

COURT OF APPEALS

Case number: PaKr 35/14
25 April

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Annemarie Meister as Presiding and Reporting Judge and Kosovo Court of Appeals Judges Fillim Skoro and Xhevdet Abbazi as members of the Panel, with the participation of EULEX Legal Officer Andres Parmas acting as Recording Officer, in the criminal proceeding against

Z.V., in the first instance convicted of the criminal offence of **Unauthorised ownership, control or possession of weapons** pursuant to Art 374 (2) of the Criminal Code of the Republic of Kosovo (CCRK);

Acting upon the Joint Appeal of Defence Counsels Faruk Korenica and Dejan A. Vasic filed on 30 December 2013 against the **Judgment of the Basic Court of Mitrovica no P 946/13 dated 20 November 2013** and delivered to the Defence Counsels on 18 December 2013;

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.-KTZ 47/14 dated 30 January 2014 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 Appellate Prosecutor Kari Lamberg;

Having deliberated and voted on 25 April 2014,

Pursuant to Art-s 398 and the following of the Criminal Procedure Code (CPC) *Renders*

the following

JUDGMENT

- 1. The Joint Appeal of Defence Counsels' filed on 30 December 2013 against the Judgment of the Basic Court of Mitrovica no. P 046/13 dated 20 November 2013, is hereby rejected.**
- 2. The Judgment of the Basic Court is hereby affirmed.**

REASONING

I. Procedural history of the case

1. On 25 October 2013 the Prosecutor filed an indictment PP No. 157/2013, charging Z.V. with the criminal offence of unauthorised ownership, control or possession of weapons under Art 374 (1) CCRK and attempted aggravated murder under Art-s 20 and 147 (1.10) of the (old) Criminal Code of Kosovo (as amended, UNMIK Regulation 26/2004, hereafter CCK).
2. At the initial hearing on 13 November 2013 the Defendant pleaded guilty to the above weapon-charge. Since the Presiding Trial Judge held that the conditions for accepting the guilty plea under Art 248 (1) CPC were met, this charge were severed from the other indicted charge by an oral Ruling of the Basic Court of Mitrovica dated 13 November 2013. In accordance with Art-s 38 (1) and 248 (4) CPC the Presiding Judge proceeded to sentencing for the severed charge.
3. The Presiding Trial Judge sentenced Z.V. to imprisonment for nine months, suspending the sentence for a verification period of two years, on the condition that the Defendant does not commit another criminal offence. The illegal weapon together with seventeen rounds of ammunition was confiscated.
4. When determining the sentence for the Defendant the Presiding Trial Judge took into account as mitigating circumstances that Z.V. entered into a guilty plea at first opportunity, the Defendant has no previous convictions and he cooperated with the prosecution in regard of the charge. As aggravating circumstances the Court took into account that the Defendant carried the weapon for a long time, *i.e* since 2009 and did so in places open to public. The weapon was fully operational and loaded while in public places. The Defendant - when trying to escape from the police discarded the weapon in a public place. The Court also put aggravating weight into the fact that Z.V. tried to avoid detention and fled from the police. The Court did not accept that the Defendant's fear of attack should have been considered as a mitigating circumstance.

II. Submissions of the parties

1. The Appeal

5. On 30 December 2013 the Defence Counsels F. Korenica and D.A. Vasic filed a joint Appeal against the above decision of the Presiding Trial Judge. The Appellants propose that the Presiding Trial Judge's decision on sentencing Z.V. be modified and the Defendant sentenced with only a fine or a conditional sentence for a shorter period and with shorter verification period. Alternatively they propose to return the case to the First Instance Court for reconsideration.
6. The Defence Counsels argue that the Presiding Trial Judge erroneously did not consider a great number of mitigating circumstances. They stress that Z.V. was very young (28) at the time of commission of the offence. The Defendant is the sole provider for his family with two minor children. His wife and one of the children have weak health and need almost constant medical observation. The Defendant is also caring for his sick parents. The offence happened in a remote place without any presence of public. The Defendant was carrying a gun for personal protection, for he had a justified concern about his physical safety. The penalty imposed on Z.V. is not in accordance with sentences usually imposed for similar offences by Kosovar courts. Usually the offenders only get fined for this offence.
7. The Appellants also oppose the existence of aggravating circumstances as established by the Presiding Trial Judge. The fact that Z.V. had the gun for several years, cannot be considered as an aggravating circumstance, because ownership of the weapon is already a constitutive element of the criminal offence under Art 374 CCRK - it must not be given a double weight when sentencing a person. Similarly the carrying of the gun in a public place must not be considered as an aggravating circumstance, because this too, is already embraced by the *actus reus* of the offence. It has to be taken into account that Z.V. had the justifying motive of self-protection for carrying around the weapon and it what have been pointless, if the gun would not have been carried in public places. The Defence Counsels disagree with considering as aggravating circumstance that the weapon was fully operational - a non- operational weapon could not be considered as a weapon altogether. It has to be noted that although the weapon had a bullet in the barrel, Z.V. did not actually shoot anybody or not even in the air. It is incorrect as if the Defendant discarded of the weapon in the public place, where anyone could have found it. He threw the weapon in scrub and bushes in a place not easily accessible and not usually visited by anyone. It cannot be held against the Defendant that he tried to avoid detention. He only panicked at first, but went to the authorities voluntarily thereafter.
8. Considering the usual sentencing practice for similar offences throughout Kosovar court the sentence for Z.V. is too severe.

