COURT OF APPEALS
PRISTINA

IN THE NAME OF THE PEOPLE

Case number:	**PAKR 412/15**
Date:	**18 April 2016**
Basic Court:	**Pristina, P.nr. 1462/14**

Original: **English**

The Court of Appeals, in a Panel composed of EULEX Court of Appeals judge Radostin Petrov, as presiding and reporting judge, EULEX Court of Appeals judge Roman Raab and Kosovo Court of Appeals judge Driton Muharremi as panel members, assisted by Alan Vasak, EULEX legal officer, acting in the capacity of a recording officer,

in the case concerning the defendant:

U.M.;

charged under Indictment, PP. Nr. 1111-8/2009, dated 4 November 2010, with two Counts:

Count I.1. Accepting Bribes, in violation of Article 343, paragraph 1, of the Provisional Criminal Code of Kosovo (CCK);
Count I.2. – Not subject of the present proceedings.

adjudicated in first instance by the Basic Court of Pristina with judgment P.nr. 1462/14, dated 26 May 2015,

by which the defendant U.M. was found guilty of Count I.1., Accepting Bribes, in violation of Article 343, paragraph 1, CCK, because on 13 September 2006 in Peja, the defendant in his capacity of presiding judge of the main trial case P.nr. 474/06 of the District Court in Peja, against the defendants D.N., P.N. and L.K., as an official person accepted from V.Z. a material benefit in the amount of 10.000 (ten thousand) EUR, money which was given to V.Z. by F.N. to be delivered to U.M., in order to perform within the scope of his authority an official act which he should have not performed, with the promise to guarantee the termination of detention on remand of the aforementioned defendants after announcement of the judgment in the criminal case P.nr. 474/06. The defendant U.M. was sentenced to 2 (two) years and 3 (three) months of imprisonment. A

material benefit in the amount of 10.000 (ten thousand) EUR was ordered to be confiscated within 30 (thirty) days after the judgment becomes final. The defendant was ordered to pay the cost of the criminal proceedings, with exception of the costs of interpretation and translation, in the amount of 150 EUR.
Count 1.2 of the indictment was rejected due to the expiration of the absolute period of statutory limitations.

seised of the appeal filed by defense counsel Orhan Basha, defense counsel Zeqir Berdynaj and defendant U.M. personally,

having considered the motion of the appellate prosecutor Lars Agren, filed on 29 February 2016,

after having held public sessions of the Court of Appeals on 16 February, 24 March and 13 April 2016,

having deliberated and by majority voted on 18 April 2016,

acting pursuant to Articles 409, 410, 411, 415, 417, 420 and 426 of the Provisional Criminal Procedure Code of Kosovo (PCPC),

renders the following:

JUDGMENT

The appeal of defense counsel Orhan Basha, defense counsel Zeqir Berdynaj and defendant U.M. personally, against judgment P.nr. 1462/14 of the Basic Court of Pristina dated 26 May 2015, is partially granted.

The judgment P.nr. 1462/14 of the Basic Court of Pristina dated 26 May 2015 is modified, insofar as the defendant is sentenced to one (1) year of imprisonment, which shall not be executed if the defendant does not commit another criminal offence in the time period of two (2) years.

The remainder of the impugned judgment is affirmed.

REASONING

I. PROCEDURAL BACKGROUND

On 4 November 2010 the prosecution filed indictment PP. Nr. 1111-8/2009 against the defendant U.M. and V.Z., accusing U.M. of two criminal offences of Accepting Bribes, in violation of Article 343, paragraph 1, CCK and V.Z. of two criminal offences - Giving Bribes and Fraud.

On 21 January 2011, the confirmation judge issued a ruling by which the indictment was confirmed in its entirety. The ruling was appealed by the defence, but the appeal was rejected as inadmissible on 22 February 2011.

