SUPREME COURT OF KOSOVO

PA-II-KZ-II-5/2014

1 October 2014

In the Name of the People

THE SUPREME COURT OF KOSOVO in the panel composed of the Supreme Court Judge Nesrin Lushta , presiding judge, EULEX Judge Esma Erterzi, reporting judge, EULEX Judge Willem Brouwer, a member of the panel, with the participation of EULEX Legal advisor Adnan Isufi, acting as recording officer, in the criminal proceeding against the defendants:

J. D., father's name X, mother's name X, born on XX in XX Municipality, residing in XX Municipality, XX, graduated from the technical school, no criminal records, indicted for having allegedly committed the criminal offences of war crime against the civilian population pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) which is currently criminalized under Articles 31 and 153 of the Criminal Code of the Republic of Kosovo (CCRK) and unauthorized ownership, control or possession of weapons pursuant to Article 328 of the Provisional Criminal Code of Kosovo (CCK) which is currently punishable under Article 374 CCRK**;**

Dj. B., father's name X, mother's name X, born on X in X, X Municipality, X, residing in X, currently in pension, no criminal records, indicted for having allegedly committed the criminal offences of war crime against the civilian population pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) which is currently criminalized under Articles 31 and 153 of the Criminal Code of the Republic of Kosovo (CCRK) and unauthorized ownership, control or possession of weapons pursuant to Article 328 of the Provisional Criminal Code of Kosovo (CCK), currently punishable under Article 374 CCRK,

Acting upon the Appeal of Defence Counsel Lj. P., dated 7 July 2014, filed on behalf of the defendant J. D. and the Appeal of Defence Counsel M. B., dated 9 July 2014, filed on behalf of the defendant Dj. B. against the Judgment of the Court of Appeals PaKr 503/13 dated 27 May 2014,

Having considered the Opinion of the Office of the State Prosecutor of the Republic of Kosovo, dated 23 July 2014,

After having held a public session on 30 September 2014, with all parties duly informed and invited- (the injured pary was informed electronically but was not able to participate due to being abroad), in the presence of Prosecutor Jaroslava Novotna, the defendants and the Defence Counsels Mr. P. on behalf of J. D. and M. B. on behalf of D. B.;

Having started the deliberation on 30 September and voted on 1 October 2014, pursuant to Article 398 in conjunction with Article 407 of the Criminal Procedure Code of Kosovo (CPC), the Supreme Court of Kosovo issues the following:

JUDGMENT

The Appeal of Defence Counsel Lj. P., dated 7 July 2014, filed on behalf of the defendant J. D. and the Appeal of Defence Counsel M. B., dated 9 July 2014, filed on behalf of the defendant Dj. B. against the Judgment of the Court of Appeals PaKr 503/13 dated 27 May 2014 are grounded.

The appealed Judgment of the Court of Appeals PaKr 503/13 dated 27 May 2014 regarding the criminal act of the war crime against the civilian population pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), currently criminalized under Articles 31 and 153 of the Criminal Code of the Republic of Kosovo (CCRK), is modified in a manner that the Judgment of the Basic Court of Mitrovicë/Mitrovica P 13/2013 dated 17 April 2013 is confirmed and the defendants J. D. and Dj. B. are acquitted of the criminal act of the War Crime against the Civilian Population pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY). In the remaining part the appealed judgment has not been subject of the review.

REASONING

I. Procedural Background

On 12 November 2012, the Special Prosecution Office of the Republic of Kosovo filed the indictment PPS nr. 89/2012 against the accused J. D. and Dj. B. with the then District Court of Mitrovicë/Mitrovica which was amended on 30 November 2012, upon the Ruling of the Court.

The prosecution alleged that defendant J. D., in the capacity as a Serbian police officer raped V.K., a Kosovo Albanian female civilian. He was armed with a rifle, kidnapped her from her house, drove the victim to an unknown location near X, and forced her, by threatening her with a knife, to have various types of sexual intercourses against her will inside his car. Furthermore, the prosecution accused the defendant J. D. for having allegedly possession without a valid authorisation of weapons, found during the search at his residence.

The prosecution also argued in the indictment that second defendant Dj. B., who had a gun on him took the victim to an unfinished house in X, threw the victim on the floor and he forced her to have sexual intercourse against her will. The prosecution accused the defendant Dj. B. for having allegedly possession without a valid authorisation as well.

