

## COURT OF APPEALS

**Case number:** PAKR 429/16  
**Date:** 20 and 27 October 2016  
**Basic Court of Pristina:** PKR. no. 357/14

The Court of Appeals, in the Panel composed of EULEX Judge Roman Raab, as presiding and reporting Judge, Kosovo Court of Appeals Judges Hava Haliti and Abdullah Ahmeti as panel members, assisted by Vjollca Kroci-Gerxhaliu, EULEX legal advisor, acting in the capacity of a recording officer,

in the criminal case concerning the accused:

**K.D., father's name xxx, male, born on xxx in xx, residing at 'xxx' street, no. xxx in xxx, Kosovo xxx, citizen of xxx, with ID xxx;**

*Charged* with the Indictment PP. no. 776-3/2012 dated 25 June 2014 of the Special Prosecutor and filed with the Registry of the Basic Court of Prishtina/Pristina on 26 June 2014 for the criminal offences of:

**Endangering Internationally Protected Persons, in violation of Article 141 (3) of the former Criminal Code of Kosovo (hereinafter: CCK);**

**Damage to Movable Property, in violation of Article 260 (2) of the CCK;**

*Acquitted* by the Judgment of the Basic Court of Prishtina/Pristina; PKR. no. 357/14 dated 18 February 2016;

*seized* by the appeal against the aforementioned judgment filed by the Special Prosecutor on 05 April 2016;

*having* considered the response of the defence counsel Afrim Salihu filed on 8 April 2016 with the Basic Court of Prishtina/Pristina and received on 11 April 2016 in the EULEX Judges Unit;

*having* considered the Motion PPA/I. no. 399/2016 of the Appellate State Prosecutor filed with the Court of Appeals on 26 August 2016;

*after* having deliberated and voted on 20 and 27 October 2016;

*acting* pursuant to Articles 390 (1), 394, 398 (1) point 1.2, Article 401 of the Criminal Procedure Code of Republic of Kosovo (hereinafter: CPC),

*renders the following:*

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## **JUDGEMENT**

- **The appeal of the Special Prosecutor filed on 05 April 2016 against the Judgement of the Basic Court of Prishtina/Pristina PKR. no. 357/14 dated 18 February 2016, is rejected as Ungrounded,**
- **The Judgement of the Basic Court of Prishtina/Pristina PKR. no. 357/14 dated 18 February 2016, is Confirmed.**

## **REASONING**

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### **I. PROCEDURAL BACKGROUND**

The indictment in this case was filed on 26 June 2014. The main trial commenced on 14 July 2015 in the Basic Court of Pristina. Sessions were held on 15 and 16 July, 1, 2 and 14 September, 7 October and 9 November 2015. Sessions were also held on 28 January and on 15 and 18 February 2016.

The detailed description of the procedure up until the announcement of the Judgment of the Basic Court of Prishtina/Pristina is described in the Judgment PKR. no. 357/14 dated 18 February 2016;

Against the Judgment of the Basic Court of Prishtina/Pristina; PKR. no. 357/14 dated 18 February 2016 (hereinafter: the impugned Judgment), the Special Prosecutor filed an appeal on 05 April 2016. The defence counsel of the defendant filed a Response on the appeal on 8 April 2016 with the Basic Court of Prishtina/Pristina.

The case was transferred to the Court of Appeals (hereinafter: CoA) for a decision on the appeal on 3 August 2016. The case was sent to the Appellate Prosecution office on the same day and received the case back with the Appellate State Prosecutor's motion on the 26 August 2016.

The Court of Appeals Panel (hereinafter: Panel) deliberated and voted on 20 and 27 October 2016.

### **A. Admissibility of the appeal**

The judgment was served on the Prosecutor on 22 March 2016 as documented by the delivery slip, and the appeal is filed on 05 April 2016 as documented by the stamp of Basic Court of Prishtina/Pristina. Therefore the appeal is timely filed. The appeal is also admissible as filed by an authorized person, pursuant to Article 380(1) CPC.

