

SUPREME COURT

Case number: **Pml.Kzz 145/2014**
(PP No. 16/2013 Basic Court of Pristina)

Date: **8 October 2014**

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Timo Vuojolahti (Presiding and Reporting), Supreme Court Judge Marie Ademi and Supreme Court Judge Emine Mustafa as Panel members, and EULEX Legal Officer Kerry Kirsten Moyes as the Recording Officer, in the criminal case number PP No. 16/2013 before the Basic Court of Pristina, in the criminal case against;

MS, arrested on 18 March 2014, in detention on remand since 19 March 2014

et al

suspected of the following criminal offences:

Organised Crime contrary to Article 283 paragraph 1 of the Criminal Code of the Republic of Kosovo (CCRK), in conjunction with the criminal offence of **Smuggling of Migrants**, contrary to Article 170 paragraph 2 of the CCRK;

Organised Crime contrary to Article 283 paragraph 2 of the CCRK, in conjunction with the criminal offence of **Smuggling of Migrants**, contrary to Article 170 paragraph 1 of the CCRK;

acting upon the Request for Protection of Legality filed by the Office of the Chief State Prosecutor on 4 July 2014 against the Ruling of the Court of Appeals PN.1.1215/2014 in this case dated 27 June 2014, accepting the defendant's appeal against extension of detention as timely and rejecting it as unfounded;

having considered the Response to the Request by defence counsel Osman Mehmeti on behalf of the defendant filed on 30 July 2014;

having deliberated and voted on 8 October 2014;

pursuant to Articles 418 and Articles 432-441 of the Criminal Procedure Code (CPC)

renders the following

JUDGMENT

The Request for Protection of Legality filed by the Office of the Chief State Prosecutor on 4 July 2014 against the Ruling of the Court of Appeals PN.1. 1215/2014, dated 27 June 2014, is well-founded. By the Ruling the Court of Appeals violated the criminal law, Articles 189 paragraph 3 and 478 paragraph 4 of the CPC, when accepting the appeal filed by the defendant's defence counsel against an order extending detention on remand as timely filed.

REASONING

1. Procedural background

1.1. The investigation against the defendant began on 30 April 2013. He was arrested on 18 March 2014 and detention on remand was ordered against him (and a co-accused) on 19 March 2014 for one (1) month. It was subsequently extended to two (2) months to expire on 18 June 2014.

1.2. On 13 June 2014 the Prosecutor filed an application for extension of detention against the defendant for a further two (2) months. On 18 June 2014 the Pre-Trial Judge of the Basic Court of Pristina granted the Prosecutor's application and ordered the extension of detention to expire on 18 August 2014.

1.3. This Ruling was served on the defendant on 19 June 2014, and on his defence counsel on 23 June 2014. An appeal was filed by defence counsel Osman Mehmeti on behalf of the defendant on 24 June 2014. The Appellate Prosecutor moved the Court of Appeals to dismiss the appeal as belated. The Court of Appeals determined that the appeal was admissible and filed in a timely manner, but rejected it as unfounded.

1.4. On 4 July 2014 the Office of the Chief State Prosecutor filed a Request for Protection of Legality. On 30 July 2014 a Response was filed by defence counsel Osman Mehmeti on behalf of the defendant.

2. Submissions by the Parties

2.1. The Request filed by the Office of the Chief State Prosecutor of Kosovo

The Prosecutor states that with Ruling PP no. 16/2013 dated 18 June 2014 the Basic Court of Pristina extended detention on remand against the defendant (and co-accused) until 18 August 2014. The Ruling was served on the defendant on 19 June 2014, and on defence counsel for the defendant on 23 June 2014. While the defendant himself did not file an appeal against this Ruling, the defence counsel filed his appeal on 24 June 2014. The Court of

Appeals found the appeal as timely filed. The Prosecutor considers that in doing so the Court of Appeals violated Article 478 paragraph 4 of the CPC.

The Prosecutor refers to Article 478 paragraph 4 of the CPC which states that the prescribed period of time for pursuing a legal remedy shall commence on the date when the document is served on the defendant. However, the Court of Appeals, despite the clear wording of the Code, allowed the appeal as timely filed. The Court of Appeals, by the reasoning stated in its Ruling, considered that a literal interpretation of this provision would result in a contradiction with the basic principles of criminal procedure, and therefore the prescribed period of time for the defence counsel to file an appeal shall commence on the date when he or she is served with the Ruling. An exception to this can be made in cases when the defence counsel was aware on the date that the Ruling was served on the defendant.