After conducting the first main trial the Basic Court of Pristina on 18 January 2012 rendered judgment P.2668/11 by which the defendant U.M. was found guilty of one criminal offence of Accepting Bribes. U.M. was sentenced to a term of imprisonment of two years and six months, with the accessory punishment of prohibition of exercising public administration or public service for two years. Further, the Basic Court, acting *ex officio,* requalified the second Count from Accepting Bribes to Trading in Influence (Article 345, paragraph 1, CCK), for which the defendant U.M. was also found guilty. U.M. was sentenced to a term of imprisonment of one year with the accessory punishment of prohibition of exercising public administration or public service for one year. The amount of € 10.000 (ten thousand), as benefit of the bribes, was confiscated. An aggregated punishment of three years of imprisonment and a prohibition of exercising public administration or public service for three years was determined. V.Z. was also found guilty and sentenced accordingly.

Judgment P.2668/11 was appealed by defence. The Court of Appeals through ruling PAKR 87/13, rendered on 27 March 2014, annulled the first instance judgment and ordered a retrial regarding both Counts concerning the defendant U.M. The charges against the defendant V.Z. were rejected.

Having held public re-trial hearings on 29 September, 21 and 23 October, 18 December 2014, and 5 January, 13 March, 17 April and 21 May 2015, and after having held the deliberation and voting session on 21 May 2015, the Basic Court of Pristina on 26 May 2015 pronounced in a public hearing the impugned judgment.

The written judgment was served on the defendant on 20 July 2015 and to his defence counsel Zeqir Berdynaj on 20 July 2015 and Orhan Basha on 21 July 2015. The appeal was filed on 31 July 2015.

The prosecution did not file a response to the appeal.

The case was transferred to the Court of Appeals for a decision on the appeal on 27 August 2015.

On 29 February 2016 the appellate prosecutor Lars Agren filed a motion.

The session of the Court of Appeals Panel was held on 16 February, 24 March and 13 April 2016 in the presence of the defendant, his defence counsel Orhan Basha and Zeqir Berdynaj and the appellate state prosecutor Lars Agren (24 March and 13 April 2016).

The Panel deliberated and voted on 18 April 2016.

II. SCOPE OF THE APPEALS

The impugned judgment of the Basic Court became final with regard to the second Count of the indictment against U.M., as the appeal of the defence does not encompass the decision of the Basic Court with regard to this Count and the prosecution did not file an appeal all together.

Therefore only the first Count is pending in the appeal.

III. PRELIMINARY MATTERS

A. Applicable Law in the Case

a. Procedure Law
On 1 January 2013 a new procedural law entered into force in Kosovo – the Criminal Procedure Code (Law 04/L-123). This Code repealed the previous Provisional Criminal Procedure Code of Kosovo. Article 545 of the current Criminal Procedure Code stipulates that the determination of whether or not to use the present code of criminal procedure shall be based upon the date of the filing of indictment. Acts which took place prior to the entry of force of the present code shall be subject to the current Code if the criminal proceeding investigating and prosecuting that act was initiated after the entry into force of this code. As correctly established by the Basic Court, the applicable procedural law would thus be the Provisional Criminal Procedure Code of Kosovo, as the first main trial in this case commenced prior to the entry into force of the current Code. The Court of Appeals accordingly conducts the proceedings pursuant to the Provisional Criminal Procedure Code of Kosovo.

b. Substantive Law
In accordance with Article 3, paragraph 1, of the current Criminal Code of the Republic of Kosovo (Law 04/L-082) the law in effect at the time a criminal offence was committed shall be applied to the perpetrator. In the event of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply, which is provided in paragraph 2 of the aforementioned provision. As correctly established by the Basic Court, applying the previous criminal code, the Provisional Criminal Code of Kosovo, is more favorable for the defendant as opposed to applying the current criminal code. The Provisional Criminal Code of Kosovo shall therefore be applicable.

B. Competence

Pursuant to Article 121, paragraph 1, PCPC the Panel has reviewed its competence and since no formal objections were raised by the parties the Panel will suffice with the following. In accordance with the Law on Courts and the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273 and clarified through the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, the Panel concludes that EULEX has jurisdiction over the case and that the Panel is competent to decide the respective case in the composition of one Kosovo judge and two EULEX judges.

