

SUPREME COURT OF KOSOVO
PML.-KZZ. No. 79/2013
Prishtinë/Priština
18 June 2013

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of
EULEX Judge Dr. Horst Proetel as Presiding Judge,
Supreme Court Judge Marije Ademi and
Supreme Court Judge Emine Mustafa as members of the panel,
On 18 June 2013 in the criminal case against the defendant:

1. S. Z. hnr

Charged according to Indictment PP. 2967-3/2009, dated 2 October 2009, as amended in the main trial on 21 October 2010 and 5 April 2011, with having committed several counts of the criminal offences of:

- a) **Sexual Abuse by Abusing Position, Authority or Profession** pursuant to Article 200 paragraph 2 item 1 of the Criminal Code of Kosovo (CCK),
- b) **Accepting Bribes** pursuant to Article 343 paragraph 1 of the CCK,
- c) **Abusing Official Position or Authority** pursuant to Article 339 paragraph 2 in conjunction with paragraph 1 of the CCK and
- d) **Mistreatment in Exercising Duties** pursuant to Article 164 paragraph 1 of the CCK,

By Judgment P. 1960/09, dated 7 April 2011, the Municipal Court of Prishtinë/Priština acquitted the defendant from the charges for the criminal offences of:

Sexual Abuse by Abusing Position, Authority or Profession pursuant to Article 200 paragraph 2 item 1 of the CCK (count 4) and

Accepting Bribes pursuant to Article 343 paragraph 1 of the CCK (count 7) and

Found the defendant guilty of

- a) **Sexual Abuse by Abusing Position, Authority or Profession** pursuant to Article 200 paragraph 2 item 1 of the CCK (count 1) and sentenced him to six (6) months imprisonment and an accessory punishment of prohibition of exercising public administration or public service for three (3) years;

- b) **Attempted Sexual Abuse by Abusing Position, Authority or Profession** pursuant to Article 200 paragraph 2 item 1 in conjunction with Article 20 of the CCK (count 3 reclassified) and sentenced him to four (4) months imprisonment with the accessory punishment of prohibition of exercising public administration or public service for three (3) years;
- c) **Accepting Bribes** pursuant to Article 343 paragraph 1 of the CCK (count 5) and sentenced him to one (1) year and six (6) months imprisonment with the accessory punishment of prohibition of exercising public administration or public service for three (3) years;
- d) **Mistreatment in Exercising Duties** pursuant to Article 164 paragraph 1 of the CCK (count 9 reclassified) and sentenced him to six (6) months imprisonment with the accessory punishment of prohibition of exercising public administration or public service for three (3) years and
- e) **Mistreatment in Exercising Duties** pursuant to Article 164 paragraph 1 of the CCK (count 10) and sentenced him to four (4) months imprisonment with the accessory punishment of prohibition of exercising public administration or public service for three (3) years;

The court pronounced an aggregate punishment of two (2) years and four (4) months imprisonment with the accessory punishment of prohibition of exercising public administration or public service for three (3) years;

Upon appeal of the defendant the District Court of Prishtinë/Priština by Judgment Ap.-Kž. 116/12, dated 3 December 2012, **rejected** the charges for count 1 (**Sexual Abuse by Abusing Position, Authority or Profession** pursuant to Article 200 paragraph 2 item 1 of the CCK),

Modified *ex officio* the conviction for count 3 (**Attempted Sexual Abuse by Abusing Position, Authority or Profession** pursuant to Article 200 paragraph 2 item 1 in conjunction with Article 20 of the CCK) by changing the wording of the enacting clause 'May or June 2008' into 'November or December 2008,

Modified count 9 by reclassifying it as **Abusing Official Position or Authority** pursuant to Article 339 paragraph 1 of the CCK,

Acquitted the defendant from the charges of count 5 (**Accepting Bribes** pursuant to Article 343 paragraph 1 of the CCK) and

Changed the sentence to an aggregate punishment of twelve (12) months imprisonment with credit for the period of time spent in detention and house detention from 27 August 2009 to 5 January 2010 and with an accessory punishment of prohibition of exercising

public administration or public service for two (2) years after the punishment has been served;

Deciding upon the " B. T. " Protection of Legality filed on the 15 April 2013 by the Defense Counsel on behalf of the defendant against the final Judgment Ap.-Kž. 116/12 of the District Court of Prishtinë/Priština, dated 3 December 2012,

Issues the following

JUDGMENT

The Request for Protection of Legality filed on the 15 April 2013 by the Defense Counsel on behalf of the defendant against the final Judgment Ap.-Kž. 116/12 of the District Court of Prishtinë/Priština, dated 3 December 2012, is REJECTED AS UNFOUNDED.

REASONING

I. Relevant Procedural History

On 27 August 2009 the defendant ' S. Z. ' is arrested for suspicion of having committed the aforementioned criminal offences. The prosecutor filed a motion to impose detention on remand. The request was rejected by the Municipal Court of Prishtinë/Priština and house detention was imposed.

On 3 September 2009 a summary indictment was filed, which was amended with new criminal offences on 9 September 2009. On 24 September 2009 the confirmation judge returned the indictment with the order to conduct a more thorough investigation. On 2 October 2009 the prosecutor re-filed the indictment charging the defendant with ten (10) counts of different criminal offences.

