

SUPREME COURT

Case number: **Pml.Kzz 91/2015**
(P. No. 98/2014 Basic Court of Mitrovica)
(PN1 496/2014 Court of Appeals)

Date: **14 May 2015**

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Elka Filcheva-Ermenkova (Presiding and Reporting), EULEX Judge Esma Erterzi and Supreme Court Judge Sali Toplica as Panel members, and EULEX Legal Officer Elise Svenkerud Thoen as Recording Officer, in the criminal case number P. No. 98/2014 of the Basic Court of Mitrovica against:

NV;

*Indicted with **Aggravated Murder*** in the form of depriving another person of his or her life because of national motives, in co-perpetration, pursuant to Article 179 (1.10) in conjunction with Article 31 of the Criminal Code of Kosovo (CCK) and criminalized also at the time of the commission of the offence under Article 30 Paragraph 2 of the CLSAPK in conjunction with Article 22 of the CCSFRY;

Attempted Aggravated Murder in the form of depriving another person of his or her life because of national motives, in co-perpetration, resulting in Grievous Bodily Injury, in co-perpetration, pursuant to Articles 179 (1.10) and Article 189 (2.1 and 5) in conjunction with Articles 28 and 31 of the CCK and criminalized also at the time of the commission of the offence under Article 30, paragraph 2 and Article 38 paragraph 2 of the CLSAPK in conjunction with Articles 19 and 22 of the CCSFRY;

Attempted Aggravated Murder in the form of depriving another person of his or her life because of national motives, in co-perpetration, pursuant to Article 179 (1.10) in conjunction with Articles 28 and 31 of the CCK and criminalized also at the time of the commission of the offence under Article 30 paragraph 2 of the CLSAPK in conjunction with Articles 19 and 22 of the CCSFRY;

*acting upon **the Requests for Protection of Legality*** filed by the defendant NV on 6 April 2015 against the Ruling of the Basic Court of Mitrovica P. No. 98/2014 dated 19 March 2015 and the Ruling of the Court of Appeals PN.1. 496/2015 dated 27 March 2015 respectively extending and confirming detention on remand against the defendant until 19 May 2015;

having considered the response to the Request filed by the Office of the State Prosecutor on 27 April 2015;

having deliberated and voted on 14 May 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 by the defendant NV on 6 April 2015 against the Ruling of the Basic Court of Mitrovica P. No. 98/2014 dated 19 March 2015 and the Ruling of the Court of Appeals PN.1. 496/2015 dated 27 March 2015 respectively extending and confirming detention on remand against the defendant until 19 May 2015, is rejected as unfounded.

REASONING

1. Procedural background

1.1 The criminal investigation in the case was initiated on 21 February 2013 and expanded against the defendant (and others) by the decision of the Special Prosecutor dated 10 March 2014.

1.2 The indictment was filed on 11 August 2014. On 19 August 2014 the Presiding Trial Judge ordered detention on remand for one month against the defendant (and others). The initial hearing was held on 26 August 2014, and an order was issued regarding the medical treatment of the defendant and requesting a report on the results of the examination.

1.3 On 25 September 2014 a report was received by the Court, and a further opinion was requested. In the meantime, on 10 September 2014 defense counsel Faruk Korenica filed a motion requesting the Presiding Trial Judge replace detention on remand with house detention on the basis of the defendant's poor health. This request was rejected on 19 September 2014.

1.4 On 13 November 2014 the defendant filed a motion pursuant to Article 192 (5) of the CPC contesting the lawfulness of the condition of detention on remand on the basis of his current medical state. This motion was rejected on 18 November 2014, extending detention on remand against the defendant. This ruling was affirmed by the Court of Appeals on 22 November 2014.

1.5 The defendant filed another submission concerning his health situation on 1 December 2014, asking the Presiding Trial Judge to visit him in detention. This request was rejected in a letter to the defendant dated 16 December 2014.

