (SIM card no 107010520941)
5. White Sony Ericsson phone (IMEI 35791301-704853-2)
6. IPKO SIM for no.049 496 595 (SIM card no 109011667200)
7. Black Nokia phone (IMEI 355956/04/366377/6)

8. VALA SIM for no.044 218 808 (SIM card no 8937701010011760689)
9. Black Nokia phone (IMEI 356841/02/844547/3)
10. Mobtel SIM for no.065 5777 631 (SIM card no 89381030000144638097)
11. Vodafone SIM (SIM card no 60610988028631G01520)
12. VALA SIM (SIM card no 89377010100016521508)
13. Mobtel SIM (SIM card no. 89381030000143222943)

Reasoning

A. Procedural history

1. On 16 July 2011 the District Public Prosecutor of Mitrovica filed an indictment PP.no 117/2011 dated 16 July 2011, which charged the Accused with the unauthorized purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substances under Article 229(2) and (4)(1). On 21 January 2013 the indictment was amended during the main trial to introduce co-perpetration under Article 23 of the CCK and reflect the introduction of the new Criminal Code of the Republic of Kosovo (2012) (Code no 04/L-082) (CCRK), i.e. the reference to Articles 31 and 273(2) of the CCRK.
2. On 13 August 2012 the President of the Assembly of EULEX Judges assigned EULEX Judges to the case in accordance with Article 3.3 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law No. 03/L-053).
3. A main trial was held on 21 to 24, 28 and 29 January 2013 with the judgment announced on 29 January 2013.

B. Competence

4. The offence falls within the Basic Court of Mitrovica's substantive and territorial jurisdiction. The offence of unauthorised purchase, possession, distribution and sale of dangerous narcotics drugs and psychotropic substances and analogues under Article 229(2) and (4)(1) of the CCK now Article 273 of the CCRK is proscribed by the CPC as within the exclusive jurisdiction of the Serious Crimes Department of the Basic Court in the first instance as the offence carries a maximum sentence in excess of 10 years and is considered a serious crime (see Articles 11 and 15(1.21) of the Law on Courts, Law no. 03/L-199; and Articles 21(4) and 22(1.68) of the CPC). As the offence was committed in part in the Mitrovica Municipality, it falls within the territorial jurisdiction of the Basic Court of Mitrovica under Article 29(2) of the CPC.

C. Evidence admitted at trial

5. The listed evidence was considered admissible at the main trial after an assessment of its credibility, relevance and probative value in accordance with Article 260(2) and (3) of the CPC.
6. The following suspect and defendant statements, minutes or reports:
 1. Criminal report dated 19 March 2012,
 2. Officer's report dated 18 March 2012, by KP Officer Mensur Krasniqi (KP no. 7947),
 3. Information report undated, by KP Officer Musli Hoxhaxiku (KP no. 7944),
 4. Minutes of the suspect interview of **FA** dated 18 April 2012,
 5. Suspect interview of **RB** dated 19 March 2012,
 6. Minutes of defendant interview of **FT** dated 2 May 2012,
 7. Suspect interview of **FT** dated 19 March 2012,
 8. Minutes of defendant interview of **RB** dated 2 May 2012,
 9. Minutes of defendant interview of **FA** dated 3 May 2012,
 10. Minutes of defendant interview of **AC** dated 3 May 2012,
 11. Minutes of defendant interview of **LK** dated 3 May 2012,
 12. Suspect interview of **LK** dated 19 March 2012,
 13. Official memo from KP Officer Avni Berisha (KP no 0384) dated 2 April 2012, and
 14. Suspect interview of **AC** dated 8 April 2012.
7. The following investigative orders, measures and reports:
 1. Official memo from Sgt Hekuran Mehmeti dated 12 March 2012,
 2. Order of the District Court of Pristina dated 12 March 2012,
 3. Official memo from KP officer Musli Hoxhaxhiku (KP no 7944) dated 9 March 2012,
 4. Order of the District Court of Pristina dated 7 March 2012,
 5. Official memo from KP officer Mensur Krasniqi (KP no 7947) dated 7 March 2012,
 6. Order of the District Court of Pristina dated 21 February 2012,
 7. Result of interceptions re **RB** (Albanian and English) from 7 to 18 March 2012, and
 8. IPKO phone details dated 7 and 12 March 2012.
8. The following other material and reports:
 1. Copy of **AC** passport,
 2. Certificate of confiscated items from **RB** dated 18 March 2012,
 3. Receipt for the temporary confiscation of items from **AC** dated 8 April 2013,
 4. List of evidences dated 17 [sic] March 2012,
 5. Photo album dated 18 March 2012,
 6. Ruling of the Basic Court of Skopje dated 17 March 2012 on initiation of investigations,
 7. Certificate of confiscation dated March 2012,