C. Admissibility of the appeal

The appeal filed by defense counsel Orhan Basha, defense counsel Zeqir Berdynaj and defendant U.M. personally is admissible. The appeal was filed within the 15-day deadline pursuant to Article 398 PCPC. The appeal was filed by authorized persons and contains all other relevant information pursuant to Articles 399 and 401 PCPC.

D. EULEX prosecutor

The defence objected the assignment of a EULEX prosecutor in this case, arguing that this assignment was not in accordance with the law. The Panel notes that on 29 March 2016 the Chief State Prosecutor Aleksander Lumezi and Chief EULEX Prosecutor Claudio Pala jointly decided to assign the case to a EULEX prosecutor, as is documented in a written decision. The Panel finds this decision in complete accordance with Articles 7 and 7.A of the Law on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo (Law No. 04/L-273). The objection of the defence is therefore rejected as unfounded.

IV. SUBMISSIONS OF THE PARTIES

A. The appeal filed by defense counsel Orhan Basha, defense counsel Zeqir Berdynaj and defendant U.M. personally

Defence counsel Orhan Basha and Zeqir Berdynaj filed an appeal with the Basic Court of Pristina on behalf of the defendant U.M. on the grounds of:

- Substantial violation of the provisions of criminal procedure;
- Erroneous or incomplete determination of the factual situation;
- Violation of the criminal law; and
- Decision on criminal sanctions.

Concerning violations of the provisions of criminal procedure the defence submits that the Basic Court did not present clearly for what reasons it considers certain facts confirmed or not confirmed and the Basic Court also did not assess properly all the exculpatory evidence.

Furthermore the Basic Court did not motivate properly why certain proposals of the parties were rejected. The reasoning of the judgment is therefore incomplete.
Additionally, the judgment is based on inadmissible evidence. Also, the defendant was not presented with all the evidence gathered during the investigation.
The request for extension of the investigation was submitted after the legal deadline and even the indictment was also submitted after the legal deadline. The criminal proceedings should therefore have ended after the deadline was reached.
Furthermore, the enacting clause is unclear and confusing and is in contradiction with the reasoning of the judgment.
Also, the minutes of the main trial were not presented to the parties to verify.
Lastly, certain witness statements were obtained prior to the initiation of the investigation, thus rendering this evidence as inadmissible.

With regard to the erroneous and incomplete determination of the facts the defence contends that the Basic Court incorrectly established that the defendant performed an official act which he should not have performed. The termination of detention on remand ordered by the defendant was correct and lawful and was also not challenged by the prosecution. Therefore the act of terminating the detention on remand was a lawful and correct official act. Furthermore, there is no evidence that the defendant accepted any bribes for the termination of the detention on remand. Additionally, no mention is made of the specific time when the alleged act of bribery took place and in what manner the bribery happened.
The witness statements can only be interpreted insofar as the defendant did not accept any money. It is clear from the key witnesses that the defendant was not involved in any bribery. Any incriminating evidence is unreliable. Furthermore, the restaurant Arrat was not yet open when the defendant was allegedly supposed to be there.

With respect to violations of the criminal law, the defence submits that the circumstances that exclude the criminal prosecution were not assessed in a considerable and correct manner. Furthermore, the amount of € 10.000 cannot be confiscated as it is clear from the statement from V.Z. that the defendant did not receive any money.

Finally, as to the decision on criminal sanctions, the defence contends that the Basic Court failed to properly take into consideration the mitigating circumstances.
Furthermore the decision on confiscation of the material benefit in the amount of € 10.000 is unlawful, since the witness F.N. did not submit such a request and she did not join the criminal proceedings against the defendant. Lastly, the amount of € 150 for costs of the criminal proceedings was not specified and also is not warranted as no expenses were made.

