

SUPREME COURT

Case number: Pml Kzz 59/2015
(PKR No. 250/2013 Basic Court of Ferizaj)
(PN 1.163/2015 Court of Appeals)

Date: 16 March 2015

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Esma Erterzi (Presiding and Reporting), EULEX Judge Willem Brouwer and Supreme Court Judge Valdeta Daka as Panel members, and EULEX Legal Officer Kerry Kirsten Moyes as the Recording Officer, in the criminal case number PKR No. 250/2013 before the Basic Court of Ferizaj against;

B. S. [REDACTED] born on [REDACTED] in [REDACTED] father's name [REDACTED] personal identity number [REDACTED] residing in [REDACTED] Kosovo Albanian, occupation [REDACTED] [REDACTED] arrested on 11 September 2013 and in detention on remand since 12 September 2013;

et al

Indicted with the following criminal offences:

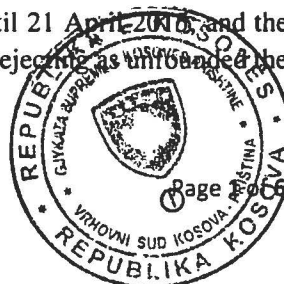
Abuse of Official Position in co-perpetration, in violation of Article 339 (1) and (2) in conjunction with Article 23 of the former Criminal Code of Kosovo (CCK), currently criminalized under Article 422 in conjunction with Article 31 of the CCK 2013;

Accepting Bribes in co-perpetration, in violation of Article 343 (1) in conjunction with Article 23 of the former CCK, currently criminalized under Article 428 in conjunction with Article 31 of the CCK 2013;

Trading in Influence in co-perpetration, in violation of Article 345 (1) in conjunction with Article 23 of the former CCK, currently criminalized under Article 431 (1) and Article 31 of the CCK 2013;

Unauthorised Ownership, Control or Possession of Weapons in violation of Article 374 (1), in conjunction with Article 120, item 38 of the CCK 2013;

acting upon the Request for Protection of Legality filed by defense counsel A [REDACTED] D [REDACTED] on 11 February 2015 on behalf of the defendant, against the Ruling of the Basic Court of Ferizaj PKR No. 250/13 dated 22 January 2015 extending the measure of detention on remand for this defendant (and a co-accused) for the period of three (3) months until 21 April 2015, and the Ruling of the Court of Appeals PN1. 163/15 dated 31 January 2015 rejecting as unfounded the defendant's appeal;



having considered the Response to the Request by the State Prosecutor KMLP.III. – ZZZK. III. No. 13/15 filed on 2 March 2015;

having deliberated and voted on 16 March 2015;

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

renders the following

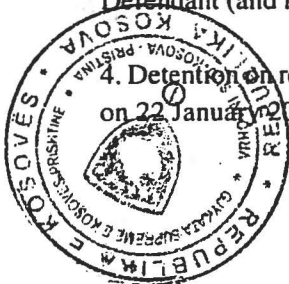
JUDGMENT

1. The Request for Protection of Legality filed on 11 February 2015 by defence counsel A. D., on behalf of the defendant, against the Ruling of the Basic Court of Ferizaj PKR No. 250/13 dated 22 January 2015 extending the measure of detention on remand for this defendant (and a co-accused) for the period of three (3) months until 21 April 2015, and the Ruling of the Court of Appeals PN1. 163/15 dated 31 January 2015 rejecting the defendant's appeal, is rejected as unfounded.
2. The impugned Rulings are affirmed.

REASONING

I. Procedural background

1. On 23 March 2013 the EULEX Prosecutor issued a Decision on Initiation of Investigation, which was subsequently expanded on 28 March 2013. The defendants were arrested on 11 September 2013, and on 12 September 2013 the Pre-Trial Judge ordered detention on remand for the defendant (and his co-accused) for one (1) month until 10 October 2013. This Ruling was unsuccessfully appealed and was affirmed by the Court of Appeals.
2. On 10 October 2013 the Pre-Trial Judge extended detention on remand for three (3) months until 10 January 2014. This Ruling was unsuccessfully appealed.
3. On 27 December 2013 the Prosecutor filed Indictment PPS No. 5/12, which charged the Defendant (and his co-accused) with the offences above.
4. Detention on remand has been subsequently extended on a number of occasions, most recently on 22 January 2015 when the measure was extended for three (3) months until 21 April 2015.