8. Notebook entry from **RB** undated (except the second sentence of the hand written note at the bottom of the page),
 9. Kosovo Agency of Forensics, Chemical analysis expertise report dated 2 May 2012 (Forensic Sciences Unit), and
 10. CD of interceptions.
9. During the main trial the following witnesses gave statements:
- NB** on 22 January 2013 (in connection with the details of different investigative activities); and
- SD** on 23 January 2013 (related to the examination of narcotic substances).
10. During the trial the following motions for inadmissibility of evidence were made by the parties and assessed by the Panel:

On 22 January 2013 **FA** put forward a motion to exclude his police interview as inadmissible. It was claimed he had not been read his rights and this was shown by the fact he had not signed the allocated box to confirm this. This was rejected by the Panel on 23 January 2013. The exact location of signatures is not proscribed by the law. The facts around the interview needed to be clear. Both the Defendant and his lawyer had signed the bottom of each page, including where the Defendant's rights are set out. **AC's** lawyer signed the records as well and did not raise any objection to the interview and how it was conducted at the time.

On 23 January 2013 **RB** challenged the admissibility of the notebook entry found on his person when arrested. At the bottom of the note an unidentified police officer had written two sentences. The first stated from whom the paper had been seized while the second speculated about the meaning of the notebook entry. The Panel granted the challenge in part. The notebook entry would be admissible. However, the annotation added by an unidentified police officer was only admissible in so far that it acted as identification for the chain of evidence. The second sentence of the annotation is unattributed speculation and is intrinsically unreliable evidence and so inadmissible under Article 259(2) of the CPC.

D. Assessment of the presented evidence:

11. Due to the drafting of the indictment the Court restricted itself to the events and narcotic shipment on 18 March 2012.

Uncontested facts

12. The seizure of 5.546 net. K.g. of narcotics (cannabis) from the car being used by **RB** on 18 March is uncontested (Criminal dated 19 March 2012; report

Officer's report dated 18 March 2012, by KP Officer Mensur Krasniqi (KP no. 7947); Trial minutes dated 22 January 2013 per **NB** (NB trial) at p10; Kosovo Agency of Forensics, Chemical analysis expertise report dated 2 May 2012 (Forensic Sciences Unit) (Forensic analysis report) at p.2, List of evidences exhibits D1.1 to D1.6; and Photo album pictures nos. 4 to 21).

13. It is also uncontested that the substances seized from **RB** were narcotics (Forensic analysis report; and Trial minutes dated 23 January 2013 per **SD** (SD trial) at p.3).
14. The narcotics seized are prohibited narcotics under Articles 9.1 and 9.2 and Table I of the Law on Narcotic Medicaments, Psycho-Tropes and Precursors (Law No. 02/L-128) (NMPP). And none of the Defendants claimed to hold a valid licence under the NMPP which would authorise any sale, distribution, transportation, possession or use of the narcotics.
15. The supplier of the narcotics was an alleged Albanian (the Albanian) who was transporting and selling the narcotics into Kosovo. **RB** met this individual in Mitrovica at an "auto-larje" (car wash) three weeks before his arrest on 18 March 2012 (Minutes of Defendant interview of **RB** dated 2 May 2012 (RB Defendant) at p.2; and Trial minutes dated 23 January 2013 per **RB** (RB trial) at p.18). Subsequently he conspired with **FT** to purchase narcotics from the Albanian and arranged the transaction (RB trial at p.18; RB Defendant interview at p.3; Minutes of Defendant interview of **FT** dated 2 May 2012 (FD Defendant) at p.3; and trial minutes dated 23 January 2013 per **FT** (FD trial) at p.30).
16. On or before 16 March **FT** with the full knowledge of **RB** arranged to sell the narcotics to a drug dealer named Nenad (Suspect interview of **FT** dated 19 March 2012 (FD Suspect) at p.3 and FD Defendant at p.3).
17. On or before the 16 March 2012 a purchase and delivery of narcotics was arranged between **RB** and the Albanian for 3000 euro (RB trial at p.21). **RB** paid the money at a meeting on the outskirts of Pristina (RB Defendant interview at pp. 2 to 4; RB trial at p.28; and interception reports dated 19 March 2012 for 16 March 2012 at 12:11, 12:12 and 16:47). The narcotics were delivered to **RB** in Smrekovnica by a courier who arrived by car and placed the bags containing the narcotics into the car boot of the vehicle driven by **RB** (a white Mercedes registration 02-197-AG) (RB trial at p.18). **RB** transported the drugs to Viva Fresh supermarket in Mitrovica where he was arrested (RB Defendant at p.3; and RB trial at p.18). **FT** and **LK** were arrested at the ETC supermarket in Mitrovica where they were waiting to meet **RB** (Officer's report dated 18 March 2012).
18. **FA** and **AC** were detained together by police on 6 April 2012 in Prizren.

19. It is uncontested the Defendant **LK** was not involved in any of these offences and the Prosecutor discontinued the prosecution against him before the end of the main trial.

Facts in dispute

The identity of the Albanian

20. The Prosecutions claim **AC** is the “Albanian” narcotics supplier who supplied the narcotics seized in **RB’s** possession. Reference is made to phone numbers believed to be used by **AC**. These numbers were linked to another investigation and a man identified as “Kukse”, an Albanian. The Prosecutor claims **AC** and Kukse are the same person.