On 5 February 2013, the Basic Court of Mitrovicë/Mitrovica issued a decision rejecting the Defence request to dismiss the indictment and the Defence objections on admissibility of evidence. This decision was affirmed by a decision of the Court of Appeals dated 6 March 2013. The Main Trial was held between 4 and 15 April 2013.

On 17 April 2013, the Basic Court of Mitrovicë/Mitrovica announced the judgment.

The defendant J. D. was acquitted of all charges from the indictment.

The defendant Dj. B. was acquitted of the charge of war crime against the civilian population (rape) punishable under Articles 22 and 142 CC SFRY. However, he was found guilty of the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons pursuant to Art 328 CCK (currently criminalized under Art 374 CCRK) and sentenced to 1 year and 6 months of imprisonment. The sentence was suspended for a verification period of 2 years. The accused B. was ordered to pay 100 Euro as part of the costs and was relieved of the duty to pay the rest of the costs.

On 31 October 2013, the SPRK Prosecutors submitted a Joint Appeal proposing that the judgment of the First Instance Court be modified and J. D. and D. B. convicted of the criminal offence of

War Crime against Civilian Population or in the alternative to return the case for the Court of First Instance for a retrial. The Appellants claimed that the Trial Panel established the factual situation erroneously and incompletely and the Impugned Judgment is reached with substantial violation of the provisions of criminal procedure.

Defence Counsel of the Defendant J. D. filed a response to the Appeal dated 15 November 2013, proposing to reject the Appeal of the Prosecutor as ungrounded and to affirm the Impugned Judgment of the Basic Court in the part related to the Defendant J. D..

Defence Counsel of the Defendant D. B. filed a response to the appeal of the Prosecutors 2013, proposing to reject the Appeal of the Prosecutor in part concerning D. B. as ungrounded and to affirm the Judgment of the first instance court. On the other hand, submitted an Appeal on behalf of the Defendant D. B. dated 29 October 2013 proposing that charges against his client be rejected because of the coming into force of the Amnesty Law. Therefore, criminal proceedings against his client have to be terminated. He also asked that the costs of criminal proceedings in regard of D. B. have to be covered from the public funds.

The Appellate Public Prosecutor moved the Court of Appeals to grant the appeal of the Special Prosecutors and to modify the Challenged Judgment as proposed by them or annul this part of the Judgment and return the case for re-trial. He further proposed to reject the Appeal of the Defence Counsel of the Defendant D. B., except in regard of the punishment which should be annulled based on the Law on Amnesty. The seized weapon and cartridges shall be confiscated.

On 27 May 2014, the Court of Appeals rendered its judgment.

The Appeals of the Special Prosecutor and the Appeal of the Defence Counsel M. B. behalf of the Defendant Dj. B. were partly granted.

The appealed Judgment of the Basic Court of Mitrovica in case no P 13/2013 dated 17 April was modified by applying the Law on Amnesty, the indictment was dismissed in part where the defendant Dj. B. had been charged with unauthorised ownership, control, possession or use of weapons, contrary to Art 328 (2) CCK (now Art 374 CCRK); whereas the acquittal of both Defendants from the criminal offence of War Crime against Civilians under Art 142 CC SFRY was

annulled and both of them were convicted of the criminal offence of War Crime against Civilians under Art 142 CC SFRY (now Art 153 CCRK).

Based on the provisions in favour of the Defendants and taking into account both aggravated and mitigating circumstances; the Court of Appeals decided that the defendant J. D. was sentenced to 12 years of imprisonment whereas the defendant Dj. B. was sentenced to 10 years of imprisonment. The Challenged Judgment of the first instance court was confirmed in the remaining part.

The defendants J. D. and Dj. B. were ordered to both reimburse 250 (two hundred fifty) Euro as part of the costs of criminal proceedings.

The request of the Special Prosecutor dated 20 February 2014 to submit supplementary evidence was rejected.

On 7 July 2014, Defence Counsel Lj. P., on behalf of the defendant J. D., respectively on 9 July 2014 the Defence Counsel M. B. on behalf of the defendant Dj. B. filed their appeals against the Judgment of the Court of Appeals PaKr 503/13 dated 27 May 2014.