The Prosecutor argues that the Court of Appeals took the same stand in Rulings KP 05/2013 dated 6 February 2013 and PN/KR 23/13 dated 14 January 2013. This approach was the subject of a Supreme Court Judgment PKL No. 22/2013, dated 4 March 2013, which determined that the Request for Protection of Legality was well-founded and declared a substantial violation of the provisions of the criminal procedure in the Ruling of the Court of Appeals. The Supreme Court Judgment stated that neither the Court nor the parties can change a legally stipulated timeline. The provision is clear and decisive, and the Court was not supposed to adjudicate in contradiction of it or interpret it as it had done in its decision. The Prosecutor considers that the Court of Appeals had not only disregarded a clear and unambiguous provision of the CPC on the basis that it simply did not agree with it, but by disregarding a Supreme Court decision it also violated the authority of the Supreme Court causing legal uncertainty.

The Prosecutor states that the Court of Appeals has created a new legal provision regarding the time limits for the filing of an appeal. However, regarding this question, in the procedural law there is neither a normative gap to be filled nor an ambiguous provision to be clarified. The Court should not adopt a *contra legem* interpretation of a rule of domestic legislation, as it has now done, as this is contrary to the principle of legal certainty and is outside of the authority of the Court. Any perceived conflict between constitutional values and a legislative provision should be resolved by the procedure in Article 113 of the Constitution for review by the Constitutional Court.

While the Prosecutor agrees that it is well established in human rights law that a remedy must be available in theory and in practice, he states that in the instant case there was enough time for defence counsel to properly defend the interests of the defendant, and there were no acts or omissions by the authorities of the State which hindered the exercise of the remedy. The CPC also provides the defendant with an additional remedy, that is, Court oversight of the measure of detention on remand. In this case the defendant was assisted by defence counsel, and no explanation has been offered by either the defendant or defence counsel for the failure to file an appeal within the prescribed period of time, and the Court of Appeals has elaborated on hypothetical impediments to the timely filing of the appeal. The conduct of the defence is

a matter between a defendant and his counsel, and the latter is expected to play an active role in criminal proceedings, and in this case it appears that defence counsel negligently waited to be served with the Ruling.

The Prosecutor moves the Supreme Court to reaffirm the principle expressed in the Supreme Court decision PKL no. 22/2013 dated 4 March 2013 and declare that the challenged Ruling violated Article 478 paragraph 4 of the CPC pursuant to Article 384 paragraph 2.1 of the CPC.

2.2. Reply of the Defence Counsel

Defence Counsel proposes that there has been no violation of the law as alleged by the Prosecutor. He was asked by a EULEX legal officer, around mid-June, if he could take the defendant's case *ex officio*, and then took the Prosecutor's request for extension of detention on remand from either the office of EULEX Judges or the Basic Court of Pristina. He collected the Ruling of the Pre-Trial Judge PP. No. 16/2013 at the Basic Court. He was not able to contact the defendant as he did not know at which detention center the defendant was being held. This was because the defendant had another defence counsel *ex officio* when his detention on remand was imposed. He has requested that in future the defendant immediately informs him regarding any Court decision he receives.

3. Findings of the Panel

3.1. The Request for Protection of Legality filed by the Prosecutor and the Response filed by defence counsel are admissible and timely filed.

Facts and the question of the case

3.2. The Panel notes that the Ruling of the Pre-Trial Judge PP no. 16/2013 dated 18 June 2014, which granted the Prosecutor's application and ordered the extension of detention, was served upon the defendant on 19 June 2014 and on the defence counsel on 23 June 2014. Defence counsel Osman Mehmeti filed an appeal on 24 June 2014 on behalf of the defendant **MS**. The defendant himself did not file an appeal.

3.3. The Court of Appeals considered that the appeal was timely filed, but rejected it as unfounded.

3.4. The question in this case is therefore: Was the appeal filed on behalf of the defendant Sejdiu by his defence counsel timely filed taking into consideration the above facts.

The Law

3.5. Article 189 paragraph 3 of the Criminal Procedure Code (CPC) provides that:

'...Each party may file an appeal within twenty-four (24) hours of being served with the ruling'.

3.6. Article 478 paragraph 4 of the CPC provides that:

(4) If the defendant has a defence counsel, a document under paragraph 2 of the present Article shall be served on the defence counsel and the defendant in accordance with the provisions of Article 477 of the present Code. In such case, the prescribed period of time for pursuing a legal remedy or answering an appeal shall commence on the date when the document is served on the defendant...