2. The Response of the Prosecutor

9. 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

10. The Appellate Public Prosecutor moves the Court of Appeals to reject the appeal as unfounded. He argues that the Appeal is unmeritorious; the Impugned Judgment is well reasoned.

III. The Findings of the Court of Appeals

I. Competence of the Court of Appeals

- II. 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).
12. 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).

2. Applicable Procedural Law

13. The criminal procedural law applicable in the respective criminal case is the (new) Criminal Procedure Code of Kosovo (CPC) that came into force on 1 January 2013.

3. Findings on merits

14. The Court of Appeals holds that the Appeal is unmeritorious and has to be rejected for the reasons below.

15. Court of Appeals notes that the determination of the sentences lies primarily with the trial court and the appellate court, when reviewing the verdict of the court of first instance, should concentrate only on procedural or substantive mistakes made by imposition of the sentences. The sentence for Z.V. remains well below the median of the sentence applicable for the criminal offence they were convicted of. The sentence has been suspended. In the Impugned Judgment the Trial Panel has adequately reasoned its stance on the severity of the punishment, based on the level of the Defendant's guilt as seen from the established facts of the case. The Court of Appeals sees no reasons to object these conclusions.
16. Concerning the Defence Counsels arguments that a great number of mitigating circumstances were unjustly not taken into account, the Court of Appeals notes that it cannot be agreed with any of such criticisms. The age of Z.V. at the time when he was caught committing the criminal offence discussed - 28 years - in no way can be considered as very young. The minimal age of criminal responsibility in Kosovo is 14 years. A person is considered an adult and vested with most civil rights already at the age of 18 years. Being already long past that age, a family man and father of two, there is no ground whatsoever to argue that 28 years of age is still a very young age.
17. It is true that the Court of First Instance has not expressly discussed that Z.V. is the sole provider of his family. However the Court of Appeals sees no violation in that. The mere fact that a convicted person has a family or even that he is the sole breadwinner in the family cannot automatically be an indulgence or mitigation of his guilt. It is the assessment of the Trial Panel, whether these facts in the specific case could diminish the guilt of the accused. If the Trial Panel sees it appropriate, it has to give its reasons for that conclusion in the Judgment. Also, if the Court disagrees with an explicit request of the defence in that regard, the reasons should be present in the Judgment. However, if there is no such argument put forward during the main trial (or the pleading stage) and if the trial court does not see any specific reasons to discuss the mitigating role of the family of the accused, it does not have to be discussed in the Judgment. The same applies for the defence arguments in regard of poor health of Z.V.'s family members and his obligation to care for them.
18. The argument concerning the alleged self-protection as the reason for carrying the gun should not be considered as a mitigating circumstance either, because there is no evidence of any imminent threat to the person of the Defendant, which could be taken into consideration in that respect.
19. Neither can it be agreed with the claim that the offence happened in a place where there was no presence of public. It is obvious even from the defence claims that Z.V. was carrying a gun when moving around and had been doing this for years. Just before apprehended, he

discarded the weapon in a place open to public. The fact that at the very specific moment other people were not moving there is completely irrelevant.

20. The Court of Appeals does not agree with the mere speculation of the Appellants that usually offenders convicted of similar criminal offences are only punished with a fine in Kosovo. The Appellants claim in that regard is not supported by any statistic, nor could it be, because the sentences for unauthorised possession of weapons vary from case to case quite remarkably.
21. The Court of Appeals disagrees also with defence criticism in regard of alleged wrongful consideration of aggravating circumstances. First, the fact that Z.V. was in possession of the illegal weapon for years, is a valid reason to find his guilt to be aggravated. The offence of unauthorised ownership, control or possession of weapons is a continuous offence, the gravity of which depends amongst other circumstances obviously also from the duration of the illegal activity. It has been established that Z.V. was in possession of a weapon for an extended period and therefore his guilt is adequately assessed bigger than it would have been in case of only a short period of weapon possession.
22. What concerns the fact that the weapon was carried around in public places this too has been correctly assessed as an aggravating circumstance. It is not in itself a constitutive element of the criminal offence defined in Art 374 CCRK as wrongly suggested by the Appellants. This article does not contain any reference to public places, whereas there is great difference where and under which circumstances a weapon is handled. In the case at hand it has been established that Z. V. was carrying the weapon around, loaded and ready to shoot. This brings the Court of Appeals to the next argument of the Defence Counsels that being in command of a non-operational weapon would not constitute a criminal offence altogether. This argument is only partly valid. Should it be the case, where a person holds a weapon that has been turned effectively and finally defunct it would indeed not constitute a criminal offence. However, if a weapon is merely unloaded or disassembled, the possession of it is still punishable, whereas the direct and imminent threat of such weapon is significantly smaller than in case of weapon, which is in full working order and loaded. Z.V. was carrying a gun which was ready to shoot with a bullet in barrel and this circumstance has correctly been assessed by the Trial Panel as aggravating.
23. The Court of Appeals also agrees with the conclusion of the Trial Panel, that the guilt of Z.V. is aggravated by the fact that when trying to avoid himself being caught he discarded the weapon in a public place, where anyone could have found it.

Presiding Judge

AnnemarieMeister

EULEX Judge

Panel member

Panel member

Recording Officer

Fillim Skoro
Judge

Xhevdet Abazi
Judge

Andres Parmas
EULEX Legal Officer

Prepared in English, an authorized language. Reasoned Judgment completed and signed on 25 April 2014.