

SUPREME COURT OF KOSOVO

Pml.-Kzz. No. 150/2015

1 September 2015

Prishtinë/Priština

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Elka Filcheva-Ermenkova, Presiding Judge, EULEX Judge Dariusz Sielicki and Supreme Court Judge Emine Mustafa as panel members, assisted by EULEX Legal Officer Holger Engelmann as recording clerk, in the criminal case number against:

1. **B. D.**, male, father's name S., born on ... in XXX, Municipality of Glllogoc/Glogovac, Kosovo Albanian, residing in XXX, Kosovo;
2. **H. T.**, male, father's name B., born on ... in XXX, Municipality of Skenderaj/Srbica, Kosovo Albanian, residing in XXX, Kosovo;

Both charged by the Indictment PPS. 45/2012, dated 19 May 2014, and filed with the registry of the Basic Court of Pristina on 21 May 2014 with the criminal offence of:

Trading in Influence, by requesting, receiving or accepting an offer or promise of any undue advantage for himself, herself or another person in consideration of the exertion of an improper influence by the perpetrator over the decision-making of an official person, whether or not the influence is exerted, or whether or not the supposed influence leads to the intended result, in violation of Article 345, paragraph 1 of the Criminal Code of Kosovo¹ (hereinafter CCK);

Adjudicated in first instance by the Basic Court of Pristina with Judgment P. Kr. Nr. 282/14, dated 4 February 2015, by which the defendants B. D. and H. T. were found guilty, each was sentenced to one (1) year and three (3) months imprisonment and both were ordered to jointly pay the sum of 200,000 Euro as compensation;

Modified by the Court of Appeals with Judgement PAKR 157/15 dated 28 May 2015, by which the Court of Appeals found that the statutory limitation had expired and as such rejected the Indictment PPS no. 45/2012, dated 19 May 2015, and filed against the defendants B. D. and H. T. on 21 May 2014;

Deciding upon the Request for Protection of Legality filed on 24 June 2015 by the Office of the Chief State Prosecutor (OSPK) against the Judgment PAKR. No. 157/2015 of the Court of Appeals, dated 28 May 2015,

Having deliberated and voted on 1 September 2015,
Renders the following:

¹ Issued as 'Provisional Criminal Code of Kosovo', promulgated as UNMIK Regulation 2003/25, dated 6 July 2003, renamed and amended by the Law No. 03/L-002, in force until 31 December 2012

JUDGMENT

The Request for Protection of Legality filed 24 June 2015 by the Office of the Chief State Prosecutor against the Judgment PAKR. No. no. 157/2015 of the Court of Appeals, dated 28 May 2015, is hereby ACCEPTED AS WELL-FOUNDED to the disadvantage of the defendants. The Supreme Court of Kosovo DETERMINES THAT with the challenged Judgment THE LAW WAS VIOLATED to the benefit of the defendants.

REASONING

1. Procedural background

On 1 August 2011, Special Prosecution Office of Kosovo (henceforth: SPRK) Prosecutor Ali Rexha issued a ruling initiating the investigation against five (5) defendants, suspected of committing the criminal offences of Organized Crime, Money Laundering, Giving Bribes, and Accepting Bribes. On 31 January 2012, the Pre-Trial Judge of the District Court Prishtinë/Priština extended the investigation for these charges for a further six (6) months, until 1 August 2012, under case number PPS 48/2011.

On 21 May 2012, SPRK Prosecutor Ali Rexha issued a ruling on the initiation of investigation in relation to seven additional defendants, including the two defendants concerned herein, B. D. and H. T., suspected of committing the criminal offences of Accepting Bribes, Giving Bribes, Trading in Influence and Abuse of Official Position or Authority.

On 23 May 2012, SPRK Prosecutor issued a ruling consolidating both cases under PPS number 45/12, and on 18 December 2012, the Pre-Trial Judge extended the investigation until 21 May 2013.

