

COURT OF APPEALS

Case number: PaKr 1/13
Date: 16 April 2014

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

L.J., in the first instance acquitted from the criminal offences of:

- *Attempted Commission of Terrorism in co-perpetration* contrary to Sec 2.3 and 2.2 of the UNMIK Regulation 2001/12 and Art-s 19 and 22 of the Criminal Code of Socialist Federal Republic of Yugoslavia CC SFRJ read with Art-s 20, 23 and 110 (1) and (3) of the Criminal Code of Kosovo (CCK);
- *Terrorism* contrary to Sec-s 2.4 and 2.2 of the UNMIK Regulation no. 2001/12;
- *Attempted commission of Terrorism in co-perpetration* contrary to Sec-s 4.4 of the UNMIK Regulation 2001/12 in conjunction to Sec-s 1 and 2 of the Administrative Direction 2003/12 in conjunction to Sec-s 1 and 2 of the Administrative Direction 2003/12 and Art 22 of the CC SFRJ read with Art-s 2, 23, 109 and 112 (5) CCK;
- *Unauthorized Ownership, control, possession and use of Weapons* in contrary to Sec 8.2 in conjunction to Sec 8.6 of UNMIK Regulation 2001/7 read with Art-s 2 and 328 (2) CCK;
- *Organization, Support and Participation in Terrorist Groups* contrary to Sec 5.3 of UNMIK Regulation 2001/12 read with Art-s 2, 109 & 113 of the CCK;
- *Attempting Commission of the Criminal offence Causing General Danger in co-perpetration* contrary to Art 157 (1) in conjunction to Art 164 (2) and Art-s 19 and 22 CC SFRJ read with Art-s 2, 20, 23 and 291 (5) CCK;

Acting upon the Appeal of the Special Prosecutor Besim Kelmendi filed on 10 January 2013 against **the Judgment of the District Court of Gjilan no P 107/05 dated 9 October 2012;**

Having considered the Response to the Appeal by Defence Counsel Nasuf Nasufi filed on 14 January 2013;

Having also considered the Opinion of the Appellate Prosecutor within the State Prosecutor's Office, no PAR/I. 33/13 submitted with the Court of Appeals on 30 January 2013;

After having held a public session on 16 April 2014, with all parties duly invited, in the presence of Appellate Prosecutor Haxhi Derguti;

Having deliberated and voted on 16 April 2014,

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

Renders the following

JUDGMENT

- 1. The Appeal of the Special Prosecutor against the Judgment of the District Court of Gjilan dated 9 October 2012 is hereby rejected.**
- 2. The Judgment of the Basic Court is hereby affirmed.**

REASONING

I. Procedural history of the case

1. On 31 July 2005 an Indictment against *inter alia* L.J. was filed with the then District Court of Gjilan, accusing L.J. of the criminal offences as articulated above.
2. The main trial was held between 7 December 2011 and 9 October 2012 when the verdict was announced.
3. The Court of First Instance acquitted L.J. of all charges. The Court held that facts showing the commission of a criminal act of terrorism had been proven but that the facts did not prove the other allegations in the indictment, including the allegation that Defendant J. was criminally involved. According to the Court an unidentified group of people prepared to blow up part of the road in the vicinity of gate 5 of the administrative boundary line between Kosovo and Serbia. For unknown reasons they abandoned the plan and left the scene.

4. The District Court held that the only direct and potentially reliable evidence confirming the participation of L.J. in the events described in the Indictment, stem from anonymous witnesses, the Serb policemen that observed the activities on the spot. Even this testimony the Court found highly suspect. More importantly in regard to this testimony, The Court pointed out that through the application of both Art. 157 (3) KCCP case law from the European Court of Human Rights, it is not allowed to find anybody guilty solely, or to decisive extent, based on the testimony of anonymous witnesses.. The Court found no other reliable evidence sufficient to adequately substantiate the testimony of the anonymous witnesses.

II. Submissions of the parties

1. The Appeal

5. On 10 January 2013 the SPRK Prosecutor submitted an Appeal, proposing that the Judgment of the District Court be annulled and the case returned for reconsideration. The Appellant argues that First Instance Court failed to give reasons why the statements of the various witnesses were not trusted.

2. The Response of the Defence Counsel

6. The Defence Counsel Nasuf Nasufi responded to the Appeal, finding that the Appeal is ungrounded and should be rejected. He suggested that the Court of First Instance has established the facts of the case correctly, has not violated the norms of criminal procedure and has correctly applied substantive criminal law.