On 28 January 2015 defence counsel A [REDACTED] filed an appeal against this Ruling, which was rejected as unfounded by the Court of Appeals on 31 January 2015. In the meantime, the main trial has begun.

5. Defence counsel A [REDACTED] filed a Request for Protection of Legality against both of these Rulings on 11 February 2015. The State prosecutor filed a response on 2 March 2015.

II. Submissions by the Parties

6. Defence counsel claims violation of Article 384 of the CPC, and violation of the provisions on human rights under Article 5 of the constitutional rights on human freedoms. He proposes that the measure of detention on remand is terminated and replaced with the measure of house arrest, or that the case is sent back to the first instance court for decision.

Defence counsel submits:

- There has been a violation of Article 191 paragraph 2 of the CPC, which states,

'The defendant and his or her defence counsel shall be informed of the motion no less than three (3) days prior to the expiry of the current ruling on detention on remand.'

They were not informed in writing of the prosecutor's application for extension of the measure of detention on remand, and so they did not have an opportunity to reply in writing.

- The enacting clause of the Ruling (he does not state to which Ruling he refers) must contain the legal qualification of the criminal offence and also a detailed description of all crucial facts which are the grounds for extending the measure of detention on remand.

- It is not correct, as stated by the SPRK Prosecutor, that the three key Prosecution witnesses have revealed the defendants' unlawful behavior.

- Article 187 paragraph 1, item 1.2.2 does not stand as the Indictment has been filed, and all of the evidence has been obtained and is being examined during the ongoing criminal proceedings. The defendant has never made any attempt to destroy, hide, or change any evidence concerning the criminal offences he is charged with.

- Both Rulings are in violation of Article 370 paragraphs 6 and 7 as they do not state which facts the Court considers proven or unproven.

- There is no grounded suspicion of the criminal offences he is charged with. Defence counsel assesses the evidence that he claims has been presented during the main trial so far, and concludes that it does not justify a grounded suspicion.

- There is no material evidence, proof or fact to prove recidivism as required by Article 187 paragraph 1.2.3 of the CPC. The defendant was sacked from his job and he now has no access to the police station.



7. The State Prosecutor proposes that the Request is ungrounded and in parts impermissible.

She submits:

- There is no violation of Article 191 paragraph 2 of the CPC. On 16 January 2015 defence counsel made a submission to terminate detention on remand due to the deterioration of the defendant's health. The Prosecutor was given an opportunity to respond to that motion, but as the defence counsel's written motion had not been served on the Prosecution at the time due to lack of English translation, the Prosecutor reserved the possibility to respond to it in writing. The document which was submitted on 21 January 2015, based on Article 193 paragraph 1 of the CPC and referred to in the Ruling of the Basic Court as an 'opinion' or 'application', is not part of the case file. The unsuccessful attempts of the Presiding Trial Judge to have the written submission of the Prosecutor communicated to defence counsel does not violate Article 191 paragraph 2 of the CPC, because that provision is not applicable to that situation. This document was a response by the Prosecutor to a motion by the defence counsel. The Article is only applicable when the request is by the Prosecutor.

- Defence counsel does not support his claim that the concrete description of all crucial facts of the criminal offences should be included in the enacting clause of the impugned Rulings by reference to legal authority. Article 370 paragraphs 6 and 7 of the CPC govern the content and form of the written Judgment, and do not apply to Rulings on extension of detention on remand in an ongoing trial. Further, a full description of the facts supporting the criminal offences is contained in the Indictment, which also provides the grounds for the grounded suspicion.

- The Indictment describes how the defendant and his co –accused approached the witnesses and injured parties of the case. There are still Prosecution witnesses to be heard in the main trial. Further, the risk of obstruction of criminal proceedings is not the sole ground upon which his detention on remand was extended.

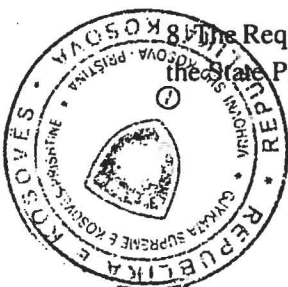
- The risk of recidivism, as per Article 187 paragraph 1 subparagraphs 1.2.3 of the CPC does not require that the same criminal offence would be committed. Neither does the fact that the defendant is no longer a police officer negate the risk. Further, he has a previous conviction in Switzerland, as detailed in the Indictment.

