COURT OF APPEALS

Case number: **PaKr 87/13**

Date: **27 March 2014**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Philip Kanning as Presiding and Reporting Judge and Kosovo Court of Appeals Judges Abdullah Ahmeti and Tonka Berisha as members of the Panel, with the participation of EULEX Legal Officer Andres Parmas acting as Recording Officer, in the criminal proceeding against

> **U.M.**, convicted in the first instance court of criminal offence of **Accepting bribe** pursuant to Art 343 (1) of the Criminal Code of Kosovo (CCK) and **Trading in influence** contrary to Art 345 (1) CCK;
>
> **V.Z.**, convicted in the first instance court of criminal offence of **Giving bribe** pursuant to Art 344 (1) CCK and two counts of **Trading in influence** contrary to Art 345 (1) and (2) CCK.

***Acting upon* the Appeals of Defence Counsels Orhan Basha, Mahmut Halimi and Enver Nimani** submitted respectively on 14, 21 and 14 January 2013 on behalf of the Defendant U.M., and **Appeal of Defence Counsel Zeqir Berdyna** submitted on 18 January 2013 on behalf of the Defendant V.Z., all filed against **the Judgment of the Basic Court of Prishtina no P 2668/11 dated 18 January 2012;**

Having considered the Response to the Appeal by EULEX Prosecution Office in Mitrovica filed on 23 January 2014;

Having also considered the Opinion of the Appellate Prosecutor within the State Prosecutor's Office, no PPA/I.-KTŽ 28/13 dated 1 July 2013 and filed on the same day;

After having held a public session on 27 March 2014, with all parties duly invited, in the presence of the Defendants U.M. and V.Z., Defence Counsels O. Basha, E. Nimani and Z. Berdyna;

Having deliberated and voted on 27 March 2014,

Pursuant to Art-s 420 and the following of the Criminal Procedure Code (KCCP)

Renders the following

RULING

1. The Appeals of the Defence Counsels Mahmut Halimi and Enver Nimani on behalf of the Defendant U.M. are granted.

2. The Appeal of the Defence Counsel Orhan Basha on behalf of the Defendant U.M. is granted in part concerning the objection to the obligation of Defendant U.M. to pay a lump sum of 450 Euro as costs of criminal proceedings.

3. The Appeal of the Defence Counsel of the Defendant V.Z. is granted.

4. The Judgment of the Basic Court of Pristina dated 18 January 2012 in the criminal case no. P 2668/11 is annulled.

5. The charges against the Defendant V.Z. are rejected.

6. The case is returned to the Basic Court of Pristina for retrial in part of charges against the Accused U.M..

REASONING

I. Procedural history of the case

1. On 4 November 2010 the Public Prosecutor filed with the Municipal Court of Prishtina the Indictment PP 1111/2008 against the Defendants U.M. and V.Z., accusing U.M. of two counts of criminal offence of Accepting bribe pursuant to Art 343 (1) CCK and V.Z. of two counts of criminal offences of Giving bribe in violation of Art 344(1) CCK and Fraud in violation of Art 261 (1) CCK.

2. The main trial was held between 21 November 2011 and 18 January 2012, when the verdict was announced.

3. U.M. was convicted of criminal offence of Accepting bribe pursuant to Art 343 (1) CCK and of Trading in influence contrary to Art 345 (1) CCK. He was sentenced to 2 years and 6 months and 1 year of imprisonment respectively. The aggregate punishment was determined 3 years imprisonment. As accessory punishment U.M. was prohibited to exercise public administration or public service for 3 years. Pursuant to Art 343 (4) CCK, the amount of 10 000 Euros, benefit of the bribe, was ordered to be confiscated.

4. V.Z. was convicted was convicted of criminal offence of Giving bribe pursuant to Art 344 (1) CCK, of criminal offence of Trading in influence contrary to Art 345 (1) CCK and Trading in influence contrary to Art 345 (2) CCK. He was sentenced to imprisonment for 1 year and 6 months, 1 year and for 6 months respectively. The aggregate sentence was determined imprisonment for 2 years. As accessory punishment V.Z. was prohibited to exercise public administration or public service for a period of 2 years.