For all these reasons, the defence requests the Court of Appeals to modify the judgment and to acquit the defendant.

B. Motion of the Appellate Prosecution Office

The EULEX Appellate Prosecutor motions the court to reject the appeal of the defendant.

The appealed judgment contains no essential violation of the provisions of criminal proceedings. The Appellate Prosecutor submits that the pieces of evidence referred to by the Defence are dully assessed. The investigation was conducted in good faith. The Appellate Prosecutor submits that the Defence has failed to demonstrate any prejudice caused to the Defendant by the practice of preparing the minutes of the trial session. The judgment contains decisive facts and circumstances indicating the criminal nature of the act committed which the accused was found guilty for. The determined factual situation is an outcome of a just evaluation of administered evidence and was correctly and completely established. Accordingly, the Basic Court has properly applied the criminal law when finding that the actions of the accused contain all substantial elements of the criminal offence for which the accused is found guilty.

V. FINDINGS OF THE PANEL

A. Substantial violation of the provisions of criminal procedure

a. Reasoning and comprehensibility
The defence submits that the enacting clause is incomprehensible and in contradiction with itself as well as with the evidence in the case file. The defence further submits that the impugned judgment is insufficiently reasoned and does not present clearly for what reasons it considers certain facts confirmed or not confirmed.

This ground of appeal is rejected as unfounded.

The enacting clause is clear, logical and does not contradict itself or the reasoning. The enacting clause provides a coherent and comprehensive description of the decisive facts and contains all the necessary data prescribed by Article 396, paragraphs 3 and 4, PCPC in conjunction with Article 391 PCPC. The enacting clause is fully coherent with the reasoning of the impugned judgment and reflects the findings elaborated therein. The Basic Court presented grounds for each individual point of its decision, as required by Article 396, paragraph 6, PCPC.
The enacting clause read together with the detailed reasoning of the impugned judgment furthermore provides a comprehensive assessment of the evidence and of the facts the Basic Court considered proven and not proven. In accordance with Article 396, paragraph 7, PCPC the Basic Court also made a detailed assessment of the credibility of conflicting evidence and the reasons guiding the basic court in settling points of fact and law.
It is clear from the elaborate analysis contained in the reasoning of the impugned judgment, that the Basic Court has performed a careful and meticulous analysis of the evidence in the case. Whilst the defence may disagree with the conclusions the Basic Court drew after completing its analysis of the evidence; that disagreement amounts to a separate challenge. The defence however cannot reasonably claim that the Basic Court did not fulfil its duty to carefully examine the evidence with maximum professional devotion.
The trial panel conducted the trial impartially and gave careful consideration to motions for evidence from the defence and prosecution alike and has carefully weighed the evidence and arguments of both parties. This is clear from the impugned judgment and the reasoning given by the trial panel therein. Again, the Panel reiterates that whether the conclusions of the Basic Court

on determination of facts were correct and complete is a separate issue and this will be assessed in the next section of this judgment.
With regard to the raised issues by the defence regarding purported violations of the criminal procedural code during the various stages of the proceeding up to the re-trial, the Panel notes that these issues were already decided upon by the Court of Appeals in judgment PAKR 87/13, rendered on 27 March 2014. It was then decided that none of the objections show that there was a substantial violation of the provisions of the criminal procedure code that influenced or might have influenced the rendering of a lawful and proper judgment. The Panel stands by this decision.

The appeal of the defence is rejected in this regard.

With regard to the submission of the defence that they were not presented with the opportunity to check the finalized record of the main trial as per Article 350, paragraph 2, PCPC, the Panel notes the following. As this case is handled by EULEX, the main trial was recorded in the English language. The parties were therefore not immediately given the opportunity to verify the minutes. However, the parties were given an Albanian translation of the record in due time. The defence then had the opportunity to make comments and request corrections. The defence however failed to do so. Also in the appeal the defence fails to substantiate any comments or correction requests. Thus no rights of the defendant were violated.

The appeal of the defence is rejected in this regard.