On 23 July 2014, the Office of the State Prosecutor of Kosovo delivered its reply moving the Supreme Court of Kosovo to reject the appeals of the defence counsels as ungrounded and affirm the challenged judgment.

Having held a public session on 30 September 2014, and following the deliberations and voting on 30 September and on 1 October 2014, pursuant to Article 403 paragraph 2 of the CPC, the Supreme Court of Kosovo rendered a ruling for immediate release of the defendants from the detention on remand.

II. The content of the Appeals

The Defence counsel Lj. P. challenged the appealed judgment of the CoA on grounds of:

- substantial violation of the provisions of the criminal procedure,
- substantial violation of the criminal code,
- erroneous establishment of facts, decision on punishment and decision on expenses for the criminal proceedings.

Mr. P. argues violation of Article 384 paragraph 2.1 of the CPCK that reasons on the decisive facts provided in the appealed judgment are completely unclear- in relation to the number of questions that are related to the essence of the case such as number of rapists, the way she was raped, the weapons by which she was frighten with, the place where she was raped, the name on which the rapist was responding etc. The defence counsel further states that there is no exact proof that the rape occurred at all since there is no medical documentation.

He submitted that the appealed judgment did not say a word about qualification related to the fourth Geneva Convention and its Additional Protocols, leaving dilemma whether the CoA modified the first instance judgment also in relation to the legal qualification of the criminal offence or not.

He also argued that the CoA only referred to Article 142 of the Criminal Law of SFRY without specifying which the paragraph given that the referred Article has three paragraphs.

He stated that the CoA did not have the opportunity to see and hear not even a single witness nor the defendants, while it convicted the defendants without trying to correct the shortcomings either through sending the case for re-trial to the first instance court or to open a hearing at the CoA.

He argued violation of principle in "*dubio pro reo*".

He challenges the establishment of the facts by the Court of Appeals. He argued that the commitment of the said crime by the defendant was not established beyond reasonable doubt.

In this regard, he states that the victim gave five different statements and gave her statement in the main trial via video link and she is not reliable.

He referred to the discrepancies in her statement given at different times as to:

- the numbers of the rapists;
- the types of the intercourse;
- whether she told her family that she was raped immediately after the event had occurred;
- whether she initially mentioned the rape to her brother or not;
- whether the rapist was, or was not nick-named as X;
- whether the rapist had a bandage on his right or on his left hand

- whether she saw the perpetrator for the first time on 14 April 1999 or the day before;
- whether the rapist was holding an automatic weapon pointed at her neck or not;
- whether the rapist threatened her with a knife during the rape or not;
- whether she told her mother what had happened after she returned to her house or she never told her about the rape since she was ashamed;
- whether she had shown to her paternal uncles M.K. that the house where she was raped, is located in the vicinity of current Hotel "X", or as the uncle M.K. stated, that the house is located 2.7 kilometres further in the direction of X at the intersection to X and X etc.;

With regard to the witness statements, he particularly argued:

- whether uncle M.K. was able to recognize the person who abducted V. K. or not as it was dark;
- whether the statements of the witnesses are in contradictory with each other or not;
- that the witness aunt M. K. confirmed that it was at dusk when the victim was abducted whereas witness I. G. stated that although it was dark, she saw the police officer who had short black hair, black eyebrows and black eyes;
- that all prosecution witnesses described the police officer as a "tall man" between 27 and 35 years of age and witness S. K. described the rapist as a "young man of an athletic bodily shape" whereas the defendant at that time was 45 years old;
- that the mother of victim, in her statement given to UNMIK investigators on 31 March 2003 stated that she could not describe the appearance of the police officer and that a photo album was shown to her in which was a photo of J. D. and she answered that she did not recognize anyone while on 21 May 2012, when a photo album was shown to this witness by the Kosovo Police, she immediately picked out the photo of J. D.;
- that witness I. K. stated that the police officer had his hair combed upwards whereas during the process of recognition at the main trial, a photo of J. D. was shown on which his hair falls on the forehead;
- that witness N. K. stated that the police officer had also called "hat-hat with a shield" on his head and although it was dark and although such a hat covers the hair and the forehead of the person who wears it, she unmistakably picked out J. D. from a photo.

The Defense Counsel further stated that:

- local investigators marked the photograph of J. D. so at first glance it was different from the other photos;
- on the folder for the photo-identification all the photograph were glued without metal to the paper whereas the photograph of J. D. was attached to the paper with a metal paperclip thus being distinct from the other ones.