- The submissions by defence counsel criticizing the Indictment and raising objections to the grounded suspicion are not permitted in a Request for Protection of Legality, as per Article 432 paragraph 2 of the CPC. The facts of the case are being examined in the ongoing main trial.

- The defence counsel has not specified how Article 5 of the European Convention of Human Rights has been violated, other than claiming violations of the criminal procedure.

III. Findings of the Panel

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



9. The Supreme Court first notes that there is very little in this Request which has not been submitted in previous appeals and Requests for Protection of Legality. The Panel agrees with the Prosecutor that it is not correct that a concrete description of all crucial facts of the criminal offences should be included in the enacting clause of the impugned Rulings, and to state which facts have and which have not been found as proven. Defence counsel is reminded that the Ruling of the Basic Court is concerned with the extension of detention on remand, and is not the Judgment which will be rendered at the conclusion of the main trial. The enacting clauses of both impugned Rulings contain all the detail as required by the CPC. Neither can the Supreme Court conduct an assessment of the evidence which has been given so far in the main trial, and which is a different matter than the establishment of a grounded suspicion. The grounded suspicion has been confirmed on numerous previous occasions, and the Supreme Court cannot find otherwise at this point in the proceedings.

10. Regarding the risks pursuant to Article 187 of the CPC, the Supreme Court notes that the only change in circumstances is the fact that the main trial has begun. However, the Panel notes that there are still prosecution witnesses who have yet to give evidence. Otherwise, defence counsel has not presented any arguments that would suggest that a violation of Article 384 of the CPC or the European Convention on Human Rights and Fundamental Freedoms has taken place.

11. Defence counsel submits that he was not given an opportunity to provide a written response to the Prosecutor's motion to extend detention on remand, and therefore there has been a violation of Article 191 paragraph 2. The Prosecutor submits that the measure of detention on remand was extended not on the motion of the Prosecutor, but pursuant to Article 193 paragraph 1, and that therefore there is no procedural violation. The Panel first notes that the Ruling of the Presiding Trial Judge states that a motion was filed by the defence counsel for the defendant's co-accused (M [REDACTED] S [REDACTED]), requesting that the measure of detention on remand be replaced with a lesser measure. The Prosecution was given an opportunity to respond to this motion. There is no requirement for a defence counsel to be given an opportunity to respond to a response (particularly as in this case it did not concern the defendant which defence counsel A [REDACTED] D [REDACTED] is representing). The Ruling of the Presiding Judge states on page 3 in the English version that he is,

'deciding ex officio pursuant to Article 193.2 of the Criminal Procedural Code ...'

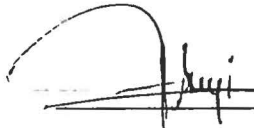
It is clear, then, that the Presiding Trial Judge was acting *ex officio*, rather than as a result of a motion filed by the Prosecutor, and therefore there is no violation of the CPC.

12. The Supreme Court, therefore, finds no substantial violations of the provisions of the Criminal Code, the Criminal Procedure Code, or international Conventions, and rejects as unfounded the Request for Protection of Legality

Done in English, an authorized language.



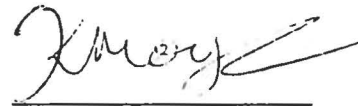
Presiding Judge



Esma Erterzi

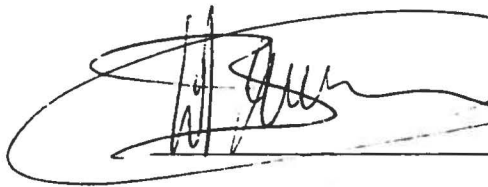
EULEX Judge

Recording Officer



Kerry Kirsten Moyes

EULEX Legal Officer

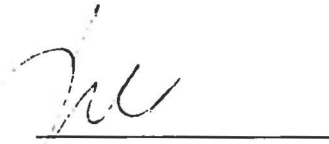


Willem Brouwer

EULEX Judge



Panel members



Valdeta Daka

Supreme Court Judge