21. **AC** claims to have had no contact with **RB**, **FT** or **LK** and has never been to Mitrovica. He denies being Kukse or importing narcotics into Kosovo. He admits knowing **FA** but only on the basis of a single meeting in Prizren and he denies having any business or illegal ties with **FA**.

22. None of the phones seized from **AC** by police correspond to any phone number intercepted by the police. There is no other physical or surveillance evidence to substantiate the Prosecutor’s case that **AC** is the Albanian narcotics supplier with whom **RB** was in contact. Apart from **FA** none of the other co-defendants admitted to having met **AC** before.

23. The Court does note the meeting between **AC** and **RB** witnessed by the police officer **NB** tipped off by telephone intercepts. Officer **NB** claims to have seen **AC** and **RB** meeting near the QMI roundabout on 16 March 2012 (trial NB trial, at p.15). This corresponds to **RB’s** testimony of meeting the Albanian narcotics supplier at a roundabout on the road to Lipjan where the deal for the narcotics was finalised (RB Defendant at p. 2). However, the Court is unable to place significant weight on this evidence sufficient to find it proven. The defendants were only observed on this single occasion, there is no clear evidence to corroborate Officer **NB’s** identification and no contemporaneous or other report recording

these facts before the Court before Officer **NB's** testimony. Although significant, there is no corroboration **AC** and **RB** had any further contact, had been in regular contact or the meeting related to the narcotics shipment on 18 March 2012.

24. The Court does not question Officer **NB's** credibility and standing as a police officer. It is highly suspicious both defendants deny this meeting or knowledge of each other. Taken with other evidence it is not enough to establish **AC** as the narcotics supplier of the shipment of the 18 March 2012. There is insufficient evidence collected during the investigation and presented by the prosecution to prove **AC** is **RB's** Albanian narcotics contact; or **AC** and Kukse are the same person. The telephone interceptions are circumstantial and are insufficient by themselves for a prosecution.

The connections with the Albanian narcotics supplier and the Defendants

25. Only **RB** admits to having contact with the Albanian narcotics supplier. They met three times, initially at the car wash in Mitrovica, secondly at the ETC supermarket in Fushe Kosovo and lastly at a roundabout on the road to Lipjan from Pristina (Defendant **RB** at p.2; and **RB** trial at p.20).
26. Ownership of the following numbers is either accepted by **RB** or officially recorded in the course of the proceedings: 044-218-808, 049-496-595, 049-425-895 (see **RB** Suspect at p.2; **RB** trial at p.17; IPKO phone details dated 12 March 2012 and Certificate of confiscated items from **RB** dated 18 March 2012). **RB** denies ownership of 049 496 595 which the Court rejects because the SIM for this number was confiscated from him on arrest. Based on the Orders of the District Court of Pristina dated 21 February and 7 March 2012 the interceptions also establishes 049-820-521 is linked to **RB**, which he also denies. The same phone used the SIM cards for numbers 049-820-521 and 049-496-595 (IEMI 357913001704853, see the interception reports dated and timed at 8 March 2012, 14:09; 14 March 2012, 16:26, 15 March 2012 15:52 and 15:47; and 16 March 2012, 11:21 and 11:44). The Panel does not believe **RB's** explanation that he trades in phones substantiates or supports his denial. The Panel does not believe it is a coincidence both numbers made contact with 049-428-375. The numbers 049-820-521 and 049-428-375 contacted each other a total of 9 times from 3 to 8 March 2012. The numbers 049-496-595 and 049-428-375 contacted each other a total of 5 times on 12 March 2012. If the SIM had

been sold on with the number memorised it is unlikely an unknown number would have been contacted so many times. After the 12 March the number 049-428-375 is no longer recorded.

27. **FA** denies knowing the Albanian narcotics supplier but admits he transported a Albanian man he knew as “Ardi from Kukës” (Ardi) on 18 March 2012 from Prizren to Vushtrri (Trial minutes dated 24 January 2013 per **FA** (FA trial) at p.17). He admits to knowing Ardi as a regular customer from his job as a taxi driver (FA trial at p.20). He also admits to driving another Albanian who stated Ardi was his friend and who phoned Ardi to confirm Ardi would pay for a trip from Prizren to Vushtrri (Ibid). He also admits to telephone contact with the Albanian.

28. The phone intercepts show a number **FA** used, 049-566-507 (a work number), in contact with a number of the alleged Albanian (049-428-375) on 12 March 2012 (FA Suspect at p.2 and FA trial at p.29). There was contact between these numbers on three occasions (Telephone intercepts dated 12 March 2012 at 22:49, 22:56 and 22:57). This is the only clear link with **RB** who communicated with the Albanian on 049-428-375 from numbers 049-425-895 and 049-965-595 on eight and five occasions respectively. However, the purpose and role of **FA** is not clear.