The defence counsel, on the other hand, argued that although the CoA acknowledged that Article 255 para 3 of the CCP SFRY which describes the procedure of identification was not complied with, it accepted the results of this deficient and problematic investigation.

He alleged that the finding of the CoA that victim was abducted and taken to X, not far from X the place where the defendant used to live, is not correct because X is not the place where the defendant lives but it is a mountain where the defendant never used to live.

The defence counsel M. B., on behalf of the Defendant B., challenged the appealed judgment of the CoA on grounds of:

- substantial violation of the provisions of the criminal procedure,
- violation of the criminal code,
- erroneous establishment of facts and the decision on punishment.

He argued that if the CoA accepted the thesis of the SPRK regarding the wrong and incomplete determination of the factual situation, the CoA, as it stands, should have cancelled the judgment and send the case for retrial, or conduct a hearing itself to induce new or to repeat already stated evidence pursuant to Article 402.1.1 and 402.1.1 and Article 392.2 of the Criminal Procedure Code of Kosovo.

He further stated that the CoA acknowledged that the persons on the photographs that were shown to the victim during the identification together with the photograph of the defendant B. were not sufficiently similar to the defendant. The defence counsel concludes that this could lessen the reliability of identification up to a certain degree.

He stated that it is clearly visible that defendant's photograph shows an elderly man while all the other photographs present significantly younger persons than the defendant and are completely

different. He raised the argument that since the victim already claimed that the rapist was an older man, it is normal that a witness or victim would pick out the photograph of old person. Thus it would be obvious that the photograph of the defendant B. would be picked out during the identification since the only photograph of an old person was the photograph of this defendant.

The defence counsel also argued that the investigators who led the investigation were both Albanians. They could not find any photo of B. from the period when the crime was committed and when victim allegedly saw him. So, they included into the set of photographs a picture that had been taken 10 years later when the defendant B. was evidently older then he was in 1999.

The victim, when describing this old man to witness S. K., never mentioned that he had a limp, but she just said that it was an old senile man. He claimed that this was not been taken into account by the CoA. The defence counsel claimed that the defendant does not limp, but that his walk is peculiar for a man of his age, as was noted by the First Instance Court.

Defence counsel further argued that the statements of the victim given during the proceedings lack credibility and reliability due to the discrepancies:

- in the number of rapists;
- whether she told her family about what had happened when she came back to home;
- who were present in the yard when she entered her uncle's courtyard after the incident, and;
- whether the first person she told what happened to her was her brother X or not since he did not confirm this.

The defence counsel argued that CoA did not even mention statements given by other witnesses that were heard in this case on the allegation of whether B. limps. He also challenged that it has never been proven that B. understands and speaks the Albanian language.

The defence counsel argued as erroneous the following conclusions of the CoA on that the defendant B. has a limp while walking and was nick-named "X". He claimed that the first instance court did not determine that the defendant B. has a limp while walking nor that anyone ever in his life called the defendant "X". He argued that only the victim described the second rapist in details as an older man with a limp. He stated that the victim since 1999 had always described the second rapist as an old man.

In her statement in 1999 the injured party never described B., in fact she did not mention a second perpetrator until 2010 when she stated that the second man was between 60 and 70 years old. He further stated that the CoA perhaps intended to say that victim told and described the second man to witness S. K. the second person was "X" or when translated it is as "X"; however, at that time the defendant B. was not an old man nor could he be considered senile.

Mr. B. argued that CoA erred when referring to "research" conducted by the brother of the victim in 2008 by simply accepting his statement that "someone" from X, on the occasion of mentioning of an older limping man, had immediately said X (the defendant D. B.) as well as when concluding that the defendant knew exactly where to take the victim and perform the rape because it cannot be coincidence the fact that other defendant and his brother were building two houses in that village next to each other.

He further argued that the witness' statement is not reliable when he states that there were visible bite marks on her body, on her stomach; bellow her breasts- not more than 20 and not less than 4, that she told him that she was raped by three men which she herself never said in any of her statements.

The defence counsel argued that the CoA acted in a violation of the principle *in dubio pro reo* and the principle that the guilt of the defendant must be determined beyond any reasonable doubt which is not the case here. In this context, the defence counsel argued the statements of the witnesses as to their value to prove the guilt beyond reasonable doubt. Mr. B. stated that the mother of the victim in her two statements did not mention at all that her daughter was raped or she asked her daughter after the event.