5. The Court of First Instance established, based on the witness statements given in the pre-trial phase that F.N. gave 10 000 Euros to V.Z. in order to deliver it to Judge U.M. as payment for him to intervene in favour of D.N. and P.N. who were kept in detention on remand. The Court also established that P.N. gave another 1 000 Euros to V.Z. in order to be helped in the appeal against the conviction issued by the Panel presided over by Judge U.M.. Furthermore the Court established that P.N. gave 100 Euros to Judge U.M. in order for him to intervene with the panel dealing with the issue of the conditional release of P.N., whereas V.Z. was acting as the middleman of these negotiations.

6. The District Court held that a different version of the events presented by the witnesses during the main trial is not credible.

7. The Trial Panel stressed that statements given by A.N. during the investigation are admissible evidence notwithstanding the fact the defence had no opportunity to challenge him during any stage of the criminal proceedings. The Court of First Instance deemed such approach allowed based on Art 368 (1) KCCP, as appearance of A.N. before the court was impossible because his whereabouts were not known to the Court. At the same time the Court of First Instance also underlined that in accordance with Art 157 (2) KCCP the Defendants were not found guilty solely on testimony given by A.N..

8. The Court of First Instance held that the charges of accepting bribe against U.M. in the 1 November 2008 episode and fraud and giving bribe against V.Z. respectively in the January 2007 and 1 November 2008 episode, are wrong as in regard of application of substantive criminal law. Therefore the Court requalified these episodes.

9. The Court noted that there is no evidence that U.M. performed any act within the scope of his authority in the above episode. He was merely promising to exert an influence over the decision making process of the conditional release of P.N.. Such act would correspond to the description of the criminal offence of trading in influence instead of accepting bribe. In similar vein, V.Z., when accepting 1000 Euros from the witness P.N., was to exert his influence over the decision making process as to the appeal against the judgment convicting P.N. (no. P 474/06 of the DC Peja). Therefore the acceptance of money cannot be indicative

of the criminal offence of fraud, but of criminal offence of trading in influence. Also, when acting as a middleman in furthering 100 Euros to U.M. on behalf of P.N., he was exerting an influence over the decision making process of the conditional release of P.N., which corresponds to the objective side of the criminal offence of trading in influence.

II. Submissions of the parties

1. The Appeals

10. The Defence Counsel O. Basha on behalf of the Defendant U.M. proposes the Court of Appeals to modify the Judgment of the District Court so that U.M. would be acquitted of the criminal offence of accepting bribe and that the indictment would be rejected in regard of the criminal offence of trading in influence because of expiration of the deadline of statutory limitations. Alternatively the Defence Counsel requests that the case would be returned to the District Court for a retrial before a new panel.

10.1. The Appellant submits that substantive criminal law has been violated in the present case, because the confiscation is not grounded in the Judgment. Nor does the evidence show that U. Muçaj received the alleged bribe money. The prosecution for the offence of trading in influence is barred by absolute statutory limitation according to Art 90 (1.6) CCK.

10.2. The Challenged Judgment lacks reasoning and does not contain analysis on the contradicting evidence. The Judgment is based on inadmissible evidence which have been continuously challenged by the Defence Counsel. Gathering the evidence continued even after the interrogation of U. Muçaj, while the Co-Defendant V.Z. was never interviewed by the Prosecutor. The right to oppose the evidence had been denied from the accused by the Prosecutor.

10.3. The enacting clause of the Judgment is unclear, in contradiction with itself and the reasoning, the Judgment lacks reasoning to the decisive facts, and the reasoning contradicts the content of the evidence. Defence counsel also points out that the Judgment fails to provide analysis on all evidence, i.e. the witness testimony of P.N. and that of P.G., the hand-written statement of A.N., the Judgment of the Supreme Court of Kosovo dated 1 March 2007, the statements of witnesses Z.S., S.B., I.T. Nowhere in the Challenged Judgment are the time, place and manner of the commission of the criminal offence established.

