

SUPREME COURT

Case number: **Pml.Kzz 7/2015**
(P. No. 410/2013 Basic Court of Prizren)
(PN 1. 2566/2014 Court of Appeals)

Date: **23 January 2015**

The Supreme Court of Kosovo, in a Panel composed of Supreme Court Judge Nesrin Lushta (Presiding), and EULEX Judge Timo Vuojolahti (Reporting) and Supreme Court Judge Sali Toplica as Panel members, and EULEX Legal Officer Kerry Kirsten Moyes as the Recording Officer, in the criminal case number P. No. 410/2013 before the Basic Court of Prizren against;

MB, in detention on remand since 13 December 2012;

et al

Indicted with the following criminal offences:

Organized Crime contrary to Article 274 paragraphs 1, 2 and 3 of the Criminal code of Kosovo (CCK);

Smuggling of Migrants contrary to Article 138 paragraphs 1, 2, 3, 4, 5 and 6 of the CCK;

Money Laundering contrary to Article 32 of *Law 03/L-196 on the Prevention of Money Laundering and Terrorist Financing of 3 September 2010, promulgated on 18 October 2010*, and while applicable, Section 10.2 of UNMIK Regulation No. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences, adopted on 5 February 2004 (as amended);

acting upon the Request for Protection of Legality filed on 12 January 2015 by Defence Counsel Osman Zajmi, on behalf of the defendant, against the Ruling of the Basic Court of Prizren P. No. 410/2013 dated 11 December 2014 extending the measure of detention on remand for this defendant (and co-accused) for the period of two (2) months until 12 February 2015, and the Ruling of the Court of Appeals PN 1. 2566/2014 dated 27 December 2014 rejecting the defendant's appeal;

having considered the Response to the Request by the State Prosecutor KMLP.II. – ZZZK. II. No. 3/2015 filed on 21 January 2015;

having deliberated and voted on 23 January 2015;

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 on 12 January 2015 by Defence Counsel Osman Zajmi, on behalf of the defendant, against the Ruling of the Basic Court of Prizren P. No. 410/2013 dated 11 December 2014 extending the measure of detention on remand for this defendant for the period of two (2) months until 12 February 2015, and the Ruling of the Court of Appeals PN 1. 2566/2014 dated 27 December 2014 rejecting the defendant's appeal, is rejected as unfounded.

REASONING

1. Procedural background

1.1. The Prosecutor issued a Ruling on Initiation of Investigation on 11 July 2011, and on 3 December 2012 the Prosecutor issued a Ruling on Expansion of the Investigation to the defendant.

1.2. The defendant was arrested on 13 December 2012 and his detention on remand was ordered on the same day by the Pre-Trial Judge. The measure has been extended against the defendant on a number of occasions, and all appeals filed on his behalf have been rejected as unfounded by the Court of Appeals. The main trial commenced and, as of 11 December 2014, 14 trial sessions had taken place.

1.3. On 11 December 2014 the Presiding Trial Judge further extended the measure of detention on remand against the defendant (and co-accused) for the period of two (2) months until 12 February 2015. An appeal against this Ruling was filed by Defence Counsel Osman Zajmi on his behalf on 17 December 2014, and was rejected as unfounded by a Ruling of the Court of Appeals dated 27 December 2014.

1.4. On 12 January 2015 Defence Counsel Osman Zajmi, on behalf of the defendant, filed a Request for Protection of Legality against both of these Rulings. On 21 January 2015 a Response was filed by the Prosecutor.

2. Submissions by the Parties

2.1. Defence Counsel claims violation of the criminal procedure provision, violations of the provision of the Constitution of the Republic of Kosovo, and violations of the provision of Article 5 of the European Convention on Human Rights. He proposes that the measure of detention on remand is replaced with the lesser measure of house detention. The investigation is complete, and the witnesses have been heard. The defendant has pleaded not guilty and there is no evidence which shows that he obtained considerable material benefit. He is of poor economic status, is married and the father of two children, and his parents are seriously ill. He has promised that he will always appeal when summonsed, and his identity is known, and he has an exact residential address. The defendant has been in detention for more than two years, which is in violation of Article 185 of the Criminal Procedure Code, Article 55 of the Constitution of the Republic of Kosovo, and Article 5 of the European Convention for Human Rights.

2.2. The State Prosecutor proposes that the Supreme Court reject the Request as unfounded, and that the contested Rulings are affirmed in their entirety. The Prosecutor notes that Defence Counsel repeats the same arguments he made in the Basic Court of Prizren and in his most recent appeal. The challenge to the facts and evidence of the case may not be the subject of a Request for Protection of Legality, and is under scrutiny in the ongoing main trial. Defence counsel also refers to the incorrect provisions in the CPC in his Request; Article 384 paragraph 1.1.2 refers to the exclusion of a Judge from participation in the main trial, and Article 384 paragraph 1.12 (if Defence Counsel meant this provision instead) applies to Judgments and appeals against Judgments, and not to Rulings. The correct provision governing the content of the Ruling on extension of detention on remand is Article 189 paragraph 1 of the CPC. Neither do the time limits of Article 190 apply as the case is post-Indictment. The impugned Rulings are well-reasoned, Defence Counsel offers no arguments which suggest that the Basic Court is not proceeding with the main trial as a matter of urgency, and the Request is greatly unsubstantiated regarding the alleged violation of the human rights of the defendant.

3. Findings of the Panel

3.1. The Panel unanimously decided that the Request for Protection of Legality should be considered as an "ongoing" case pursuant to Article 1.A of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, and thus EULEX Judges have jurisdiction on the case. The Panel decided with a majority vote that a local Judge should act as the Presiding Judge in the Panel¹. On this basis, Supreme Court Judge Nesrin Lushta acts as the Presiding Judge.

3.2. The Request for Protection of Legality filed by the Defence Counsel and the Response filed by the State Prosecutor are admissible and timely filed.

¹ The dissenting opinion of Judge Timo Vuojolahti is attached to this Ruling.

3.3. The Supreme Court concurs with the State Prosecutor that the content of the Request is little more than a repetition of previous submissions by the Defence, all of which have been considered and adjudicated by both the Basic Court and the Court of Appeals. The Panel finds that both Courts rendered Rulings which are well-reasoned and in full compliance with the criminal procedure law. Defence Counsel offers no new arguments or facts which would induce the Supreme Court to conclude other than that the measure of detention on remand is fully justified and that no other, lesser, measures would be sufficient to meet the risks. The Panel is also confused by the Articles cited by Defence Counsel in his Request, as they are not appropriate in the defendant's circumstances, nor are any arguments made that would support them. The Panel concludes that they are cited by Defence Counsel in error.

3.4. In conclusion, the Supreme Court finds that full consideration was given by both Courts to the circumstances of the defendant and the nature of the alleged offences. Further, the trial is now underway. The Supreme Court, therefore, finds no violations of the provisions of the Criminal Procedure Code, criminal law, the Constitution of the Republic of Kosovo, or international Conventions, and rejects as unfounded the Request for Protection of Legality.

Done in English, an authorized language

Presiding Judge

Nesrin Lushta

Supreme Court Judge

Recording Officer

Kerry Kirsten Moyes

EULEX Legal Officer

Panel members

Timo Vuojolahti

EULEX Judge

Sali Toplica

Supreme Court Judge