The defence counsel further argued that the witness M. K. stated that she heard from her family that V. K. was raped by the persons who kidnapped her and not from the victim herself but what she stated was that the victim only told that she was. He also discussed that the witness I. G. stated that she heard that V. K. was raped from others, not from the victim herself.

He discussed that the witness Rr. told to M. that the victim told him that those two men in fact raped her. This statement, however, was not confirmed by Rr. who said that he did not speak with victim at all.

Mr. B. stated that CoA failed to say a word on the report of police officer X, dated 16 September 2010, which states that he got the information from Mrs. X that the victim informed her that she was raped by one person.

He claimed an alibi stating that the defendant B. was in Pristina throughout the bombing period in 1999 with his family as confirmed by witness S. M. This witness stated that during the bombing he did not even once see B. in X.

He further submitted that CoA erred in qualification of the criminal offence when concluding that the second rape was performed in the direct context of the ongoing conflict and so it creates the connection between that conflict and defendant B. as a civilian.

Both defence counsels, Mr. P. and Mr. B. alleged the violation of the law with regard to the decision on punishment since there is an erroneous determination of the factual situation. The Defence counsels proposed the Supreme Court of Kosovo to quash the appealed judgment of the CoA, to refuse the appeal of the SPRK as ungrounded and to confirm the judgment of the first instance court or to return the case to the same Court of to the Court of First instance for retrial.

III. Prosecution Response to the Appeals

In the response to the Appeals, the Prosecutor argued that the CoA rightly established the facts, referred to a previous Judgment of the Supreme Court in which the Court decided that the minor discrepancies in the statement of a particular witness with the facts would not discredit their value. The prosecution also argued that minor discrepancies between the victim statements result from a psychological process of human nature, especially when the victims underwent traumatic events.

As to the identification process, the prosecution stated that actually the victim noted that the perpetrator was an old man who limped. It argued t that the victim had the possibility to observe the defendant sometime after the date of the rape and this made the photo identification reliable. It is further argued that the CoA correctly rejected the argument that the victim selected among the pictures the only one depicting an old man. The Prosecution concurs with the CoA that the fact that the identification of the perpetrators were carried out based on previous interviews and not a part of the identification process does not make it inadmissible. It also argued that the lack of information on how the identification was actually carried out, the CoA rightly concluded that victim and several

witnesses recognized the perpetrator on later occasions and he even was recognized 12 years after the first identification based on different photos. The prosecutor maintains that the identities of the perpetrators were established beyond reasonable doubt as well the commitment of the crime.

The prosecution maintains that the sentencing is in line with the provisions of the law read in line with each other. The prosecutor asks the Court to reject the appeals.

IV. Findings of the Supreme Court of Kosovo

In reviewing of the appeals, the Supreme Court of Kosovo establishes the following:

- The appeals are admissible; they have been filed by a person authorized thereto and within the legal time frame.
- The Supreme Court of Kosovo finds that appealed judgment rendered by the Court of Appeals does not warrant an ex officio intervention. Accordingly, the Supreme Court of Kosovo shall confine itself to examining solely those violations of the law which the requesting parties allege in their appeals pursuant to provisions of the CPC.
- The Supreme Court of Kosovo finds that the appeals are grounded.

As to the particular grounds the defence relies on:

The Supreme Court finds the allegations of the defence counsels on that the CoA erred in the legal qualification of the crime as it was silent on the Geneva Conventions and its protocols and did not specify the paragraph of Article 142 allegedly having three paragraphs are not grounded. The Supreme Court would suffice to say that Article 142 of the CC SFRY (now Art 153 CCRK) sanctions the action as a crime on its own without any need to refer the Geneva Conventions or its Protocols as a legal basis which is composed of only one paragraph including several sentences.

Concerning the credibility of the statements of the injured party V. K. and from the witnesses, the Supreme Court of Kosovo disagrees with defence counsels that the presence of any discrepancy on a witnesses' statement renders their credibility doubtful. In principle, the court should not treat every minor discrepancies of a particular witness statement as discrediting its probative value as a

whole where that witness has nevertheless recounted sufficiently the essence of the incident in a satisfactory detail.