On 4 April 2013, the EULEX SPRK Prosecutor Andrew Carney issued a ruling expanding the charges of the investigation against the defendants, and further on 20 May 2013, issued a further ruling expanding the investigation in relation to weapons charges against five (5) defendants.

On 16 July 2013, the EULEX SPRK Prosecutor filed an application to extend the consolidated and expanded investigation.

On 26 April 2013 and 11 February 2014, the investigation was terminated against a number of defendants, and, in the latter ruling, against defendant H. T. regarding the weapons charges.

On 21 May 2014, the SPRK Prosecutor Andrew Carney filed an indictment in case PKr 282/14 against the two defendants herein, dated 19 May 2014.

After eleven (11) sessions, the Basic Court of Pristina rendered Judgment P.-Kr. No. 282/14, dated 4 February 2015, by which the defendants B. D. and H. T. were found guilty and both sentenced to the punishment of one year and three months of imprisonment and ordered to pay jointly and severally the sum of EUR 200,000 as well as ordered to reimburse the sum of EUR 150 each as part of the costs of the criminal proceedings and were relieved to pay the rest of the costs.

Defence counsel Mahmut Halimi on behalf of defendant B. D., defence counsel Bajram Tmava on behalf of the defendant H. T., the defendant H. T. and the prosecution filed an appeal against Judgment P.-Kr. no. 282/14 of the Basic Court of Prishtinë/Priština to the Court of Appeals.

In its Judgement PAKR. 157/15, dated 28 May 2015, the Court of Appeals found that the statutory limitation had expired and as such modified the appealed Judgement P.-Kr. no. 282/14 of the Basic Court of Prishtinë/Priština, rejecting the Indictment PPS no. 45/2012, dated 19 May 2015, against the defendants B. D. and H. T..

On 24 June 2015 the Office of the Chief State Prosecutor filed a request for protection of legality against the Court of Appeals Judgment PAKR. 157/15, dated 28 May 2015.

2. Submissions by the Parties

The EULEX State Prosecutor submits in his Request for Protection of Legality that the Judgment of the Court of Appeals PAKR 157/15, dated 28 May 2015, constitutes a violation of criminal law in relation to Article 90 paragraph 5 and 6 and Article 91 paragraphs 3, 5 and 6 of the CCK, a substantial violation of the provisions of the criminal procedure in relation to Article 370 paragraph 11 of the Criminal Procedure Code² (CPC) as well as a violation of the provisions of the criminal procedure which affected the lawfulness of the judicial decisions in relation to Article 3 paragraph 2 of the CPC.

The EULEX State Prosecutor argues *inter alia* that the Court of Appeals simply limited itself to highlighting the discrepancies in the different language versions of Article 90 of the CCK, and with reference to Article 3 paragraph 2 of the CPC (which stipulates that in the event of a change in the law the most favourable law shall apply) concluding that the most favourable language version applies, without putting a single effort in order to reconcile those discrepancies for the sake of the legal system's coherence.

The EULEX State Prosecutor motions the Supreme Court of Kosovo to declare that the Judgment of the Court of Appeals PAKR. 157/15, dated 28 May 2015, violated the law as stated above.

The defendants were served with the Request for Protection of Legality on the 7 July 2015; however, no response was filed within the legal time limit.

² Law No. 04/L-123, published in the Official Gazette of the Republic of Kosovo No. 37, 28 December 2012

3. The Competence of the Panel

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.

The Panel considered the Request for Protection of Legality filed by the prosecution as an “ongoing” case pursuant to Article 1.A of the Omnibus Law. Thus EULEX judges have jurisdiction on the case.

4. Findings

The Request for Protection of Legality filed by the Office of the Chief State Prosecutor is admissible, timely filed and well-founded.

The Panel determines that the contested Judgment violated of the criminal law in relation to Article 90 paragraph 5 and 6 and Article 91 paragraphs 3, 5 and 6 of the CCK and substantially violated the provisions of the criminal procedure in relation to Article 3 paragraph 2 of the CPC to the benefit of the defendants.