10.4. After the original Indictment was returned to the Prosecutor, the Prosecutor failed to observe Art 306 (2) and Art 305 (1.5) KCCP, filing the “second indictment” in breach of prescribed time limits. The investigation, in violation of Art 225 (1) KCCP, lasted longer

than six months, whereas after expiration of the period of investigation the Prosecutor failed to argue for the complexity of the case in his request for extension.

10.5. The Appellant claims that the minutes of the trial sessions were not finalized by the end of each session; therefore the defence could never exercise its right to comment on the accuracy of the records of the main trial. He submits that the records of the main trial are not in conformity with Art 351 (3) KCCP, as the minutes fail to reflect several poignant moments during the trial sessions. According to the Defence Counsel part of information was deliberately removed from the minutes and suggests that the two EULEX Judges in Trial Panel should have been disqualified, because they had previously worked together at the same court with the accused.

10.6. The Defence Counsel notes that the Trial Panel has overlooked the fact that that the ruling on termination of detention on remand of D.N., P.N. and L.K. was rendered by the trial panel, and not individually by the Defendant in the role of the Presiding Judge. The Trial Panel has assessed facts incompletely, because the alibi witness proposed by the Defendant was not heard. In fact the Court failed even to rule on the rejection of this proposal. Witness statements do not support the charges against U.M..

10.7. In regard of the sentence the Defence Counsel claims that the Court erroneously did not refer to mitigating circumstances. The Appellant also claims that there were no expenses which would have justified obliging U.M. to pay a lump sum for reimbursement of the costs of the proceedings.

10.8. Finally the Appellant raises doubts if the Judgment has been signed by the Presiding Judge.

11. Defence counsel M. Halimi proposes to acquit U. Muçaj from the charge of accepting bribe. Alternatively he requests for returning the case to the First Instance Court for a retrial. As a third alternative he proposes to impose a more lenient punishment on the accused. Regarding the criminal offence of trading in influence, the Appellant proposes acquittal due to the statutory limitation.

11.1. The Trial Panel violated criminal procedure by allowing as admissible witness statements given to the police. The Appellant submits that the statement of A.N. is inadmissible and should not have been leaned upon by the Court. Also the Judgment violated procedural law, because evidence obtained during the pre-trial investigation were not read during the main trial or analysed by the Court.

11.2. The Challenged Judgment lacks reasoning.

11.3. The Appellant criticises the proceedings following the rejection of the "first indictment", i.e. the one dated on 27 March 2009, and notes that within one year and seven months the Public Prosecutor interviewed two witnesses whose statements were not used in the "second indictment", dated 4 November 2011.

11.4. According to the Defence Counsel the factual situation was established erroneously. The statements given to the police were fabrications by the N family out of revenge towards Ukë Muçaj for imposing high sentences on D.N., P.N. and L.K. The witnesses have admitted themselves (*e.g.* P.N.) that they were lying out of revenge. There are discrepancies in the statements in decisive details like the place of residence of U.M. or the exact sum allegedly offered as bribe. The fact that should exclude all discussion on probable misuse of official duty by the Defendant is the Judgment of the Supreme Court of Kosovo, which rejected the appeals of defendants D.N., P.N. and L.K. as well as the appeal of the Public Prosecutor and affirmed the Judgment of the trial panel. In conclusion of the above the Appellant submits that there is no inculpatory evidence and hence the substantive criminal law has been applied erroneously and to the detriment of the Defendant.

11.5. Regarding the charge of trading in influence he argues that the prosecution of this criminal offence is time-barred pursuant to Art 90 (1.5) CCK.

11.6. The Defence Counsel finds the punishment imposed on U.M. to be too severe. He points out as a mitigating circumstances that the Defendant has never before been found guilty of similar criminal offence, he served as a judge for almost three decades, he's in poor economic situation, he behaved correctly during the proceedings, and finds that a suspended sentence would best fit the general purpose of punishments.

12. Defence Counsel E. Nimani proposes to acquit U. Muçaj from both charges or to annul the Judgment and return the case for retrial before a different panel.