In the case at hand, the Supreme Court of Kosovo finds credible the statements from the injured party V. K. and from the witnesses testifying in this case insofar as those statements do not relate to the identification of the suspects. The injured party and the witnesses are, to a large extent, consistent in describing the way in which the abduction was carried out. The Supreme Court of Kosovo is satisfied with this description to this regard and considers it sufficient. The Supreme Court of Kosovo does not also agree with defence counsels that in circumstances of lack of medical report, it is contentious that the rape actually occurred at all. The Court considers that the mere lack of medical report does not indicate that the rape did not take place. The medical reports are to be expected under normal circumstances. However, in the case at hand, the lack of medical report is well justified by the circumstances of the armed conflict that prevailed at the material time.

The Supreme Court of Kosovo is satisfied and finds it proven that a person**,** in his capacity of a Serbian Police Officer, during the period of the armed conflict in Kosovo, on 14 April 1999, abducted V. K., a Kosovo Albanian female civilian, by driving her to an unknown location near X. He then raped her by forcing her, while armed with a rifle and threatening her with a knife, to have various types of sexual intercourse against her will inside his car. Despite the discrepancies in the statements of the injured party, the Supreme Court of Kosovo considers also proven that a second person of Serbian ethnicity on 14 April 1999 raped V. K., by taking her to an unfinished house in X, throwing her on to the floor and forcing her to have sexual intercourse against her will.

Irrespective the fact that there are discrepancies in the injured party's statements regarding the number of rapists and the forms of sexual intercourse, the Supreme Court of Kosovo considers that those discrepancies do no undermine the overall finding of the previous Court that such a crimes were committed. Not considering the discrepancy in the number of the rapists as a minor one, yet the Supreme Court should not underestimate there might be well-reasoned concerns of the victim to limit herself in such a close society of those times without going into the details of social science in that regard but rather confine itself with the legal matters to consider. Eventually, the Supreme Court finds the statements of the victim consistent and concludes that she was raped by two rapists.

However, the Supreme Court considers that it has not been proven beyond any reasonable doubt, as required by the Law, that the defendants in this case were the persons who have committed those acts due to the deficiencies in the identification of the perpetrators which does not derive from the victim or the witnesses but the process how the identification was carried out.

At the outset, addressing the admissibility of the statements given by the injured party and by the witnesses; the Supreme Court of Kosovo notes that Article 153 of the Provisional Criminal Procedure Code of Kosovo (PCPCK) that was applied during the pre-trial procedure in this criminal case provides "Evidence *obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Code or other provisions of the law expressly so prescribe*". Article 161 of the PCPCK stipulates that a statement of a person who has been examined as a witness shall be inadmissible if "*the testimony was extorted by force, threat or a similar prohibited means according to Article 155 of the PCPCK*" (absolute impediments). Furthermore, Article 155 of the PCPCK foresees that in "*any questioning or examination it is prohibited to impair person's freedom to form his or her own opinion and to express what he or she wants by ill-treatment, induce fatigue, physical interference, administration of drugs, torture, coercion or hypnosis, threatening with measures not permitted under the law, holding out the prospects of an advantage not envisaged by law and impairing his or her memory or his or her ability to understand*".

Thus, when the authority conducting the procedure obtains a statement from the injured party or from the witnesses by forms not permitted by the law as stipulated in Article 155 of the PCPCK, the evidence is inadmissible. However, the law does not automatically render the evidence inadmissible for merely procedural flows committed by the authorities conducting the procedure. The eventual irregularities, which do not constitute essential violation of the criminal procedure according to Article 155 of the PCPCK do not require rendering of a statement inadmissible provided that the evidence is introduced in accordance to the provisions governing the evidence and the parties are given the possibility to challenge them. The irregularities may; however, be of importance for purpose of assessing their credibility and when their probative value is at stake.

In the case at hand, the Supreme Court of Kosovo finds no evidence that show that the statements from the injured party or the witnesses had been obtained in a manner not permitted by the law. It is also evident that statements from the injured party and from the witnesses have been introduced in accordance with the law and the parties to the procedure have been given ample of opportunities to challenge them. The law clearly specifies when evidence is inadmissible and the lack of compliance

with the formalities on the identification of the perpetrator is not one of them as it occurred in this case. Therefore, the Supreme Court of Kosovo does not agree with defence counsels that the statements of the injured party V. K. and the witnesses in this case are inadmissible. Regardless of the conclusion of the Supreme Court in that regard, the question now to address is whether such incompliance with the formalities and irregularities in the identification of the perpetrators by the victim is sufficient to conclude that the defendants are the perpetrators of the crime concerned.

