PML 188/2013

29 January 2014

SUPREME COURT OF KOSOVO

THE SUPREME COURT Of KOSOVO, in the panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, and Supreme Court Judges Nesrin Lushta and Sukri Sylejmani as members of the panel, in the presence of Natalie Dawson EULEX Legal Officer, acting in capacity of a recording clerk,

In the criminal case against the following defendants:

S.M. - Albanian; Date of birth…; in detention at Dubrava Prison since 7 July 2003,

AND

B.T. - Albanian; Date of birth…; in detention at Mitrovica Detention Center since 19 June 2003.

Deciding upon the Requests for Protection of Legality from:

- **S.M.**, dated 30 August 2013
- **B.T.**, dated 19 August 2013

Taking into account the opinion of the Office of the State Prosecutor of the Republic of Kosovo (OSPK) dated 6 November 2013

Following the deliberation and voting, in accordance with Article 435 of the CPC, the Supreme Court issues the following:

JUDGMENT

The Requests for Protection of Legality dated 30 August 2013 and 19 August 2013 filed by the defendant S.M. and B.T. respectively, are rejected as unfounded.

REASONING

I. Procedural History:

The defendants were charged by the first indictment of the Public Prosecutor's Office of the Republic of Kosovo PP No, 107/03 filed on 3™ December 2003, and by the amended indictment filed on 21st January 2004, with committing the criminal offences of Kidnapping of witnesses 3 and 4 and witness FY pursuant to Article 64 Paragraphs (1), (2) and (4) of the CL SRS read with Article 22 CC SFRY. **S.M.** was also charged with committing criminal offence of Kidnapping of witness A.K. pursuant to Article 64 Paragraphs (1) and (2) CL SRS read with Article 22 CC SFRY. and a criminal offence of Attempted Extortion pursuant to Article 180 CL SRS read with Articles 19 and 22 CC SFRY.

The defendants were convicted of the offences listed above in the first instance by the verdict of the District Court of Gjilan/Gnjilane by Judgment No. P. 199/2003 dated 25 June 2004. They were acquitted of the other offences listed on the indictment.

M. was sentenced to 8 years of imprisonment for each offence of Kidnapping, and 2 years of imprisonment for the offence of Attempted Extortion. He received an aggregate sentence of 12 years imprisonment.

T. was sentenced to 5 years of imprisonment for each count of Kidnapping. He received an aggregate sentence of 7 years imprisonment.

Both defendants lodged appeals against judgment no. P. 199/2003. On 27 March 2007 the Supreme Court of Kosovo issued its verdict no. AP 470/2004. This verdict partially annulled the Judgment of the District Court of Gjilan in relation to the Kidnapping of witness F.Y., and accordingly the aggregate sentences, and in this regard sent the case back to the District Court for re-trial. The Supreme Court affirmed the judgment of the District Court in relation to the other offences and the individual sentences in respect of each, and the judgment of the District Court no. P. 199/2003 became final on 27 March 2007. The Supreme Court ordered the District Court to adjudicate upon the outstanding count of Kidnapping and thereafter determine a new aggregate punishment.

During the re-trial, on 4 October 2010, the Prosecutor withdrew the outstanding count of Kidnapping of witness F.Y. The District Court gave its judgment no. P. 181/07 on 5 October 2010 in which it rejected this count, and recalculated the aggregate punishment in accordance with the convictions and individual sentences which became final on 27 March 2007.

Both defendants again appealed to the Supreme Court. The Supreme Court handed down its ruling no. AP 351/2010 on 25 May 2011. This annulled ruling no. P. 181/07 because the enacting clause of the judgment did not include a factual description of the rejected charge; did not contain a reference to the individual sentences which contributed to the aggregate sentence imposed, and did not contain the reasoning behind the aggregate punishments imposed. The case was again returned for re-trial.

On 2 December 2011 the Basic Court of Gjilan handed down its judgment no. 118/11. The withdrawal of the count of Kidnapping of witness F.Y. against both defendants was confirmed by the Prosecutor and the Judgment further rejected this charge. The Trial Panel imposed aggregate sentences in accordance with the convictions and individual sentences which became final on 27 March 2007, **M.** was sentenced to an aggregate punishment of 9 years imprisonment

and **T.** to an aggregate punishment of 6 year and 9 months imprisonment. The time spent in detention to date was credited in the aggregate punishments imposed in respect of each defendant.

Both defendants appealed this judgment to the Court of Appeals. The Court of Appeals gave its judgment no. PAKR 907/12 on 30 April 2013. The Court of Appeals found that the convictions and determination of individual sentences became final on 27 March 2007 and as such the trial panel had no legal basis to make any assessment as to guilt or individual sentences. The Court of Appeals also found that the most favourable law in relation to aggregate punishment remains to be the CC SFRY. The court found no flaws in the assessment made by the Trial Panel, and confirmed the aggregate punishments imposed on each defendant respectively.

The defendant **M.** filed a request for Protection of Legality dated 30 August 2013 and the defendant **T.** filed a similar request which is dated 19 August 2013.

The requests for Protection of Legality are submitted on the following grounds:

S.M.

The grounds relate entirely to the original judgment of the first instance court in 2004, since they relate to when **M.** was convicted of the offences.

a) The enacting clause of the judgment of the court of first instance is incomprehensible and contradicts the reasoning of the judgment as a whole.
b) There are contradictions between the content of the statements and evidence and the reasoning of the judgment.
c) The intent element of the offence is missing.