12.1. He first finds that the Challenged Judgment is incomprehensible. Further the Appellant argues that the Court of First Instance violated the provisions of criminal procedure relating to the issue of whether there exists a charge by an authorized prosecutor, claiming that following the rejection of the "first indictment" by the Ruling of the Confirmation Judge on 17 November 2009, it is not possible to file a new indictment on the same matter. The Judgment is based on inadmissible evidence, *i.e.* information collected by the police before an investigation was initiated. The Albanian translation of the Judgment is not signed by the Presiding Judge or the Court Personnel, whereas the signature on the English version is not verified to belong to the Presiding Judge who left Kosovo in January 2012.

The Appellant finds that the dismissal of his appeal against the confirmation of the "second indictment" as inadmissible was in violation with Art-s 317 (2) and 431 KCCP.

12.2. Defence Counsel disagrees with the Trial Panel's evaluation of contradicting witness statements given during different phases of the proceedings. He argues that V.Z.'s statement to the police on 27 January 2009 should be considered a witness statement; therefore the evaluation of the Court is wrong because participants may not hold two statuses in the same criminal proceeding: witness and defendant.

12.3. The factual situation is established incompletely by the Trial Panel because the alibi of U. Muçaj was not verified, nor were several other pieces of evidence evaluated – such as: the statements of P.N. and P. G. given to the Prosecutor, the written statement of A.N., the Judgment of the Supreme Court of Kosovo dated 21 March 2007, or the statement of V.Z. during the confirmation hearing.

12.4. The obligation that the Defendant has to cover the expenses of the proceedings in a lump sum of 350 € is unsubstantiated and illegal.

13. Defence Counsel Z. Berdyna on behalf of the Defendant V.Z. proposes to terminate criminal proceedings against his client or to acquit him because of expiration of the deadline on statutory limitations.

13.1. The Appellant submits that the Challenged Judgment is incomprehensible, lacks reasoning, and is, in violation of norms of criminal procedure, based on evidence not administered during the main trial but obtained by the Police. The testimonies given by witnesses at trial have not been assessed by the Court.

13.2. Defence counsel alleges violations of the provisions of the criminal procedure from the initiation and extension of investigation, throughout the entire proceeding, as far as the signing of the appealed Judgment. Although defending V.Z., the Defence Counsel claims that the Presiding Judge should have been disqualified, because he had previously been working together with the Co-Defendant U. Muçaj.

2. The Response of the Prosecutor

14. The EULEX Prosecutor of the Basic Prosecutor's Office responded to the Appeal, finding that it is unsubstantiated and should not lead to any modification to the Impugned Judgment.

3. The Opinion of the Appellate Prosecutor

15. The Appellate Public Prosecutor moves the Court of Appeals to grant the Appeals of the Defence Counsels, to annul the Challenged Judgment and to return the case for a retrial in regard of charges brought against U.M., and to reject the Indictment against V.Z. in regard of charges concerning the January 2007 and 1 November 2008 episodes because of the expiration of statutory limitations.

16. The Appellate Prosecutor opines that the trial panel violated procedural law when relying on pre-trial statements of the witness A.N.. The First Instance Court did not act in due diligence in order to secure the presence of this witness at the trial. There is no proof that –apart from contacting the local police and summoning A.N. from Kosovo – the Court in fact attempted to summon him from Switzerland, through official channels of international legal cooperation. However the allegations as if the witness statements stemming from police interviews in the preliminary investigation stage were inadmissible, are wrong. These pieces of evidence are admissible, because nothing in KCCP rules out the possibility to use as evidence statements given to the Police during the preliminary investigation.

17. The Appellate Prosecutor agrees with the Defence Counsel E. Nimani's stance that the appeals of the accused filed against the confirmation of the indictment were wrongfully dismissed as inadmissible. However the Appellate Prosecutor opposes the opinion of the Appellant that this fact has contributed to a wrongful judgment, finding that it did not influence the rendering of a lawful and proper judgment. Furthermore, the Appellate Prosecutor opines that the appeal of the defendants filed against the confirmation of the indictment was unfounded and should have been rejected anyway as unmeritorious.