The Supreme Court notes that the first document as to the identification is the statement of the victim dating back 13 October 1999 given to the UNMIK officer. Having describing how the kidnapping from home and the rape of the first defendant occurred, without mentioning the second rapist at all, giving a description of the police officer as 'tall, short hair black, the color of the eyes were green-brown, thin, the right arm was bandaged', after the closure of her statement and signature, it is noted in that document that 'she remembers that on date 10.10.1999 she went to KLA MP'. They showed her some photos and she identified a police man who raped her and they told her that that person is from village of "X". This means that she was shown some photos of some policemen and among them she identified one but the Supreme Court lacks the evidence on how the identification process is carried out or the photos shown to her then and where those photos are. Apart from the lack of document on the identification process as such, the Court cannot know whether such statement of the KLA members blurred her memory as to the person who committed the crime. The next identification took place on 17 July 2012 which does not comply with the provision of Article 155 of the PCPCK, either as to the order to follow and the reminder to be given to the victim. Lately, she identified them in the hearing she participated via video conference; however, in that one only the defendants were raised, accordingly it was lacking the point that the perpetrators were recognized among many persons without any doubt. Thus, the Supreme Court considers that the identification of the perpetrators by the victim needs supporting corroborative evidence in that regard. At this point, the Court examines the statements of the witnesses and the identifications made by them.

The Supreme Court of Kosovo finds the description of the first perpetrator by the injured party and by the witnesses general and not sufficient to reach the conclusion that he was the person that committed the rape. As regards the second rapist, there is only description given by the injured party which is not corroborated sufficiently by other supporting evidence. To illuminate, in the statement

dated 21 March 2012 witness N.K. described the first perpetrator as " *person was tall about 185 cm, approximately 30-35 years of age, normal body weight, brown grayish color of hair, he had a military hat on the head, his left hand was bandaged, I do not remember anything else. Considering that a lot of time has passed, I am not very sure but I believe that if I see him again, I can identify him".* As far as it concerns second rapist, he states that as V. K. described the second perpetrator to him as" *being little short, old and having a limp*". Same witness N. K. described on his statement 04 March 2003 the first perpetrator as follows " *with uniform, military Serbian, with weapon AK 47, also Pistol at his belt called TT pistol, approximately 180 cm tall, looked were big because we all were scared. Next day he abducted my sister".* The witness H. K. in her statement 21 May 2012, described the perpetrator as "has *been very skinny, his face and chin were acute".* The injured party V. K. on the statement to UNMIK, stated that "*on 14 April 1999 in my house came a Serbian Police Officer. That day I saw that man for the first time. During the rape he had his automatic machine gun on my throat. Victim describes the first rapist as tall, short hair black, the color of the eyes were green-brown, he was thin, the right arm was bandaged.* She describes second rapist "*as civilian, wearing blue jeans and brown jacket, he was average high, average fat, I cannot remember the colour of his eyes, black hair and he was a little bald and he had a beard.* While they retuned her home she states that "*the two persons spoke in Serbian with each other whereas with me the Police Office spoke in Albanian*". Similarly the injured party on her statement 24 August 2010 describes the perpetrator as being "*in a uniformed police man in dark blue uniform and with kind of sign on his shirt sleeve which showed that he was of the Serbian police. The Officer had a machine gun and a knife that was visible and thinks that it was an Ak-47, he was tall 1.75-1.80 cm, short dark hair, medium colour skin, is had left one, was injured and he had a bandage around it, medium to skinny built, between 29-35 years old, he spoke Serbian.* The injured party gives a description of the second rapist as being "*an old man, probably around 60-70 years old. The man spoke Albanian but she thinks he was Serbian*, *limping a little, he was not so tall somewhere between 1.67 -1.71 cm, speaking Albanian but not as a native*. Furthermore, the injured party V. K., in her statement of 17 July 2012 describes the first rapist as being "*175-180 cm tall, he was thin and had dark complexion and short black hair, he was wearing a camouflage police uniform with Serbian insignia on his arm written "milicija". He had the wrist of his left hand bandaged with gauze, he was about the age of 27-33 years old, he had an automatic rifle with wooden butt, on his waist he had a long knife of the automatic rifle and he spoke little Albanian.* The injured party V. K. describes the second rapist as "*he was about 50-60 years old, he had a stout body, his hair had average length and he was grey, he was about 165-170 cm tall and limped with one leg and he spoke Albanian and had a weapon on his waist*". The witness H. K. on 31 March 2003 described as "*one man in camouflage uniform and automatic gun*". On question if she can describe the military who kidnapped her daughter, she states that "*she cannot exactly remember because it was a long time*