29. **FA’s** account of two trips from Prizren to Vushtrri with Ardi’s Albanian “friend” raise the issue of transporting narcotics (Suspect interview of **FA** dated 8 April 2012 (Suspect FA) at p. 4 and FA trial at p. 21). However, the dates of these trips are unclear from the testimony and apart from the presence of an Albanian national carrying a bag linked with Ardi, there is no indication these trips involved the transportation of narcotics, let alone the narcotics seized on the 18 March 2013.

30. Overall, the Court found **FA’s** denials and identification of Ardi to be unreliable, lack basic credibility and represents highly evasive testimony. Equally, the prosecution has failed to provide sufficient evidence to prove his connection and involvement with the shipment on 18 March 2012.

31. The Court can only establish as proven the link between the narcotics supplier and **RB**, mainly via his testimony. It is unable to prove a connection with

any other co-defendants and the narcotics supplier for the shipment on the 18 March 2012.

Did FA know he was transporting narcotics?

32. The Defendant pleads ignorance of the cargo his passengers carry. He mentions an unrelated occasion when an Albanian friend of Ardi claimed to be carrying clothes for which he had not paid any customs duties (FA trial at p.22). He identifies two trips with this person, carrying the same bag, but not knowing what it contained (minutes of defendant interview dated 3 May 2012 (FA Defendant) at p. 3). However, no evidence was produced to show or suggest any of these trips were part of an organised drug deal.

33. The Court accepts his explanation about the conduct of customers, where there is no reasonable suspicion of illegal activity a taxi driver is not obliged or entitled to know what a customer is carrying or the contents of their luggage. His account of how customers regularly place their luggage in the boot of his taxi without his assistance or supervision is not unreasonable (FA trial at p.21). The size of the bag used would not raise any suspicion in itself. The narcotics have a strong and distinct smell, however they were well packaged, in a quantity and location in the car which would have made their detection difficult (Forensic analysis report; and Photo album pictures 5, 6 and 9). It is not unreasonable the narcotics may have escaped **FA's** detection.

34. Phone interceptions showed suspicious conversations between **FA** and a man claimed to be **AC**. The Prosecutor claims the conversations are in code and the code refers to the quantity and delivery of narcotics. However, no evidence produced before the Court proved the conversations including **FA** were conducted in code and the code referred to narcotics and the avoidance of detection by the police. The intercepts referred to did not relate to the shipment to **RB** on 18 March 2012 and the Court is unaware of any enforcement action in relation to these occasions which would indicate a correlation between certain code words and narcotics. No intercept where similar words were used relate to the shipment on 18 March 2012 which would allow a clear inference to be drawn. At best the evidence produced is circumstantial.

35. Despite the evasive and questionable testimony of **FA**, there is insufficient evidence to prove he knew or had constructive knowledge to the

necessary level of probability that he was transporting narcotics on 18 March 2012 to satisfy the legal tests for intent.

Summary of proven facts

36. The following facts are proven:

Before 16 March 2012 **RB** met an Albanian narcotics supplier in Mitrovica at an “auto-larje”.

Before 16 March 2012 **RB** was in contact with the Albanian narcotics supplier to arrange a shipment of 6kg of cannabis.

On or before 16 March 2012 **RB** and **FT** agreed to purchase narcotics and sell them onto a drug dealer called Nenad.

On or before 16 March 2012 **RB** and **FT** raised 3000 euro to pay for the narcotics.

On 16 March 2012 **RB** met the narcotics supplier to finalise the shipment for 18 March 2012. On the Pristina to Ferizaj road at QMI he paid the 3000 euro for the shipment.

On 18 March 2012 **RB** took delivery of the shipment from a courier at Smrekovnica village.

On 18 March 2012 **RB** transported the narcotics to Mitrovica to meet **FT**.

On 18 March 2012 **RB**, **FT** and **LK** were arrested at the Viva Fresh and ETC supermarkets. The shipment of 5.546 net kg of narcotics (cannabis) was seized from the car boot of a white Mercedes (registration 02-197-AG) which **RB** had used to transport the narcotics.

On 6 April 2012 **AC** and **FA** were arrested in Prizren on suspicion of the indicted offence.

E. Legal qualification. Criminal Liability and Intent. Sentence imposed.

Law

37. In accordance with Article 3(2) of the CCRK the Court has decided the provisions under the CCRK are the most favourable. In addition the Court is not bound by the legal classification of the offences by the Prosecution (Article 360(2) of the CPC).

Unauthorized production and processing of narcotic drugs, psychotropic substances or analogues

38. The relevant provisions of Article 273 considered by the Court are:

“1. Whoever, without authorization, purchases, possesses with the intent to sell or distribute or offers for sale substances or preparations which have been declared by law to be narcotic drugs,...

2. Whoever, without authorization, distributes, sells, transports, delivers, brokers, dispatches in transit substances or preparations which have been declared by law to be narcotic drugs... with the intent that they shall be distributed, sold or offered for sale...”

39. The Court considers that “to broker” under Article 273(2) of the CCRK can cover a situation where an agreement is reached between two principals, it is not necessary for the activity to involve the perpetrator only as an intermediary in any agreement between two other principals. In English the verb “brokers” means to arrange or negotiate an agreement while the Albanian version of the CCRK refers to “ndërmjetëson” which translates as “mediates”. This means the activity is broader than only that carried out by a broker or intermediary and can involve two principals to an agreement.