B. Determination of the factual situation

The defence submits that the Basic Court did not evaluate all the evidence administered during the main trial in a fair manner and as a whole. The defence argues the Basic Court failed to properly assess the evidence and therefore came to the wrong conclusion that the defendant is guilty.

Before assessing the merits of the arguments presented by the defence on the alleged erroneous or incomplete determination of facts, the Panel reiterates the standard of review regarding the factual findings made by the trial panel. It is clear from Article 424, paragraph 3, PCPC that it is not sufficient for the appellant to demonstrate only an alleged error of fact or incomplete determination of fact by the trial panel. Rather, as the criminal procedure code requires that the erroneous or incomplete determination of the factual situation relates to a “material fact”, the appellant must also establish that the erroneous or incomplete determination of the factual situation indeed relates to a material fact, i.e. is critical to the verdict reached.[1] Furthermore, it is a general principle of appellate proceedings that the Court of Appeals must give a margin of appreciation to the finding of fact reached by the trial panel because it is the trial panel which is best placed to assess the evidence. The role of the appellate instance is to verify whether the first instance has considered all the relevant facts, applied the law correctly and reached a reasonable conclusion. The Supreme Court of Kosovo has frequently held that it must “*defer to the*

[1] See also B. Petric, in: Commentaries of the Articles of the Yugoslav Law on Criminal Procedure, 2nd Edition 1986, Article 366, para. I. 3.

assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so." The standard which the Supreme Court applied was "*to not disturb the trial court's findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous.*"[2]

The Basic Court in the impugned judgment in detail analyses the evidence administered during the main trial. The Panel examined the recapitulation of the witness statements which is set out on pages 5 to 9 of the impugned judgment, the material evidence which is set out on pages 9 to 10 of the impugned judgment and the statement of the defendant which is set out on pages 10 to 11 of the impugned judgment. Furthermore, the Panel carefully assessed the thorough and detailed analyses of the evidence which is set out on pages 11 to 15. In the view of the Panel, the Basic Court comes to logical conclusions in its assessment of that evidence and finds no contradiction in the stance of the Basic Court. The Panel furthermore autonomously reviewed all the evidence. After this careful evaluation the Panel is still fully persuaded by the conclusions and reasoning of the Basic Court. The Panel finds that there is sufficient evidence to prove beyond a reasonable doubt that the defendant is guilty of Accepting Bribes, because on 13 September 2006 in Peja, the defendant in his capacity of presiding judge of the main trial case P.nr. 474/06 of the District Court in Peja, against the defendants D.N., P.N. and L.K., as an official person accepted from V.Z. a material benefit in the amount of 10.000 (ten thousand) EUR, money which was given to V.Z. by F.N. to be delivered to U.M., in order to perform within the scope of his authority an official act which he should have not performed, with the promise to guarantee the termination of detention on remand of the aforementioned defendants after announcement of the judgment in the criminal case P.nr. 474/06. The defence did not bring forth any substantial new arguments that were not already addressed by the Basic Court. Seeing as the Panel finds the decision of the Basic Court reasonable and in accordance with the law, the Panel therefore does not see a need to repeat the detailed analysis of the Basic Court. The Panel however stresses the following with regard to the key witness statement of A.N.

A.N. testified that he was interested in finding connections in order to release his brothers from prison. Through V.Z., A.N. came into contact with the defendant. A.N. met the defendant (with V.Z.) in a restaurant and he was assured by the defendant that the case of his brothers will be dealt with accordingly by the defendant. In return for this A.N. was to send an envelope with money and a Nokia telephone to the defendant through V.Z. With the Basic Court, the Panel finds this testimony of the witness A.N. credible and reliable. The testimony of A.N. is supported by the pre-trial testimonies of F.N. and P.G.. The Panel fully adopts the detailed reasoning of the Basic Court as to why the incriminating testimonies are considered to be credible and reliable, in particular the following passage:

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[2] Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, para. 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, para. 30.