The Supreme Court observes that the impugned Judgment correctly assessed that there are differences between the different language versions of Article 90 paragraph 1 subparagraph 6 of the CCK. While English and the Serbian language version apply the determined period of time to “...a criminal offence punishable by **imprisonment for up to one year** or punishment of a fine” the Albanian language version of the provision talks of “.....a criminal offence punishable by **imprisonment of more than one year** or punishment of a fine”.

The Court of Appeal, however, went wrong in applying the principle of ‘*in dubio pro reo*’ enshrined in Article 3 paragraph 2 of the CPC to the discrepancy between the different language versions. Article 3 paragraph 2 of the CPC requires “...doubts regarding the implementation of a certain criminal law provision.” The contested Judgment wrongfully concluded that such doubts existed without applying to the provision in question any of the standard methods of interpretation, different from literal interpretation. The latter is only a starting point. A literal interpretation of a law issued in more than one original language, which is the case, would not suffice any time when there would be a difference in the wording of the different language versions. In such a case other classical methods of interpretation, such as systematic interpretation and teleological interpretation should be employed in order to eliminate any confusion. The first method would explain the meaning of a provision in the context of the other norms within the same legal act and in particular the norms which precede and follow the provision in question. The second one would explain what is the reason for the existence of the provision in question. If the literal wording of a provision does not appear reasonable the Court has to attempt to find an interpretation that makes sense.

The Panel of the SC in trying to resolve the confusion created by the different language versions of the same provision considered the following:

In trying to properly read the provision of Article 90 paragraph 1 subparagraph 6 of the CCK the Court had to assume that the lawmaker intended the provisions regulating the statutory limitation to be logic and reasonable (as mentioned above – the law has to make sense, even when the wording does not). The period prescribed for statutory limitation reduces in steps beginning from subparagraph 1 to subparagraph 5 for criminal offences punishable by sanctions of in steps decreasing severity. In the English and Serbian language versions of the provision this logic continues in subparagraph 6 with the prescribed period of statutory limitation shorter than the one in subparagraph 5 for offences punishable by less severe sanctions (imprisonment for up to one year or punishment of a fine) than the ones described in the previous subparagraph (imprisonment of more than one year). In the Albanian language version, however, the description of the criminal offences and the sanctions in subparagraph 6 matches the one on subparagraph 5, which prescribes a shorter period of statutory limitation. It is apparent that it is not logic or reasonable to prescribe two different periods of statutory limitation for the same category of criminal offences. Consequently, the Panel concludes that this could not have been the will of the lawmaker.

Using the systematic interpretation one should consider that subparagraph 6 does not stand alone and isolated and has to be read in the system of the whole Article 90 paragraph 1 of the CCK, as described earlier.

Finally the standard methods of systematic and teleological interpretation compellingly lead to one conclusion only, which is that the Albanian language version contains a clerical error while the other two identical language versions are genuine, logical and systematically consistent.

As a result of these considerations the Panel notes that any ambiguity concerning the wording of Article 90 paragraph 1 subparagraph 6 of the CCK is to be resolved by applying the standard methods of interpretation. Hence, there are no doubts about the implementation of a certain criminal law provision, which could leave space for the application of the principle of ‘*in dubio pro reo*’ enshrined in Article 3 paragraph 2 of the CPC.

After concluding that with the challenged Judgment the law was violated to the benefit of the defendants, the Supreme Court notes that by Article 438 paragraph 2 of the CPC it was limited to determining a violation of the law without interfering in the final decision.

Based on this reasoning the Panel decides as in the enacting clause.

Done in English, an authorised language.

Panel members

Dariusz Sielicki
EULEX Judge

Emine Mustafa
Supreme Court Judge

Presiding Judge

Elka Filcheva-Ermenkova
EULEX Judge

Recording Officer

Holger Engelmann
EULEX Legal Officer

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