3.7. Article 445 paragraph 1 of the CPC provides that:

(1) The prescribed periods of time envisaged by the present Code may not be extended unless the law explicitly so permits. If a prescribed period of time has been defined by law for the realization of the right to defence and other procedural rights of the defendant, the prescribed period of time may be shortened at the request of the defendant in writing or orally in the record before the court.

3.8. There are further relevant provisions in the CPC regulating the right to defence counsel and the position where there are several defence counsel.

First, Article 53 paragraph 1 of the CPC states:

The suspect and the defendant have the right to be assisted by a defence counsel during all stages of the criminal proceedings.

Second, Article 55 paragraphs 2 and 3 of the CPC state:

(2) A defendant may have up to three (3) defense counsel, and it shall be considered that the right to defense shall be considered satisfied if one of the defense counsel is participating in the proceedings.

(3) If a defendant has more than one defense counsel, one defense counsel shall be nominated the lead counsel by the defendant or, if the defendant fails to do so, the competent judge shall appoint the lead counsel.

Third, Article 478 paragraph 5 of the CPC provides that:

(5) If a document is to be served on defence counsel of the defendant, and the defendant has more than one defence counsel, it shall be sufficient to effect service on one of them.

Fourth, Article 19 paragraph 1.28 of the CPC states:

(1) Terms used in this Criminal Procedure Code shall have the following meaning:

1.28. Lead Counsel – when a party is represented by more than one attorney, one and only one attorney shall represent the party before the court or during criminal proceedings. Service upon the lead counsel of documents, including indictments, requests, replies, appeals and the documents required to be disclosed to defendants shall constitute service upon all attorneys representing the party.

Assessment

3.9. First, the Supreme Court Panel points out that the rules set out in Articles 189 paragraph 3 and 478 paragraph 4 of the CPC are clear: the prescribed period of time to file an appeal against a Ruling ordering detention on remand is 24 hours, and it commences on the date when the Ruling is served on the defendant. Moreover, Article 445 paragraph 1 of the CPC strengthens the absolute nature of this time limit.

3.10. However, in the impugned Ruling the Court of Appeals has presented arguments which it considered provide sufficient reasons and justification to diverge from the rule that the prescribed period of time for an appeal shall commence on the date when the document is served on the defendant. Although the arguments presented are reasoned, the Supreme Court Panel considers they may not justify an exception to the clear provisions in the CPC.

3.11. First, regarding the short 24 hour time limit to file an appeal, the Supreme Court Panel states the following:

On the one hand it can be argued that the right to appeal (Article 189 paragraph 3) and the right to be assisted by a defence counsel (Article 53 paragraph 1) are ineffective as the time limit is so short. The Court of Appeals speculates that defence counsel may not be served with the Ruling on the same day as the defendant, or that the defendant may not be able to contact defence counsel in time. Although the defendant can file an appeal himself, this would deny him the right of legal assistance, which is inherent within the principle of a fair trial and is also mandatory in certain circumstances.

However, the Supreme Court Panel rejects these arguments. Although the main purpose for the short time limit may be considered as to protect the rights of the defence, another purpose surely is in furtherance of the overall aim to conduct the proceedings in a speedy and effective manner. Namely, it is relevant to note that the defendant has always, and without

any time limits, the possibility to file a request for court oversight as provided by Article 192 of the CPC.

A defendant always has the right to contact his/her defence counsel, whether the defendant is in detention on remand or at liberty. Both the defendant and his/her defence counsel are aware of the short period of time for filing an appeal, and they have to be prepared to act immediately. A defence counsel who represents a defendant who is subject to the measure of detention on remand will be aware when the measure has been ordered or extended, and must know that the Ruling will be served without any delay. The defence counsel must also know that he/she may not receive the Ruling on the same day as the defendant, and may receive it later. The defence counsel therefore has the obvious responsibility to be proactive and be prepared to act without delay, rather than passively awaiting for Rulings to be served upon him/her. The Panel also notes that usually the defence counsels manage to file appeals in a timely manner.

3.12. Second, regarding the argument that when the defendant and defence counsel have separate rights to file an appeal it means that there must also be separate deadlines for them, the Supreme Court Panel states the following:

The Court of Appeals opined that as the defendant and the defence counsel have separate rights to file an appeal, so it follows that separate periods of time are set, otherwise an unfair situation results that cannot have been the intention of the lawmaker.

As provided by Article 55 paragraphs 2 and 3 of the CPC a defendant may have up to three defence counsel, and when a defendant has more than one defence counsel, one shall be nominated the lead counsel. The argument that the defendant and the defence counsel should have separate deadlines would raise the question of whether all the defence counsels also have individual deadlines for filing an appeal, or should the period of time commence for all of them when the ruling is served on one of them, perhaps only to the lead counsel as Article 19 paragraph 1.28 of the CPC would suggest.