40. The Court notes the essential element of an intent to distribute, sell or offer for sale the narcotics.

41. In addition the Court has considered Article 281(1) and (1.1) of the CCRK:

“1. If the criminal offence from Article 273... of this Code is committed in one or more of the following circumstances, the perpetrator shall be punished by a fine and imprisonment of three (3) to fifteen (15) years, if:

1.1 The perpetrator is acting as a member of a group”

A group is further defined as, “... three (3) or more persons.” (Article 120(12) of the CCRK).

42. The Court does not consider all the members of the group have to be identified or tried together in order for there to be a group. In addition the group does not have to be a hierarchical or highly organised body. As in this case, the group can be an informal association that comes together for a one-off activity. Individual members of the group can have different motivations and incentives but still be classified as a group if their efforts contribute towards a single course of offending behaviour. Further, the Court deemed it not necessary that within a “group”, in the sense of Article 281 of the CCRK, each member knows the other and the exact roles of those involved. Defined roles for members are unnecessary and the group does not have to exist for a very long period of time. A group can also have main actors and assistants, as e.g. carriers in drug transports. It is not compulsory that the other members of a group have been accused or even convicted. The reason for the higher punishment for members of a group lies in the danger of acting in a group. Within a group every member has a binding will to commit the criminal offence which makes it difficult for the member to change his mind and to abstain from the commission of the crime. There is regularly the possibility of influencing one member by others. This potential danger exists, when a member doesn’t even know the chief of the group or the other members.

43. Here, there were at least 4 persons involved in the commission of the criminal offence and the roles of the members of the group were sufficiently clear: a supplier, a courier, together with **RB** and **FT** .

44. The Law on Narcotic Medicaments, Psycho-Tropes and Precursors (Law No. 02/L-128) (NMPP) deals with the authorisation of the possession, use and distribution of controlled substances. It is clear that cannabis (also known as marijuana) is prohibited in Kosovo (see Articles 9.1 and 9.2, and Table I of the NMPP. Only natural and legal persons involved in medical and a scientific research, educational or police purposes can obtain a licence to buy, supply or possess cannabis – a Table I classified narcotic (Articles 16.1 and 17.1 of the NMPP). An importer or exporter of cannabis also needs to be licenced and only legal persons can be licenced (Article 19.1 of the NMPP).

45. In so far as intention is concerned this is determined by Article 21 of the CCRK:

“1. A criminal offence may be committed by 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.”

46. The Court can infer intent from the factual circumstances of the case (Article 22 of the CCRK). In order to prove eventual intent the Court considers a very high level of foresight of the prohibited consequence is required but short of a certainty. It should be distinguishable from negligence.

47. As the law states intention can be inferred from the circumstances and evidence in the case. In order for there to be intent there has to be knowledge. The Court considers this includes circumstances where the defendant is wilfully blind – an unacceptable “don’t ask, don’t tell” approach that is easily adopted in contraband cases. The Court notes the adoption of this approach by defendants in criminal cases from other jurisdictions (e.g. *United States v Heredia*, 483 F.3d 913 (9th Cir) (en banc), cert. denied, 76 U.S.L.W. 3303 (U.S. Dec. 11, 2007) (No. 07-5762); *United States v. Nicholson*, 677 F.2d 706, 711 (9th Cir. 1982); *Taylor’s Central Garages (Exeter) Limited v Roper*, Local Government Review Reports vol 115, p. 445 (U.K.); and *Atwal v Massey*, 56 Cr. App. R 6 (U.K.)).

48. This would amount to eventual intent under Article 21(3) of the CCRK and needs to be distinguished from recklessness and negligence under Article 23 of the CCRK. No provision is made for negligence under the article 273 offences.

49. In order to establish wilful blindness or constructive knowledge the following factors have to be present, the defendant: 1/ had an active suspicion there was criminal activity; 2/ realised the high probability of the suspected criminal activity; 3/ deliberately avoided confirming their suspicion; and 4/ failed to confirm their suspicion in order to retain a defence against any subsequent prosecution. The defendant’s knowledge must be subjectively proven. Constructive knowledge will not be an issue where a denial of knowledge is primarily an issue of the credibility of the defendant’s account.

50. The establishment of constructive knowledge is sufficient to create the necessary awareness for eventual intent under Article 21(3) of the CCRK.

51. Lastly, the Defendants are accused of acting in co-perpetration which is defined as:

“When two or more persons jointly commit a criminal offence by participating in the commission of a criminal offence or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offence.” (Article 31 of the CCRK)

Co-perpetration and acting as a group are not considered as mutually exclusive. Co-perpetration allows the cumulative or joint activity of at least two persons to meet the elements of an offence. In this case acting as a group is an aggravating factor which goes to an increase in potential sentence rather than essential in establishing criminal liability.