ago". On question if she can point him out if she is shown a photo of this man, she answered "*maybe but I cannot give a description of him*". The other eyewitness M. K. (who was around 11 years old at that time of the incident) in her statement dated 26 April 2012, as a response to the question of whether she can describes the police officer, she states that " *I was very young at that time and I thing he was a tall man, medium build, short black hair. I could not remember the colour of his eyes even though I was 4-5 m away from him. I do not remember anything else about him but I think that he was around 30 years old*". She continues further "I *think that I have seen him in 2010 in X village at* Rr. *M. shop. He was buying some stuff. He seemed familiar to me but I have not heard him speaking Serbian. I thought that he was the one that took V. K.. I was surprised when I saw him wearing the Kosovo Police uniform*". The witness Statement I. G. (who was around 16 years old at that time of incident) in her statement dated 26 April 2012, in question if she can describe the person that took V K. away, she states that "*he was around 30 years old, medium built, around 175-180 cm tall, short black hair, black eyes and black eye brows.* The witness X. K. in her statement dated 1 April 2003 in the question whether she can describe the person she stated that "he *was tall, thin, he was in a grey uniform, dark complexion face, he was carrying automatic weapon*". Further the witness M. K. in his statement dated 1 April 2003, in question whether he can describe him stated that " *he was taller than me, more than 1.80 m, he was thin. Dark face, I cannot remember the color of the hair. He was in grey uniform, and maybe a reserve policeman. He was not a regular policeman, he was also carrying an automatic gun. Perhaps I cannot identify him because it was dark*".

Based on comparison of all the statements of the injured party as well as the witnesses, the Supreme Court of Kosovo considers that the descriptions of the perpetrators are general and vague which do not suffice to reach the conclusion beyond the reasonable doubt that the defendants in this case were those who committed the criminal acts.

The Supreme Court of Kosovo also finds substantial deficiencies in the process of the identification of the defendants. Since the identification is a crucial factor, which is decisive in determining the guilt of a person the deficiencies should not be underestimated and when present they must always be interpreted in favour of the defendant. The identification must be explained to such a degree that the evidence eventually leaves no doubt as to the presence of these elements. Otherwise, the court must act in accordance with the principle of construction in favour of the accused (favor rei) conceived also as a standard governing the appraisal of evidence.

In the case at hand, the Supreme Court of Kosovo finds that the identification has not been done in accordance with the provisions of the PCPCK. Regarding the first defendant, it is evident that from the eight photos shown to the injured party and the witnesses in the case only one photograph, is the one of J. D. was marked, thus raising concerns that the injured party and witnesses might have been guided in identifying the perpetrator.

As far as the second defendant is concerned, the photographs shown to the injured party contained images of young persons and only the photograph showing Dj. B. is an image of an older man corresponding to the statement of the injured party that the second rapist was an old person.

Taking into account that no proper identification of the perpetrators has been done and considering the absence of additional evidence, which corroborates the statements of the injured party and the witnesses, the Supreme Court of Kosovo is of the opinion that the charges against the defendants have not been proven beyond any reasonable doubt, as it is required by the Law.

The Supreme Court of Kosovo finds other allegations raised by the defence counsels without any effect in the overall outcome of the case and as such any further elaboration would be superfluous.

IV. Conclusion of the Supreme Court of Kosovo

In light of above, the Supreme Court of Kosovo decides as in the enacting clause of this judgment.

SUPREME COURT OF KOSOVO

PA-II-KZ-II-5/2014, date 1 October 2014

Presiding Judge: **Recording Officer:**

Nesrin Lushta Adnan Isufi

Supreme Court Judge EULEX Legal Advisor

Members of the panel:

Esma Erterzi Willem Brouwer

EULEX Judge EULEX Judge