1.6 The first session of the main trial was held on 18 December 2014.

1.7 On 22 December 2014 defense counsel Faruk Korenica filed a motion for determination of lawfulness of detention on remand referring, *inter alia*, to the health problems and requesting that he should be released or that a more lenient measure should be imposed. Moreover, on 15 January 2015 defense counsel Žarko Gajić filed a request for termination of detention on remand. Both of these motions were rejected by the Basic Court of Mitrovica in its Ruling dated 16 January 2015 which also extended the detention on remand against the defendant until 19 March 2015. This Ruling was affirmed by the Court of Appeals on 23 January 2015.

1.8 On 19 March the Basic Court of Mitrovica extended the detention on remand for two further months, from 19 March until 19 May 2015. The ruling was appealed by the defense counsel Faruk Korenica as well as the defendant. The Court of Appeals rejected both appeals in its Ruling dated 27 March 2015 as unfounded and affirmed the Ruling of the Basic Court. The defendant filed a request for protection of legality against these last two Rulings issued by the Basic Court of Mitrovica and Court of Appeals respectively on 6 April 2015

2. Submissions by the Parties

The requests for protection of legality filed by the defendant NV:

2.1. On 6 April 2015 the defendant NV filed the request for protection of legality against the Ruling of the Basic Court of Mitrovica P. No. 98/2014 dated 19 March 2015 and the Ruling of the Court of Appeals PN.1. 496/2015 dated 27 March 2015 respectively extending and confirming detention on remand against the defendant until 19 May 2015.

2.2 The defendant bases his request on the violation of the criminal law and on substantial violations of the criminal procedure. The defendant argues *inter alia* that the prosecution failed to comply with the provisions of the criminal procedure code of the SFRY Articles 400, 402, 403, 406 and 407 due to the fact that no application for reopening of the criminal procedure was filed prior to 11 August 2014 when the Indictment was filed despite that fact that the investigation against him was terminated in 2002. Furthermore, that the conditions for reopening the criminal procedure as stipulated in Article 423 of the CPC are not met as he was never indicted by UNMIK. In addition, neither the defendant nor the prosecution submitted a motion for re-trial in accordance with Articles 424 of the CPC and that

consequently such a motion was never reviewed by the Basic Court as stipulated in Articles 426 – 428 of the CPC.

2.3 The defendant also states that the Basic Court and the Court of Appeals have ignored the aforementioned provisions of the criminal procedure code and wrongfully reviewed if the principle of *Ne bis in idem* is applicable which is irrelevant to the case at hand. He however states that the current case against him has already been decided in 2002 when a panel of judges in the Mitrovica District Court found that there were insufficient grounds for investigation against the defendant to be ordered and therefore constitutes *res judicata*.

2.4 Finally, the defendant holds that there is no grounded suspicion that he committed the alleged criminal act, nor is there a risk of flight or a risk of tampering with evidence and as such there is a violation of the CPC Article 193 (2) cf. Article 187 of the CPC. He also states that the Courts failed to consider his medical condition when extending detention on remand in the aforementioned rulings.

The Reply of the Office of the State Prosecutor

2.5 The State Prosecutor concurs with the reasoning of the contested rulings and finds that the request for protection of legality is without merit. He observes that most of the defendant's claims were already put forward by as grounds for appeal and rejected by the Court of Appeals. On this basis the State prosecutor moves the Supreme Court of Kosovo to reject the request for protection of legality and affirm the contested Rulings in their entirety.

3. The Competence of the Panel

3.1 Law No. 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo (hereinafter "*Omnibus Law*"), approved on 23 April 2014 and entered into force on 30 May 2014 *inter alia* modifying Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (hereinafter '*Law on Jurisdiction*') regulates the jurisdiction of EULEX Judges which is related to the competence of the Court.

3.2 The Panel unanimously decided that the Requests for Protection of Legality filed by the defendants and the Defence Counsel should be considered an "ongoing" case pursuant to Article 1.A of the Omnibus Law, and thus EULEX judges have jurisdiction on the case.

4. Findings of the Panel

A. General findings

4.1 The Requests for Protection of Legality by the defendants and the Defense Counsel and the Reply by the State Prosecutor are admissible and timely filed.

4.2 A large number of points were raised by the defendant. However, the Supreme Court notes that most of the submissions are mere repetitions of the issues that have been raised by the defence against the applications of the prosecution and the rulings of the Basic Court imposing and extending detention on remand against the defendant which have been carefully and thoroughly considered by the Basic Court of Mitrovica and the Court of Appeals. It is a widely spread and unfortunate tendency among many defense counsels and defendants to try to use the Request for Protection of Legality as a second Appeal, which it is not supposed to be.