The Defendants’ criminal liability

RB

52. **RB** in full knowledge acted with **FT** to purchase a large quantity of narcotics from an Albanian drug supplier. With **FT** he raised the required 3.000 euro.

53. Before 18 March 2012 he contacted the Albanian and organised for the shipment of narcotics to be delivered to Mitrovica. On 16 March 2012 he made the shipment payment on the outskirts of Pristina. He arranged to meet the delivery courier at Smrekovnica village and brought the drugs in the back of a car he borrowed to Viva Fresh supermarket in Mitrovica (RB trial at p.18). He had planned to meet **FT** in Mitrovica. He was arrested at Viva Fresh supermarket and the narcotics were seized from the vehicle he was driving.

54. It is clear he desired the purchase and possession of prohibited narcotics. His actions in arranging the narcotic delivery, his co-operation with **FT** , the purchase and transportation of the narcotics all shows his intention to distribute and sell the narcotics on to an unknown purchaser with whom **FT** had brokered a deal. His acts of purchasing and transportation of the narcotics and brokering the deal with the Albanian are all acts sufficient to be active elements of the offence under Article 273(2) of the CCRK. He had no licence to authorise the possession of narcotics.
55. The above are established based on the following evidence: certificate of confiscate items from **RB** dated 18 March 2012; Forensic analysis report; testimony of the expert witness **SD** and the statements of both this Defendant and Defendant **FT** .
56. The Defendant has tried to use in his defense the fact that he was not aware that dealing marijuana is prohibited by law. The Panel finds his claim to be highly unreliable, giving the fact that he and his supplier undertook a lot of precautions when meeting to exchange the money or the drugs. Moreover, the Panel notes the principle "*Ignorantia juris non excusat*" which holds that a person who is unaware of a law may not escape liability for violating that law merely because he or she was unaware of its content.
57. **RB's** actions and intentions are clear and fulfil the elements of the offence under Article 273(2) of the CCRK. He acted with **FT** as a co-perpetrator in committing the offence (Article 31 of the CCRK).
58. Although the motivation and role of the Albanian was different it is sufficient for his involvement to be part of the co-perpetration of **RB** and **FT** in order to establish a group under Articles 120(12) and 281(1.1) of the CCRK. The Albanian brokered the narcotics deal with **RB** and dispatched the shipment on 18 March 2012.
59. **RB** is guilty of co-perpetration in a group for Unauthorized production and processing of narcotic drugs, psychotropic substances or analogues under Articles 31, 273(2) and 281(1.1) of the CCRK in accordance with Article 362 of the CPC.

FT

60. The Co-Defendant admitted his guilt and entered a guilty plea. He has admitted his desire to purchase the narcotics with **RB** in order to distribute onwards in Mitrovica to a drug dealer identified only as “Nenad”. His clear intention was to sell and deliver the narcotics to a third party. He had already brokered an arrangement for this onward deal. This in itself represents the mental and active elements of the offence under Article 273(2) of the CCRK.
61. Equally, the Panel considers Defendant **FT** acted in co-perpetration with the transportation of the narcotics. It is an essential element of the offence that there is an intention to distribute, offer for sale or sell the narcotics. **FT** set-up the onward deal with “Nenad” for the purchase of the narcotics which **RB** transported. Without this onward deal it is questionable whether **RB** would have purchased and transported the narcotics he was arrested with on 18 March. **FT** was key and his participation was an essential in the offence which proves both Defendants’ intent to offer the narcotics for sale.
62. In full knowledge he worked with **RB** to raise the funds for the purchase of the narcotics. He acted with **RB** as a co-perpetrator in the commission of the offence. He did not have a licence which authorised the purchase or possession of the narcotics. With **RB** and the Albanian he acted as a group under Articles 120(12) and 281(1.1) of the CCRK.
63. The above are established based on the following evidence: certificate of confiscate items from **RB** dated 18 March 2012; Forensic analysis report; testimony of the expert witness **SD** and the statements of both this Defendant and Defendant **RB** .
64. **FT** is guilty of co-perpetration in a group for Unauthorized production and processing of narcotic drugs, psychotropic substances or analogues under Articles 31, 273(2) and 281(1.1) of the CCRK in accordance with Article 362 of the CPC.