3. The Opinion of the Appellate Prosecutor

7. The Appellate Public Prosecutor moves the Court of Appeals to accept the Appeal. He argues that the Court of First Instance only described material evidence found at the scene, but failed to analyse it. This evidence should have been analysed together with witness-statements. The facts of the case have not been established properly by the Court of First Instance. The Court has failed to assess the evidence correctly, unreasonably evaluating witness statements and the recognition of L.J. from the photo line-up that took place during the pre-trial phase, hence near in time to the event.

III. The Findings of the Court of Appeals

1. Competence of the Court of Appeals

8. 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).
9. 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

10. 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

11. In this matter the Defendant, L.J., was charged with the crimes of Commission of Terrorism, Attempt to Commit Terrorism, Unauthorized Ownership, Control, Possession or Use of Weapons, Organization, Support and Participation in Terrorist Groups and Attempt to Commit the Causing of General Danger. The charges all arose out of an incident in June, 2003 in an area near the border with Serbia.
12. After a public trial that spanned ten months and involved eighteen sessions, the Defendant was acquitted of all charges by the Trial Panel. The Prosecution appealed alleging essential violation of criminal procedure, violation of the criminal law, and wrong and incomplete corroboration of the factual situation.
13. For the reasons set forth below the Court of Appeals rejects the appeal of the Prosecution and affirms the challenged judgment of the District Court.
14. The factual events that gave rise to this case are not in dispute – whether the Defendant was one of the perpetrators is.
15. Before analyzing the arguments of the Appellant, the Panel briefly summarizes what was established by the District Court in the challenged judgment.
 - 15.1. Late in the afternoon on the 6th of March 2003 in the vicinity of the Administrative Boundary Line between Gate 5, (CP 75), Kosovo and the Serbian checkpoint located at or near Konculj, Serbia a black Mercedes was observed from a distance driving up and down

the road on the Kosovo side of the boundary. Eventually the Mercedes stopped and four people got out. They were not close enough to observe their faces.

- 15.2. The four engaged in removing wire, a canister of fuel and a box from the trunk of the car and placed these materials in a channel alongside of the road. The wire was stretched along the channel from the box and canister to a nearby bridge. The box and canister were covered with something. At this point two of the occupants of the car went into the woods nearby and the two other occupants returned to the Mercedes and left the scene, driving back toward Kosovo. The observers were able to gain a general description of the four people but could not clearly observe their faces.
- 15.3. The next day the Mercedes reappeared in the area occupied by two people who had not been present the day before. Eventually a Volkswagen Golf also appeared and pulled up alongside of the Mercedes. It was not possible to observe who was in the Golf. There was some conversation between the occupants of the two cars.
- 15.4. Eventually the two men from the woods appeared. At that time it was possible observe the faces of these two people through binoculars and a telescopic sight on a sniper rifle. The wire, container and fuel canister were gathered up and put back into the Mercedes. The two men from the woods entered the Golf, seating themselves in the back. Two men entered the Mercedes and drove north toward the border checkpoint. The three men in the Golf went south into Kosovo.
- 15.5. When the Mercedes did not stop at the border checkpoint the occupants were shot and killed by border guards and a subsequent search of the car revealed the presence of wire, a large battery, a canister of fuel and a substantial quantity of explosives.
- 15.6. In the meantime, the Golf proceeded south along various roads until stopped by police. At the time of the stop there were only two men in the car. The Defendant was not one of them. The driver was later identified as the father of the driver of the Mercedes who had, by then, been killed by the border guards.
- 15.7. Through subsequent investigations Defendant was identified as a defendant through some photo lineup procedures provided to the people who had observed the various activities near the border crossing. These procedures and the subsequent identification of the Defendant are at the heart of the Trial Panel's decision and thus at the heart of this appeal.
- 15.8. In acquitting the Defendant the Trial Panel made three specific findings: 1) The facts proved the commission of a terrorist act; 2) The facts did not prove that the terrorist act was committed by a terrorist organization; and 3) The facts did not prove that the

defendant J was involved in the commission of the terrorist act. The Court of Appeals only addresses the third finding of the District Court as it is dispositive of this appeal.

