

31 July 2014

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Timo Vuojolahti as Presiding Judge, and Supreme Court Judge Emine Mustafa and Avdi Dinaj as panel members, assisted by EULEX Legal Officer Natalie Dawson acting in the capacity of recording clerk, in the criminal case P. no. 02/2012 before the Basic Court of Mitrovicë/a;

In the criminal case against the defendant,

JP [REDACTED], born on [REDACTED], currently residing in [REDACTED]

In respect of the criminal offence of:

Organised Crime, contrary to article 274(1) and (2) Provisional Criminal Code of Kosovo (hereafter CCK) in conjunction with money laundering, contrary to section 10.2 UNMIK Regulation no. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences.

Deciding on a Request for Protection of Legality filed by the State Prosecutor on 4 April 2014,

Considering the response of Defence Counsel ZJ [REDACTED] on behalf of the Defendant [REDACTED] filed on 3 June 2014.

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 filed by the State Prosecutor against the Judgment of the Court of Appeals in PAKR 4/2013 on 25 September 2013 is hereby REJECTED AS UNGROUNDED.

I. Procedural History:

- a. On 13 October 2010 the prosecutor issued a Ruling of Initiation of an Investigation in case PPS 41/2010 against several suspects. The Prosecutor issued a Ruling on Expansion of Investigation to include another suspect. On 28 March 2011



- Prosecutor issued a Ruling on Expansion of Investigation to include the Defendant P [REDACTED]. As of 22 October 2014 two suspects, [REDACTED] were still at large. JR and SP
- b. On 16 May 2011 the Pre-Trial Judge granted Orders for Arrest and for Search both dated 16 May 2011 following application by the Prosecutor. On 17 May 2011 the Defendant P [REDACTED] was arrested and was remanded in detention, where he remained throughout the proceedings.
- c. On 14 October 2011 the Pre-Trial Judge granted the extension of the investigation until 13 April 2012.
- d. On 10 November 2011 the Prosecutor filed the Indictment PPS no. 41/2010 against the Defendant P [REDACTED]. The Defendant P [REDACTED] was indicted in respect of the following offences:
1. Smuggling of goods, contrary to Article 273(1) CCK;
 2. Tax Evasion, contrary to Article 249(1) and (2) CCK;
 3. Fraudulent Evasion of Import Duty and Excise Tax, contrary to Article 298 of the Customs and Excise Code;
 4. Money Laundering, contrary to Section 10.2 UNMIK Regulation no. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences;
 5. Organised Crime, contrary to Article 274(1) and (2) CCK; and,
 6. Unauthorised Ownership, Control, Possession or Use of Weapons, contrary to Article 328(2) CCK.
- e. On 20 January 2012 the Indictment was confirmed with Ruling KA no. 201/11, and the Confirmation Judge declared all the evidence admissible. This Ruling was not appealed.
- f. Between 15 June and 20 September 2012 the Main Trial took place. P
- g. On 20 September 2012 the Verdict was pronounced. The Defendant P [REDACTED] was found guilty of Counts 4, 5 and 6 on the Indictment, those being: Money Laundering, Organised Crime and Unauthorised Ownership, Control, Possession or Use of Weapons. P
- h. The Defendant P [REDACTED] was sentenced to four (4) years imprisonment and a fine of €1,000 for Money Laundering; eight (8) years of imprisonment and a fine of €1,000 for Organised Crime, and one (1) year of imprisonment for the Unauthorised Ownership, Control, Possession or Use of weapons. The aggregate punishment was determined as nine (9) years of imprisonment and a fine of €2,000. The time spent in detention on remand was credited. The weapon illegally owned by the Defendant P [REDACTED], two motor vehicles, and cash in both Euros and Serbian Dinar currencies, were confiscated. The Defendant P [REDACTED] was ordered to reimburse the costs of the criminal proceedings.
- i. The Defendant P [REDACTED] was acquitted of the other counts on the Indictment.
- j. On 3 December 2012 Defence Counsel P [REDACTED] filed an Appeal on behalf of the Defendant P [REDACTED]. On 31 December 2012 the Special Prosecutor filed a (belated) response to the Appeal. On 24 June 2013 the EULEX Appellate P [REDACTED] filed an Opinion and Motion in response to the Appeal.
- k. On 22 October 2013 the Court of Appeals issued its Judgment, partial Appeal. The Court of Appeals found as follows:



1. The Indictment is rejected in respect of the offence of Unauthorised Ownership, Control, Possession or Use of Weapons
 2. The legal designation of the offences attributed to the Defendant [REDACTED] is changed pursuant to Article 420(1), (4) and 426(1) of the Provisional Criminal Procedure Code of Kosovo (hereafter KCCP):
 - 2.1 The conviction in respect of Money Laundering is annulled.
 - 2.2 The Defendant [REDACTED] is convicted of Organised Crime contrary to Article 274(1) and (2) CCK, in conjunction with Money Laundering contrary to Section 10.2 UNMIK Regulation no. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences.
 3. The Defendant [REDACTED] was sentenced to four (4) years imprisonment and a fine of €1,000.
 4. The decision to confiscate the items listed above is annulled.
 5. The remaining part of the Judgment of the Basic Court of Mitrovicë/a of 20 September 2012 is confirmed.
- i. On 4 April 2014 the State Prosecutor filed a Request for Protection of Legality against the Judgment of the Court of Appeals on 22 October 2013.
- m. On 3 June 2014 the Defence Counsel [REDACTED] filed a Response to the Request on behalf of the Defendant [REDACTED]

II. Positions of the Parties

The Prosecutor

- a. The Court of Appeals applied an inapplicable law to the case insofar as it found that the concurrence between the offences of Money Laundering and Organised Crime was apparent, ideal or actual concurrence. The Prosecutor submits that the concurrence between the offences is real.
- b. This is supported by the jurisprudence of the Supreme Court of Kosovo. The Judgment referred to by the Court of Appeals in its Judgment in support of its findings in this regard deviated from previous precedent.
- c. The scope of review of the Court of Appeals was limited to the legal grounds raised by the Defence in its Appeal. Mitigating circumstances were not raised by the Defence therefore the Court of Appeals was not permitted to consider them.
- d. The Court of Appeals 'based its decision on an assumption that the acts of money laundering... *might* fall under amnesty.' The State Prosecutor submits that the grounds for amnesty were not established by the Court of Appeals.
- e. The Court of Appeals failed to weigh the mitigating factors against the aggravating factors in determining the appropriate sentence. The Prosecutor further submits that the sentence imposed on the Defendant is lower than the minimum fores... 274(1) and (2) CCK.

The Defence



- a. Firstly, the Defence Counsel makes reference to factual circumstances, stating there is no reason to return the case to either the first or second instance court.
- b. Secondly, the Request was filed late because it was filed on the 'last day of the legal deadline.'

III. Findings of the Court:

- a. The Supreme Court considers that the Request for Protection of Legality is timely filed and admissible. Parties are entitled to file such a Request on day during the period allowed by law. The fact that the State Prosecutor filed her Request on the last day of that time period is immaterial.

Scope of the appellate review

- b. The Prosecutor submits that the mitigating circumstances were not raised in the appeal by the Defense, and therefore the Court of Appeals was not permitted to consider them. The Supreme Court finds out that this allegation is without merits. The Defense Counsel argued in his appeal, filed against the First Instance Judgment, that the sentence imposed on the defendant [REDACTED] was wrong, and moreover, referred to the wrongful finding of aggravating circumstances and to the failure of giving appropriate importance to the mitigating circumstances. It must be noted that the court shall determine the punishment (within the limits provided for by law) taking into consideration all the circumstances that are relevant to the mitigation or aggravation of the punishment, as stated in Article 64 CCK. The Supreme Court finds that there is no violation of the provisions of the criminal procedure in this regard.

Punishment

- c. Article 274(1) CCK states, '*Whoever commits a serious crime as part of an organized criminal group shall be punished by... imprisonment of at least seven years.*' The Supreme Court finds that the District Court applied this provision when calculating the punishment (referring to paragraph 10.3 in its judgment of 20 September 2012). The minimum sentence for the offence of Organised Crime in these circumstances is therefore seven years.
- d. Article 66 CCK states, '*The court may impose a punishment below the limits provided for by law or impose a lesser type of punishment... when the court finds that there are particularly mitigating circumstances which indicate that the purpose of punishment can be achieved by imposing a lesser punishment.*'
- e. Article 67(1) CCK states that '*When the conditions provided for in Article 66 of the present code exist, the court shall mitigate the punishment within the following limits... (1.2) If a period of at least three years is provided as the minimum term of imprisonment for a criminal offence, the punishment can be... imprisonment of one year.*'