B.T.

- The judgment contains two violations of the legal provisions. Firstly, the court of first instance should not have adjudicated on the case based on individual offences of Kidnapping; rather it should have dealt with the case as one offence of Kidnapping. Secondly the court should not have imposed individual sentences in respect of each offence.
- The SFRY should not have been applied, rather the new Criminal Code (CCK) and the new Criminal Procedure Code (CPC).

The State Prosecutor filed an opinion dated 6 November 2013. This opinion makes the following observations:

- When the Supreme Court annulled the judgment of the District Court in relation to the Kidnapping of Witness F.Y. only (27.3.2007), it affirmed the remainder of judgment in relation to the other offences. The only part of the judgment which remained unresolved was in relation to the aggregate sentences.
- The judgment of the District Court finds that both defendants committed the acts alleged. These acts are separate criminal offences because they were committed during

different time periods, against different individuals and there is no continuity in the sequence of events.

- The court properly imposed individual punishments for each offence and an aggregate punishment.
- The enacting clause of the judgment is comprehensible and contains decisive facts which constitute the criminal offences of which the defendants were convicted. Relevant legal and factual reasons are given for all decisions.

II. Findings of the Court:

The Admissibility of the Appeals

The judgment of the Court of Appeals of 30th April 2013 was delivered to both defendants and their lawyers on 15 August 2013. These requests, received by the Basic Court of Gjilan on 4 September 2013 (**M.**) and 20 August 2013 (**T.**), were therefore filed in a timely manner (within three months) and are therefore admissible.

The requests were filed after 1 January 2013, and therefore the Criminal Procedure Code (CPC) is the applicable procedural law in relation to dealing with the requests.

The Merits of the Requests for Protection of Legality

The convictions and individual sentences on the offences for which the defendants were convicted became final on 27.3.2007.

The allegation on the indictment, which was the subject of the partial annulment by the Supreme Court on 27 March 2007 of the original verdict of the District Court of Gjilan, (given on 26 June 2004), was withdrawn by the prosecution on 4 October 2010 and rejected by the District Court of Gjilan on 5 October 2010. This part of the case therefore came to an end on 5 October 2010.

When the decision of the District Court of Gjilan of 5 October 2010 was appealed to the Supreme Court, the only part of that judgment which the Supreme Court determined was incorrect was in relation to the omission of details from, and errors in, the composition of the judgment. The composition of the judgment was rectified by the Basic Court of Gjilan in its judgment of 2 December 2011. The Basic Court of Gjilan was correct not to reconsider the original convictions and individual sentences since they became final on 27 March 2007 by the decision of the Supreme Court.

The defendant **M's** request relates entirely to the convictions and individual sentences imposed. His request is therefore rejected as ungrounded in its entirety. The defendant **T's** request in relation to his conviction and sentence for separate offences instead of one offence covering the kidnap of all witnesses (as in a) above) is also rejected as ungrounded for the same reason.

An issue does arise from the judgment of the District Court of Gjilan on 25 June 2004 in this regard, in relation to the Kidnapping of witnesses 3 and 4, the indictment (at paragraph 14, internal page 4) is clear that the Kidnapping of each individual should form a separate count. In its judgment of 25 June 2004 the District Court lists the charges faced by each accused. The Kidnapping of witnesses 3 and 4 are listed together in one count at [i]. The District Court sentenced the defendants to individual sentences in relation to the Kidnapping of witness 3 and the Kidnapping of witness 4. This judgment became final through the decision of the Supreme Court of Kosovo on 23 March 2007. The Supreme Court judgment on 23 March 2007 (at internal page 3) and its correction verdict of 10 March 2010 (at internal pages 1 and 2) are clear that the Supreme Court understood there to be two convictions and two individual sentences in relation to two separate counts of Kidnapping in respect of witness 3 and witness 4.

It is clear to the panel that the offences were adjudicated upon as two separate counts, and sentenced as such. The Supreme Court finds that this was the correct approach since they are individual criminal acts against individual injured parties. It is therefore correct to treat these matters as individual criminal offences. The defendant **T.'s** request in relation to point a) above is also rejected as ungrounded in this respect.

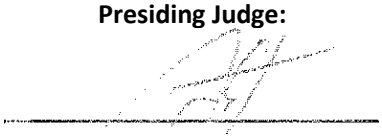
The part of the original judgment which did not become final on 23 March 2007 relates only to the aggregate sentence.

Article 3(2) CPC states that *'doubts regarding the implementation of a certain criminal law provision shall be interpreted in favour of the defendant and his or her rights under the present Code and the Constitution of the Republic of Kosovo.'*

The Court of Appeals performs a thorough and accurate analysis of the most favourable law to be applied to the calculation of the aggregate sentence. The Supreme Court shares this view, finds the SFRY to be the most favourable substantive law and upholds the aggregate sentences imposed. The defendant **T.'s** request on the basis of ground b) above is therefore rejected as ungrounded.

The requests made by defendants **M.** and **T.** are therefore rejected as ungrounded in their entirety.

Presiding Judge:



Gerrit Marc-Sprenger
EULEX Judge

Recording Officer:

Natalie Dawson

EULEX Legal Officer

Members of the panel:

Nesrin Lushta
Supreme Court Judge

Shukri Sylejmani
Supreme Court Judge

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