16. The central issue raised by the Prosecution on appeal is that the Trial Panel did not give sufficient weight to the evidence of the two anonymous witnesses who identified the Defendant through various photographic lineup procedures as one of the people involved in the illegal activities near the border crossing.
17. As the Trial Panel correctly pointed out in the reasoning section of its judgment, the only two people who were direct witnesses to the alleged involvement of the Defendant in the illegal activities were two former Serbian border guards who, as stated above, observed the activities through binoculars and a telescopic lens on a sniper rifle. They made the subsequent identifications of the Defendant through being shown some photographic lineups that the Trial Panel found suspect because of the types of photographs and potential number of times the witnesses were shown these same photographs. The Panel also pointed out that at trial the two anonymous witnesses picked out the photo that appeared to be the Defendant, but were unable to identify him when they saw him on the video screen during the trial.
18. In addition to the Trial Panel's skepticism regarding the reliability of the processes around the photographic lineup, the Panel also pointed out that the only other evidence potentially linking the Defendant to this matter was the testimony of a suspended and imprisoned former Kosovo Police Service officer who changed his story several times and who, at best, could be believed to have said that he "had heard" that the Defendant was involved. The Panel rejected this testimony as wholly unreliable. The Panel was clearly justified in finding this witness to have very low credibility and his evidence unreliable.
19. The Court further pointed out that other Defendants, in their own separate trials, denied even knowing the Defendant.
20. The Court of Appeals of Kosovo has often applied the general principal that it is required to give some substantial degree of deference to the finding of fact of the trial panel as it has heard the evidence and is in the best position to assess its weight and value.¹ In addition, the Kosovo Supreme Court has held that it must, "...defer to the assessment by the Trial Panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the Trial Panel assessment of credibility of those witnesses unless there is a sound basis for doing so." The Court went on to say that the standard to be applied was "...to not disturb the trial court's findings unless the evidence relied upon by the trial court could not have been

¹ See for example, Court of Appeals of Kosovo PAKR 1121/12, 25 September 2013, para. 48

accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous.”²

21. Here it is apparent that the Trial Panel carefully analyzed and weighed the evidence, especially the testimony given by those who gave evidence purporting to connect the Defendant to the criminal act. Given the careful review of the evidence by the Trial Panel and their clear explanation of their reasons for finding that the prosecution had not proven that Defendant was involved in the criminal act, the application of the legal principles set out above provides ample basis for this panel to affirm the findings of the trial panel and reject the appeal of the Prosecutor.
22. Even though applying the legal principles set out above is enough to support the findings of the Trial Panel and affirm their judgment, this panel feels it is important to discuss one other important factor in regard to the anonymous witnesses.
23. The Prosecution complains in its appeal that the Trial Panel did not give enough weight to the statements of the two anonymous witnesses given during the preliminary stages of the investigation. By raising this as a ground for appeal it is apparent that the Prosecution has completely ignored the clear and succinct statement of the law regarding the use of testimony of anonymous witnesses to prove guilt provide by the Trial Panel on page 21 of the English version of the challenged judgment.
24. As the Trial Panel correctly pointed out, the Kosovo Criminal Code of Procedure in Art 157 (3) prohibits the court from finding someone guilty based solely or to a decisive extent based on the testimony given by a witness who is anonymous to the defendant and his counsel. As the Panel went on to point out the Kosovo code appears by its language to apply to the testimony of a single anonymous witness while the European Court of Human Rights in *Doorson v. Netherland* from 26 March 1996 (20524/92) said that even the testimony of more than one anonymous witness is insufficient.
25. It is not evident from the appeal of the Prosecutor whether the prosecution seeks to draw a distinction between pre-trial statements given by anonymous witnesses and testimony given at trial by those witnesses. If that is the intent, the attempt to draw such a distinction is without merit. The form in which the anonymous witness provides testimony is irrelevant. No matter how the testimony is presented the fact of granting anonymity to a witness means that the testimony can never be fully challenged for veracity and credibility and therefore, its use as evidence is severely restricted.

² Supreme Court of Kosovo , AP-KZi 84/2009, 3 December 2009, para. 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, para. 30

26. Based upon the foregoing, this Panel rejects the appeal of the Prosecutor and affirms the finding of the Trial Panel finding the Defendant not guilty on all charges.

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

Presiding Judge

James Hargreaves

EULEX Judge

Panel member

Annemarie Meister

EULEX Judge

Panel member

Xhevdet Abazi

Judge

Recording Officer

Andres Parmas

EULEX Legal Officer