AC

65. The Prosecutor has been unable to sufficiently link the Defendant with the activities of the co-defendants **RB** and **FT** .
66. Upon his arrest, police seized from **AC** a SIM card with nr. 049-484-628 (page 294 case file); this is the number which Prosecution tried to demonstrate that **AC** indicated to **S** as his new phone number(allegedly after the arrest of the first lot of defendants he changed numbers); what is relevant is that the alleged “announcement of changing numbers” was made to **S** over a phone call made from number 049-428-375; this number (049-428-375) is contested by **AC** and regarding it the order for covert measures was issued on the name of the so called “Kuksi”. Yet, to establish that **AC** used 049-428-375 number to announce **S** the change of numbers, prosecution makes reference to a police report (pages 187-190 case file); this is actually a Police request motioning for ordering covert measures which in its reasoning mentions that there are intercepts about this change of numbers, therefore, they want the new number tracked as well (049-484-628); we do not have any actual intercepts or other to corroborate the Police request and support that **AC** swapped from 049-428-375 to 049-484-628.
67. Another possible evidence to support that **AC** used 049-428-375 is the testimony of police officer **NB** ; he mentions that Police intercepted **AC** and **RB** discussing about meeting each other; this, plus the fact that police surveyed them when they met on the 16th March 2012, also corroborated with **AC**’s personal data collected at the border to Skopje led him to this conclusion that **AC** was the one meeting **RB** and who used the intercepted phone; yet, we do not have these conversations reflected in the transcripts; there are only two SMS-s on the 16 March 2012 reflected in the summary of the transcripts but there are no individual transcripts for them; on the 14 March 2012 there are certain communications between **RB** and two Albanian numbers about some “actions” and “movements”. However, there is absolutely no conclusive proof that the Albanian numbers are used by **AC** and this, according to witness **NB** , is a mere assumption by the Police.
68. Between 3 and 12 March 2012 there are communications between 049-428-375 and **RB** (049-425-895 - number confirmed by IPKO, page 235 case file) regarding apparent coded discussions about quantities of narcotics, deliveries, situation of roads (clear/not clear) and police presence, including first 3 calls summarized on page 228 which date in fact from 6 March 2012 and not 19 March 2012 as

mistakenly dated on the file. However, these could not bring in any other evidence as to the link between **AC** and the intercepted number.

69. Therefore, the interception evidence is inconclusive as to the identity of the caller and there is no proven direct contact between the Defendant and the convicted co-Defendants in relation to the narcotics shipment on 18 March 2012.

70. The Defendant was not observed in possession or organising the importation of narcotics into Kosovo and around Kosovo. Equally he was not identified by the co-defendants **RB** and **FT** as the Albanian who supplied the narcotics. The Court considers the denial of contact between **RB** and **AC** to be unreliable. However for the reasons stated above, the meeting between **RB** and **AC** observed by Officer **NB** on 16 March 2012 is insufficient to ground a conviction beyond a reasonable doubt.

71. No surveillance or financial investigation or other evidence has shown any link with the narcotic shipment on the 18 March 2012.

72. Another fact which adds up to the uncertainty that **AC** and the Albanian provider are the same is that **RB** in his statement says he handed 3.000 euro to the Albanian when meeting him at the roundabout. **AC** was not in the possession of this amount of money when remanded by the police in the same day at the border crossing with Macedonia.

73. Such uncertainty further substantiated the fact that the Court could not find established that the Accused had any involvement in the transport of the drugs seized on the 18 March 2012. This doubt and the presence of other possible and plausible alternative solutions had to be interpreted in the favour of the Accused, based on the principle of *in dubio pro reo*.

74. On the basis of this principle, the burden of proof incorporated in the Prosecution's obligation to prove a Defendant's guilt beyond reasonable doubt means that it must be established and proven that there are no other reasonable alternatives to the one demonstrated by the Prosecutor. As explained by the European Court of Human Rights (ECtHR) in the case of *Barberà, Messegue and Jabardo v Spain*, in relation to the right to a fair trial, Article 6 of the European Convention on Human Rights

(ECHR);: “Paragraph 2 [of Article 6] embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the Accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the Accused.”¹ Therefore, this principle is intrinsic to the right to be presumed innocent until proven guilty according to the law. Subsequently, based on the principle of *in dubio pro reo*, the Court, when evaluating the facts and the evidence, must find in the favor of the Accused in case of doubt.

75. Based on the above, the charge against the Defendant is not proven beyond a reasonable doubt and he is found not guilty and acquitted (Article 364(1.3) of the CPC).

FA

76. When assessing the intercepts, the Court notes the following:

According to the IPKO certificate (page 235 case file) together with the Defendant's statement from 24 January 2013, one of the number he uses is 049-566-507; this number is reflected on the transcripts from pages 259, 263 and 265 case file.

On 12 March 2012 between this number, **RB's** number 049-425-895 and the 049-428-375 number there have been intense conversation regarding if they managed to get through police filter, driving behind each other, coordinating movements, etc. However there has been no direct communication between **FA** and **RB**, everything goes through 049-428-375 and cannot be linked to the transport of drugs on the 18 March 2012.

77. Moreover, as presented above, the Court cannot rule out the Defendant's explanation about the conduct of customers, where there is no reasonable suspicion of illegal activity a taxi driver is not obliged or entitled to know what a customer is carrying or the contents of their luggage. His account of how customers regularly place their luggage in the boot of his taxi without his assistance or supervision is not unreasonable (FA trial at p.21). The size of the bag used would not raise any suspicion in itself. The narcotics have a strong and distinct smell, however they were well packaged, in a quantity and location in the car which would have made their detection difficult (Forensic analysis report; and Photo album pictures 5, 6 and 9). It is not unreasonable the narcotics may have escaped **FA's** detection.