> "As for the witnesses' statements given in this retrial, the trial panel concluded that statement of witness A.N. given in the course of the main trial session on 05.01.2015 is the most reliable one, because it corroborates with his first statement given in front of the police on 15.01.2009. His way of recollecting the facts is logic, and the reason he did not remember some details are justifiable because a relative time has elapsed. Moreover, when confirmed with these details, e.g. sum of the money, he confirmed that his mother, F.N., a day before his brothers were released from detention on remand, called him on the phone and informed that together with P.G. and V.Z. are going to U.M. to deliver the money. Further to this, witness A.N. also confirmed to have been informed by F.N. right after going back at home that the money was delivered by V.Z. to U.M. In conclusion, A.N. confirmed that F.N. gave V.Z. 10.000 Euros to be delivered to U.M. a day before his brothers were released from detention on remand."

The Panel reiterates that it also fully adopts the detailed reasoning of the Basic Court as to why to other statements are considered to unreliable, as sufficiently elaborated on by the Basic Court on pages 13 and 14 of the impugned judgment.

In conclusion, the Panel is satisfied that the Basic Court completely and correctly established the factual situation and that the arguments raised in the appeals do not undermine these findings. This ground of the appeal of the defence is therefore rejected as unfounded.

C. <u>Decision on the criminal sanction</u>

The defence challenges the determination of punishments, considering it unfair and unlawful.

Pursuant to Article 391 PCPC the court shall impose a punishment if the defendant is found guilty. Seeing as the Basic Court rightfully found the defendant guilty, the imposition of a punishment is lawful.

Pursuant to Article 396, paragraph 8, PCPC the court shall consider all the relevant factors needed to determine an adequate punishment. The Basic Court wrongfully assessed the aggravating circumstances. The sole motive for the commission of the criminal offence accepting bribes, as properly raised by the Appellate Prosecutor, was to gain material benefit. Therefore gaining material benefit, as one of the elements of the criminal offence, cannot be an aggravating factor. The Basic Court also failed to take into account the mitigating circumstance that the criminal offence took place a relatively long time ago, namely in 2006. Because of this, the Panel shall partially grant the appeal of the defence and modify the impugned judgment to impose a more lenient punishment. After assessing and weighing the mitigating and aggravating circumstances the Panel finds imprisonment of one (1) year, which shall not be executed if the

defendant does not commit another criminal offence in the time period of two (2) years, adequate and proportional.

D. Confiscation

With the Basic Court the Panel finds that according to Article 343, paragraph 4, CCK the confiscation of the material benefit is mandatory. Whether or not the witness F.N. joined the criminal prosecution is irrelevant in this regard. Concerning the amount of the confiscation, the Panel refers to the correctly determined factual situation by the Basic Court where it was established € 10.000 was delivered to the defendant. This ground of the appeal of the defence is therefore rejected as unfounded.

E. Costs

The defence submits that the amount of € 150 for costs of the criminal proceedings was not specified and also is not warranted as no expenses were made.

The Panel rejects this ground of the appeal, because the lump sum of € 150 was not determined in the detriment of the defendant. The public re-trial hearings were held on 29 September, 21 and 23 October, 18 December 2014, and 5 January, 13 March, 17 April and 21 May 2015. The costs for these proceedings were much more than € 150. The defendant is guilty and therefore he is obliged to reimburse the cost for the proceedings.

F. Closing remarks

The Court of Appeals – for reasons elaborated above – partially grants the appeal of the defence with regard to the imposition of a more lenient measure and affirms the remainder of the impugned judgment.

The dissenting opinion of Judge Driton Muharremi is attached to this judgment.

Reasoned written judgment completed on 18 May 2016.

Presiding Judge

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Radostin Petrov
EULEX Judge

Panel member	Panel member
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Driton Muharremi Kosovo Judge	Roman Raab EULEX Judge

Recording Officer

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Alan Vasak
EULEX Legal Officer

Court of Appeals
Pristina

PAKR 412/15

18 April 2015