- f. Article 67(2) CCK states, *'In determining the degree of mitigation of punishment in accordance with paragraph 1 of the present article, the court shall take into special consideration the minimum and maximum term of punishment provided for the criminal offence.'*
- g. The Supreme Court points out that these provisions give the court the discretion to impose a punishment below the required minimum provided for in the provisions for different criminal offences, where it finds there are particularly mitigating circumstances, but within the limits set out in Article 67 CCK.
- h. In paragraphs 56 and 57 of its Judgment the Court of Appeals states its reasons for going below the minimum sentence provided for in Article 274(1) CCK in accordance with Articles 67(2) and 66 CCK. The reasoning in these paragraphs shows that the Court of Appeals Panel was entitled to, and has carefully considered, all of the circumstances of the case. This includes both mitigating and aggravating features. The Panel clearly took into account each of the relevant provisions of the CCK and reached its conclusions accordingly.
- i. The Court of Appeals did not impose a sentence below the one year minimum as stated in Article 67(1) CCK. Therefore no violation of criminal law has taken place with regards to the minimum term of imprisonment.
- j. In the same paragraph (56) of the Court of Appeals judgment the specific considerations of the Panel in relation to the Amnesty Law provisions are made clear. The Court of Appeals has given relevance to the possible effect of the Amnesty Law stating that *'...the acts of money laundering involved proceeds from criminal activities, which might fall under amnesty.'* The Court of Appeals reasoned that *'...it might be the case that J [REDACTED] P [REDACTED] will be punished for laundering the proceeds of above mentioned criminal proceeds, but the persons who have actually committed the crimes referred to above walk free because of the amnesty.'*
- k. The reasoning in paragraph 56 of the Court of Appeals judgment can be understood to mean the Court of Appeals took account of the Amnesty Law provisions because they affect the positions of others involved in the same group, rather than the Defendant himself. The Court of Appeals took account of the effect these provisions have on other individuals of the group and the minor position of the defendant P [REDACTED] to ensure proportionality prevailed.
- l. The fact that another panel might disagree as to the relevance and significance of the circumstances described above does not mean that the Court of Appeals violated the provisions of calculating the punishment when considering these arguments as mitigating circumstances. It must be noted that Article 64.1 CCK gives an extensive discretion to the court to decide what can be considered as mitigating circumstances. It is clear that this must be assessed on a case by case basis. The Supreme Court panel finds that there is no clear violation of the criminal law.



- m. In summary, in relation to the quantity of the punishment and the reasoning behind it, the Supreme Court finds no violations of the criminal law have taken place. There is no reason to interfere with the reasoning of the Court of Appeals.

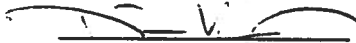
Whether the offence of Organised Crime should subsume the offence of Money Laundering

- n. The Majority of the Panel finds that the findings of the Court of Appeals Panel in this regard are sound.
- o. The Majority of the Panel is of the opinion that the Supreme Court's stance on this issue is that, where Organised Crime and the underlying offence are both made out in law, there should be one conviction for Organised Crime in conjunction with the underlying offence. In this case the Defendant ██████████ should be convicted of Organised Crime in conjunction with Money Laundering, just as the Court of Appeals held.
- p. In support of this the Supreme Court cites the findings in case no. Ap-Kz 61/2012 in a Judgment dated 2 October 2012. At paragraph 48, the Supreme Court stated that, 'The formulation used throughout Article 274 of the CCK clearly stipulates that the commission of the basic offence is a constitutive element to the offence of Organised Crime.' This jurisprudential principle is relied on by the Court of Appeals in this case and the Supreme Court sees no reason to disagree with this assessment.

The matter was decided by a majority vote. The Partially Dissenting Opinion of Presiding Judge Timo Vuojolahti is attached.



Presiding judge:



Timo Vuojolahti
EULEX Judge

Recording officer:



Natalie Dawson
Legal Officer



Emine Mustafa
Supreme Court Judge

Avdi Dinaj
Supreme Court Judge

SUPREME COURT OF KOSOVO
PML 83/2014
31 July 2014