On the one hand it can be argued that only one appeal can be filed by the several defence counsels (first sentence of Article 19 paragraph 1.28 of the CPC), but the practice in Kosovo has been to accept appeals filed by each of the defence counsels of the same defendant. So, on the other hand, if this is accepted, it would be impossible to establish what would be the exact moment when the time limit for each defence counsel commences. While the second sentence of Article 19 paragraph 1.28 of the CPC states that the service on lead counsel constitutes service upon all attorneys, the fact is that the other attorneys would not necessarily have any knowledge of the moment when the Ruling was served on the lead counsel, and thus of the moment when the time starts running also for them. The same kind of a situation would arise whenever the Ruling is served only on one of the defence counsels, pursuant to Article 478 paragraph 5 of the CPC. It is clear that the lawmaker did not intend to create such a vague situation. And surely, taking into consideration the short time limits for the Court of Appeals to decide upon the appeal, the lawmaker did not create a system where a number of

appeals filed on behalf of the same defendant could be filed over the period of several days, and thus decided separately.

There has to be an assumption that the lawmaker was rational in their approach, to ensure that the different provisions in the law regulating a certain question are coherent and consistent with each other. When the lawmaker set rules to permit several defence counsels for a defendant, it did not set rules which would indicate that their rights to represent the defendant is separate from the rights of the defendant regarding this question. The lawmaker had a number of opportunities to allow separate periods of time for the filing of appeals to the defendant and his/her defence counsel, and did not. The Supreme Court Panel finds that it was the particular intention of the lawmaker that the period of time should be from the time that the defendant is served, and in doing so fully appreciated that this is a short deadline.

3.13. The Supreme Court Panel does not agree that a literal interpretation of the law on this issue produces a result that is contrary to the basic provisions and principles of criminal procedure. The Panel considers the result rather to be the expectation that defence counsels remain apprised of the dates of expiration of periods of detention on remand for their clients, and that they act accordingly. This expectation is reasonable, and is fully consistent with the professional duty of defence counsels towards their clients. Thus, due to the short time limits for the filing of an appeal, both defence counsel and defendant must be proactive and fully engaged with each other and with the procedure as laid down in the CPC, the requirements of which it is entirely possible to meet provided that a passive, casual approach is not taken. Therefore, the guarantees of international conventions regarding a defendant's rights of the availability of appeals against decisions ordering or extending detention on remand, and the provision of legal assistance in the same, are not denied by the provisions of the CPC as such.

On the other hand, the Supreme Court Panel points out that it is the obligation for all judicial authorities when conducting their duties to pay special attention to the rights of the defendant, in order to guarantee them as provided by law and applicable international conventions. This means, for example, that the police and correctional service authorities also have to ensure that the defendant has, in practice, an opportunity to effectively use his/her right to appeal and the right to have legal assistance.

The Supreme Court Panel finds that in this case, the defence counsel filed an appeal against the Ruling of the Basic Court of Pristina dated 18 June 2014 after the expiry of the prescribed period of time for the filing of an appeal. Nothing indicates that the defendant or his defence counsel were in any way prevented from being able to effectively use the right to appeal within the time limits. On the contrary, as stated by the defence counsel, he did not take any actions to try to contact his client, nor even tried to find out where his client was detained. So, this refers rather to inaction or tardiness of the defence counsel himself.

3.14. In summary, the Prosecutor presents a very thorough and compelling argument in his Request for Protection of Legality, and the Supreme Court Panel is in complete agreement. The Supreme Court Panel finds that it is not open to the Court of Appeals to replace a

precisely and unambiguously worded legislative provision with one of its own devising. Should the Court of Appeals be of the view that Article 478 of the CPC is in contradiction with constitution principles, the matter should be raised in the manner provided for in the Constitution of the Republic of Kosovo.

3.15. Thus, the Supreme Court Panel finds the Request filed by the prosecutor as well-founded. Pursuant to Article 438 paragraph 2 of the CPC the Supreme Court only determines that the law was violated when the Court of Appeals found the appeal filed by the defence counsel Osman Mehmeti on behalf of the defendant **MS** as timely filed.

Done in English, an authorized language.

Presiding Judge

Recording Officer

Timo Vuojolahti
EULEX Judge

Kerry Kirsten Moyes
EULEX Legal Officer

Panel members

Marie Ademi
EULEX Judge

Emine Mustafa
Supreme Court Judge