¹ A 146 (1989); 11 EHRR 360 para 77 PC;

78. Therefore, it is concluded that there is insufficient evidence to show **FA** transported the narcotics on 18 March 2012 or knew he had transported narcotics on previous occasions. The Court has considered the evidence above and cannot conclude either direct or eventual intent to transport narcotics.

79. For these reasons the mental and active elements of the charge against him has not been proven beyond a reasonable doubt. The court makes reference to the consideration related to the principle *in dubio pro reo* as presented for Defendant **AC**. He is not guilty and acquitted of the charges against him (Article 364(1.3) of the CPC).

LK

80. It is considered proven the Defendant was not intentionally or negligently involved in any criminal activity and the Prosecutor has withdrawn the indictment against him under Article 52 of the CPC.

81. The charges against him are rejected in accordance with Article 363(1.1) of the CPC.

Sentencing

82. An offence under Article 273(2) of the CCRK carries a punishment of a fine and imprisonment for between two (2) to twelve (12) years. The period of imprisonment is increased to three (3) to fifteen (15) years when the offence is committed by a group – as in this case (Article 281(1.1) of the CCRK).

83. The Court has adhered to the rules and factors for calculating punishments under Articles 73 -74 of the CCRK.

RB

84. The Court notes he instigated the narcotics shipment and took a leading role in organising the purchase and delivery of the narcotics. He did this for personal profit. But since his arrest he has been open about his involvement. Although, he has not fully assisted the investigation to catch and prosecute other perpetrators.

85. In mitigation the Court has noted his limited co-operation with the investigation, remorse and acceptance of criminal responsibility for part of his actions (Article 74(3.9) and (3.11) of the CCRK). The Court has considered the type of narcotic seized and amount which is considered to be a small supply. The Defendant has no prior convictions. Under Article 76(1.3) of the CCRK the Court can reduce the minimum sentence of imprisonment to 1 year.

86. In light of these factors the Court imposes a sentence of a fine of 30 euros and imprisonment for 1 year and 6 months.

87. Under Article 83 of the CCRK any time served on remand detention, house detention, or any other deprivation of liberty must be taken into consideration in calculating the final punishment. The Defendant was detained on 18 March and held in remand until 17 September 2012 at which point he was held on house detention until this expired on 17 January 2013.

FT

88. The Court notes he was a willing and key co-perpetrator. Without his contribution it is unlikely **RB** would have gone ahead. **FT** was essential in brokering the deal with the drug dealer named as Nenad to whom the narcotic shipment of 18 March 2012 would have been sold. He did this for personal profit. But since his arrest he has been open about his involvement and pleaded guilty at the first opportunity.

89. In mitigation the Court has noted his full co-operation with the investigation, remorse and acceptance of criminal responsibility for part of his actions (Article 74(3.9), (3.10) and (3.11) of the CCRK). The Court has considered the type of

narcotic seized and amount which is considered to be a small supply. **FT's** role was less than **RB's** in the offence. The Defendant has no prior convictions. Under Article 76(1.3) of the CCRK the Court can reduce the minimum sentence of imprisonment to 1 year.

90. In light of these factors the Court imposes a sentence of a fine of 30 euros and imprisonment for 1 year.

91. Under Article 83 of the CCRK any time served on remand detention, house detention, or any other deprivation of liberty must be taken into consideration in calculating the final punishment. The Defendant was detained on 18 March and held in remand until 17 September 2012 at which point he was held on house detention until this expired on 17 January 2013.

Confiscation

92. The 5546.4g (net) of narcotics seized on 18 March 2012 are confiscated and destroyed in accordance with Articles 69 and 273(5) of the CCRK and Article 31 of the Law on Narcotic Medicaments, Psycho-Tropes and Precursors.

93. In accordance with Article 69 of the CCRK the following articles confiscated from the convicted Defendants **RB** and **FT** are confiscated having been used in the criminal offence:

1. White Mercedes car (registration 02-197-AG)
2. Black Samsung phone (IMEI 352025/04/978394/2)
3. IPKO SIM for no.049-425-895 (SIM card no 107010520941)
4. White Sony Ericsson phone (IMEI 35791301-704853-2)
5. IPKO SIM for no.049-496-595 (SIM card no 109011667200)
6. Black Nokia phone (IMEI 355956/04/366377/6)
7. VALA SIM for no.044-218-808 (SIM card no 8937701010011760689)
8. Black Nokia phone (IMEI 356841/02/844547/3)
9. Mobtel SIM for no.065-5777-631 (SIM card no 89381030000144638097)
10. Vodafone SIM (SIM card no 60610988028631G01520)
11. VALA SIM (SIM card no 89377010100016521508)
12. Mobtel SIM (SIM card no. 89381030000143222943)

Roxana Comsa

Presiding Judge

EULEX Judge

John Gayer

Recording Officer

EULEX International Legal Officer

Legal Remedy: The Prosecutor, Defendants or Defence Counsel must file any appeal against this Judgment within 15 days of service (Article 380(1) of the CPC). Any appeal to the Court of Appeals must be filed with the Basic Court and be in the manner set out under Articles 376 and 382 of the CPC.