18. The Impugned Judgment lacks reasoning on relevant issues. Some of the evidence has not been analysed at all. The reasoning of the Judgment is silent on which facts were found established by the panel. Reasoning of the Judgment falls into assumptions, because no evidence supports that the money delivered to U.M. by V.Z. was shared between the two of them.

19. The Appellate Prosecutor submits that the Public Prosecutor acted in accordance with the instructions received from the Confirmation Judge and in line with Art 46 (1), Art 47 (1) and Art 304 (1) KCCP, when on 4 November 2010 filed the "second Indictment" with the Court. There is no provision in the KCCP which would attribute *res judicata* power to the Ruling of the Confirmation Judge dismissing the indictment for lack of well-grounded suspicion. Based on law, it is the obligation of the Public Prosecutor to pursue the case, which is exactly what happened in the present case. The Public Prosecutor would have violated the criminal procedure if he did not file the Indictment despite in possession of inculpatory evidence.

20. Arguments of defence counsels O. Basha and Z. Berdyna that the Presiding Judge and the panel member EULEX Judge should have been excluded from the trial panel are not substantiated. The claim of the Defence Counsel E. Nimani that V.Z. was interviewed by the police on 27 January 2009 in the capacity of a witness does not stand. It is clear from the record of the interview ("FORM D1") that V.Z. was instructed by the police on the rights of the suspects and interviewed in the capacity of a suspect.

21. The Appellate Prosecutor draws attention to the fact that part of the charges against V.Z. have to be rejected because of expiration of the deadline on statutory limitations, whereas none of the charges concerning U.M. is affected by that.

22. The Appellate Prosecutor disagrees on the critique concerning the allegedly wrongful consideration of mitigating circumstances when sentencing U.M. and finds that the sentence has been imposed in full accordance with respective norms.

23. At the same time the Appellate Prosecutor agrees with the claim of the Defence Counsels O. Basha and E. Nimani regarding the costs of proceedings determined in a lump sum. There is no reasoning in the Impugned Judgment given on if and what kind of expenses occurred during the criminal proceedings. Even if eventually the amount of the cost may not be determined accurately it has to be supported by evidence that in fact some costs occurred during the proceedings.

24. The claims of Defence Counsel O. Basha that the confiscation of the amount of the material benefit from U. Muçaj is not substantiated and in fact no evidence supports the conclusion that he even received any money are groundless. The Court of First Instance have established that U.M. received a bribe in sum of 10 000 €. Since Art (4) CCK makes it compulsory to confiscate the gift or other benefit received the order of confiscation of said sum is legal.

III. The Findings of the Court of Appeals

Competence of the Court of Appeals

25. The Court of Appeals is the competent court to decide on the Appeal pursuant to Art-s 17 and 18 of the Law on Courts (Law no. 03/L-199).

26. The Panel of the Court of Appeals is constituted in accordance with Art 19 (1) of the Law on Courts and Art 3 of the Law on the jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo (Law no 03/L-053).

Applicable Procedural Law

27. The criminal procedural law applicable in the respective criminal case is the (old) Criminal Procedure Code of Kosovo (KCCP) that was in force until 31 December 2012.

3. Findings on merits

28. Having reviewed the case files and impugned judgment, in line with provisions of Art 394 CPC, upon assessing appellate allegations, the Appellate Court found that Appeals of Defence Counsels O. Basha, E. Nimani and Z. Berdyna are well-founded and should be granted, whereas the Appeal of Defence Counsel M. Halimi should be granted partially. The Challenged Judgment should be annulled. The case should be sent back for retrial and reconsideration concerning the charges against U.M. and all of the charges against the Defendant V.Z. should be rejected because of expiration of the deadline on statutory limitations.