4.3 The arguments presented by the defendant can be divided into two categories; the arguments related to the decision issued by a panel of judges in the District Court of Mitrovica dated 3 August 2002 and the arguments related to the alleged violation of Article 193 (2) cf. Article 187 of the CPC.

B. The arguments presented by the defendant related to the decision by the Mitrovica District Court dated 3 August 2002

4.4. According to a Decision with reference number Hep No 139/2002, PP No. 1013/02 a panel of judges in the Mitrovica District Court decided on 3 August 2002 that there were insufficient grounds to order an investigation against the defendant. The Supreme Court initially notes that this decision could not be verified as it was not found at its place of issuance. However, even if the document is genuine, the arguments raised by the defendant in this respect are unfounded.

4.5 Firstly, the provisions in the criminal procedure code of SFRY as referred to by the defendant are not applicable. Chapter XXXVIII of the Criminal Procedure Code of Kosovo of 13 December 2012 which entered into force on 1 January 2013 includes the transitional provisions of the Law. According to Article 539, “*any criminal proceedings initiated after the present Code shall be fully compliant with the terms of the present code*”.

4.6 The criminal investigation in this case was initiated on 21 February 2013 and expanded against the defendant (and others) by the decision of the Special Prosecutor dated 10 March 2014. Thus it is clear that it is the CPC which is applicable.

4.7 Secondly, the provisions referred by the defendant in the CPC are without merit. The Decision of the District Court of Mitrovica is a decision to not order initiation of investigation. It was therefore neither an acquittal, nor a decision to dismiss criminal proceedings by a final ruling cf. Article 422 of the CPC, or a decision to terminate criminal proceedings by a final judgement. The Supreme Court has furthermore compared the Decision of the District Court of Mitrovica from 3 August 2002 with the current indictment against the defendant, and it is clear that the facts described in the two documents are widely

different as the first case is much broader than the current case. As such the case against the defendant cannot be considered a re-trial and does not trigger the principle of *Ne bis in idem*.

4.8 In addition, as the Decision of the District Court of Mitrovica from 3 August 2002 was only a decision not to initiate investigations and not a final decision against the defendant, it cannot constitute *res judicata* even if the subject matter and parties of the case has been the same, which they are not.

C. The arguments presented by the defendant related to the alleged violation of Article 193 (2) cf. Article 187 of the CPC

4.9 The defendant argues that there is no grounded suspicion that he committed the alleged criminal act, nor is there a risk of flight or a risk of tampering with evidence.

4.10 The Supreme Court finds that full consideration was given by the Courts to the circumstances of the defendant and the nature of the alleged offences in relation to the existence of grounded suspicion and the existence of the risk of flight and risk of tampering with evidence (i.e. influencing witnesses), and that no other, lesser measure would be sufficient to meet these risks.

4.11 The Supreme Court however notes that in its Ruling dated 27 March 2015 the panel of the Court of Appeals refers to the fact that the grounded suspicion has been established on a number of previous occasions. Although this does not constitute a violation of the criminal procedure, the Supreme Court finds that this Ruling of the Court of Appeals is not self-explanatory. A reference to “as said before” does not explain the basis of the argument relied upon, which can make it difficult for the defendant to understand the basis for the decision. Although it is the responsibility of the defendant to have access to all the previous documents of his or her case, one cannot assume that the defendant *in fact* will be able to access these documents within the short deadlines that he or she is subject to. The Supreme Court therefore finds it advisable that the Rulings *in itself* give sufficient basis for the defendant to understand the arguments fully in order to present an effective defense.

D. Conclusion

4.12 The Supreme Court finds no substantial violation of the criminal code or the criminal procedure. As such, the request must be rejected.

Done in English, an authorised language.

Presiding Judge

Elka Filcheva-Ermenkova

EULEX Judge

Panel members

Esma Ertezi

EULEX Judge

Recording Officer

Elise Svenkerud Thoen

EULEX Legal Officer

Sali Toplica

Supreme Court Judge