On 15 October 2009, by Ruling KA. 274/09, the Indictment was confirmed.

On 23 November 2009, upon a request from the EULEX Prosecutor supported by the President of the Municipal Court of Prishtinë/Priština, the President of the Assembly of EULEX Judges decided to assign the case to an EULEX Judge as presiding judge.

On 18 October 2010 the main trial commenced before the Municipal Court Prishtinë/Priština. After 16 hearings, on 7 April 2011, the aforementioned Judgment P. No. 1960/2009 was pronounced.

B. T.

Upon an appeal filed by Defense Counsel ██████████ on behalf of the defendant on 9 August 2011, a panel of the District Court of Prishtinë/Priština on 3 December 2012 issued the aforementioned final Judgment Ap.-Kž. 116/12.

On 17 April 2013 the defendant S. Z. ██████████ had filed with the Basic Court of Prishtinë/Priština a request for protection of legality against the aforementioned final Judgment of the District Court Prishtinë/Priština Ap.-Kž. 116/12.

On 20 May 2013 the Office of the State Prosecutor of Kosovo (OSPK) filed a response on the defendant's request for protection of legality and on 22 May 2013 the Supreme Court by Judgment Pml.-Kzz. 62/13 rejected the request as ungrounded.

Already on 15 April 2013 Defense Counsel I B. T. ██████████ had filed a Request for Protection of Legality on behalf of the defendant (dated 15 April 2013). This request however was received by the Supreme Court on 30 May 2013 only after the judgment on the other request for protection of legality filed by the defendant against the same judgment had been issued.

On 6 June 2013 the OSPK filed a response on the defendant's request for protection of legality proposing to dismiss it as inadmissible.

II. Supreme Court Findings

1. Admissibility of the Request for Protection of Legality

The Request for Protection of Legality is admissible.

Pursuant to Article 433 paragraphs 1 and 2 of the CPC, it was filed by an authorized party and within the legal deadline. The contested decision was served upon the defendant on 16 January 2013. Consequently, the request for protection of legality was filed within the deadline of Article 433 paragraph 2 of the CPC of 3 months within service.

The contested decision is final in the sense of Article 432 paragraph 1 of the CPC.

The OSPK proposes to dismiss the Request as inadmissible due to the fact that the Supreme Court of Kosovo had already earlier (on 22 May 2013) rejected a request for protection of legality filed by the defendant himself against the same final Judgment as ungrounded.

In this particular case the panel does not consent to that argument. The procedural law knows no explicit restrictions against the filing of several legal remedies by one defendant against the same decision. On the contrary, Article 381 paragraph 1 of the CPC enumerates as persons authorized to file an appeal, except the accused herself/himself, also the defence counsel and the legal representative of the accused. It is quite common

and accepted practice that several similar legal remedies are being filed on behalf of the defendant against the same decision.

In addition, in this case the court had to consider that the current Request for Protection of Legality had been filed earlier (on 15 April 2013 – not as claimed by the OSPK on 4 June 2013) than the one, which had been decided earlier. The fact that by coincidence the later filed request was decided earlier and without the Supreme Court having knowledge yet of the earlier filed request cannot cause retro-actively the inadmissibility of the earlier filed remedy.

2. Procedures followed by the Supreme Court

The Supreme Court panel has decided in a session as described by Article 435 paragraph 1 of the CPC.

3. On the merits of the Requests for Protection of Legality

The Request for Protection of Legality is unfounded.

The Requester challenges the mentioned Ruling on the ground of violations of the criminal law and proposes to annul the contested decision and return the case to the for retrial to the Basic Court or, alternatively, to the higher court.

The Request contests the Judgment based on the allegations that the time for the commission of the criminal offences had been determined wrongly, that the injured party ~~K. H.~~ had not been employed at the police station in Obiliq/Obilić during the time of commission of the criminal offence and that the courts had wrongly evaluated the credibility of the injured party ~~K. H.~~ *K. B.* All these claims refer to allegedly erroneous determination of facts.

Pursuant to Article 432 paragraph 2 of the CPC, a request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation. Hence, the Supreme Court did not have to examine these alleged violations.

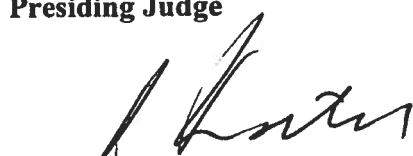
There is no considerable doubt as to the correctness of the determined facts either, pursuant to Article 439 of the CPC, which could have obliged the court ex officio to review the factual situation.

The Request also challenges the court of second instance's interpretation Article 339 paragraphs 1 and 2 of CCK, in particular in regard to the meaning of term "damage" in the provision and the question if it includes immaterial damage.

The panel finds no fault with the District Court's interpretation of the legal provision and refers to the thorough and correct reasoning in paragraph 53 of the contested Judgment.

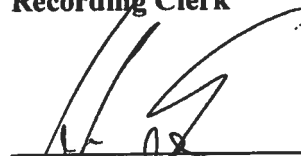
For the aforementioned reasons, the Supreme Court of Kosovo decides on the Request for Protection of Legality as in the enacting clause, based on Article 437 of the CPC.

Presiding Judge



Dr. Horst Proetel
EULEX Judge

Recording Clerk



Holger Engelmann
EULEX Legal Officer

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