29. The Appellate Court found that the Challenged Judgment found the Defendant V.Z. guilty of the criminal offenses of: 1) Giving Bribes, contrary to Art 344 (1), date of offense 13 September 2006, (maximum sentence of imprisonment of up to three years and statutory limitation of 3 years under Art 90 (5)); 2) Trading in Influence, contrary to Art 345 (1), date of offense January 2007, (maximum sentence of imprisonment of up to two years and statutory limitation of 3 years under Art 90 (5)); 3) Trading in Influence, contrary to Art 345 (2) date of offense 1 November 2008, (maximum sentence of imprisonment of up to one year and statutory limitation of 2 years under Art 90 (5)); all articles of the CCK. The absolute bar on criminal prosecution under Art 91 (6) is twice the period of statutory limitation or six or four years respectively from the date of the offense. Because these three charges are dismissed or rejected by virtue of the expiration of the time to bring these matters to a final conclusion, the Appellate Panel sees no need to rule on any of the other motions of Defendant V.Z.'s defence counsel.

30. The Appellate Court found that the Challenged Judgment found the Defendant U.M. guilty of the criminal offenses of: 1) Accepting Bribes, contrary to Art 343 (1) date of offense 13 September 2006, (maximum sentence of imprisonment of up to five years and statutory limitation of five years under Art 90); 2) Trading in Influence, contrary to Art 345 (1) date of offense 1 November 2008, (maximum sentence of imprisonment of up to two years and statutory limitation of 3 years under Article 90 (5)); all articles of the CCK. The absolute bar on criminal prosecution under Article 91 (6) is twice the period of statutory limitation or 10 years from the date of the offense for Accepting Bribes (13 September 2016) and six years for Trading in Influence (1 November 2014). As a practical matter, it is highly

unlikely that the Trading in Influence charge will be concluded by 1 November 2014, but it would be premature for the Appellate Court to dismiss it at this time.

31. The remaining paragraphs of this decision will pertain only to the appeals of Defendant U.M..

32. The Appellate Court found most of the arguments of defence counsel as ungrounded and because the matter will be sent back to the Trial Court for retrial, these objections will not be discussed at length.

33. The Appellate Court accepts the opinions of both the Appellate Prosecutor and defence counsel that the Challenged Judgment was based upon inadmissible evidence, i.e. A.N. statements. Specifically, the Appellate Panel notes that insufficient efforts were made to compel his appearance to testify in the trial and also that defence counsel were not given an opportunity to challenge his previous statements as provided by Art 156 (2) KCCP. There was no right of confrontation nor was there any evidence to show that international mutual assistance had been sought. Therefore, in light of Art 156 (2) KCCP, his statements should have been excluded from the case files and should not have been used as evidence in the Judgment. The Appellate Court concludes that neither Art 368 (1.1) nor Art 157 (1) KCCP could have been applied in this case.

34. The Appellate Court has carefully reviewed the Challenged Judgment and concludes that the enacting clause is not incomprehensible or internally inconsistent. In addition, while it is always possible for a reviewing court to seek greater detail in the explanations of the trial court about accepting, discounting or rejecting the evidence given during trial testimony, the reasoning provided by the trial panel in the instant case is sufficiently detailed so as to allow the Appellate Court to follow their logical chain of reasoning.

35. Defence counsel also raises as issues purported violations of the criminal procedural code during the various stages of these proceedings. None of these objections raised show that there was a substantial violation of the provisions of the criminal procedure code that influenced or might have influenced the rendering of a lawful and proper judgment. Accordingly, these are rejected as ungrounded.

36. The Appellate Court accepts the arguments of defence counsel that the costs accessed against Defendant U.M. were not sufficiently detailed by the trial panel and therefore these should be rejected as well.

37. In light of the Appellate Court's decision to send the matter back for retrial, the issue of the reasonableness of the punishment is moot.

38. It is therefore decided as in the enacting clause.

This Reasoned Judgment, prepared in English, an authorized language, completed on 7 May 2014.

Presiding Judge

_____
Philip Kanning
EULEX Judge

Panel member	Panel member	Recording Officer
_____	_____	_____
Abdullah Ahmeti	Tonka Berisha	Andres Parmas
Kosovo CoA Judge	Kosovo CoA Judge	EULEX Legal Officer