## **II. SUBMISSIONS OF THE PARTIES**

### **A. The appeal**

The SPRK by the appeal challenges the Judgment of the Basic Court of Prishtina/Pristina on the grounds of an erroneous or incomplete determination of the factual situation pursuant to Article 383 (1) 1.3 ) and Article 386 (1) of CPC. In her appeal she raises a numerous arguments stating that the court of the first instance has made an erroneous factual determination of the identification evidence provided by Xh.H., a former police officer. Special Prosecutor further states that the first instance court contradicts its own determination in relation to the credibility of the Xh.H.. She states that the judgment of the Basic Court contains contradictions and inconsistencies therefore she proposes to the CoA to determine and asses the material facts and declares the defendant guilty.

### **B. The response of the defence counsel**

In his response, the defence counsel states that the impugned Judgment is grounded and based on law. He further states that the indictment was based only on indirect evidence and on a single testimony given by the police officer. He asks the CoA to upheld the judgment of the Basic Court and dismiss the appeal of the Prosecution.

### **C. The Appellate Prosecutor's Motion**

The Appellate Prosecutor in her motion fully supports the appeal. She points out that the court of the first instance made several mistakes in assessing the credibility of the witness Xh.H. and determination of the factual situation. Bringing up plentiful arguments, the Appellate Prosecutor requests from the CoA to grant the appeal filed by the EULEX Special Prosecutor, to annul the Judgment of the Basic Court and return the case for retrial and decision.

### **D. Competence of the EULEX Court of Appeals Panel**

The Panel of the Court of Appeals is constituted in accordance with Article 19 (1) of the Law on Courts and Article 3 of 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 amending Law no. 04/L-273 (also known to the public as the Eulex Omnibus Law) in Article 1.A defines what cases constitute ongoing cases which fall within Eulex jurisdiction. The present case clearly constitutes an on-going case pursuant to Article 1A (1) of the said law. The investigation in the case was initiated in 2012, the first instance judgment issued on 18 February 2016.

### **III. Findings on the merits**

By the Judgment PKR no. 357/14, the Basic Court of Prishtina/Pristina acquitted the defendant **K.D.** of all charges as described in the Indictment.

The SPRK by the appeal challenges the Judgment of the Basic Court of Prishtina/Pristina on the grounds of an erroneous or incomplete determination of the factual situation pursuant to Article 383 (1) 1.3 ) related to Article 386 (1) of CPC.

The first instance court finds the defendant not guilty because it was not proven beyond reasonable doubt that the defendant **K.D.** had committed the criminal offences he was charged with.

The Panel of the CoA finds the impugned Judgment sufficiently reasoned. The impugned Judgment finds the Police Officer Xh.H. as not credible witness. As stated in the impugned judgment and evidenced in the case files, Xh.H., firstly gave very brief incident report on 4 February 2012 and a detailed statement to the French Police in September 2013. In the written report and in his statement, he claims that three persons attacked the vehicle. He changes his testimony in the main trial when heard by the panel. He was actually heard about the incident of 4 April 2012 in the main trial on 1<sup>st</sup> September 2015, by video link. According to the minutes of the main trial session of 1<sup>st</sup> September 2015, he stated that the '*truth*' is that there were five persons throwing stones, however in the report he indicated three persons since he was told to write down so. The fact that he admitted that he wrote inaccurate incident report, does not make him credible. Considering the official function of witness Xhevdet Haliti in this event, the first instance court has found the witness not credible.

The first instance court has correctly interpreted the evidence in favor of the defendant, considering the situation of doubt and uncertainty created by witness Xh.H.'s diverse and inconstant statements. Namely, as stated in the Article 3 of CPC ' The doubts regarding the existence of the facts relevant to the case [...] shall be interpreted in the favor of the defendant and his rights under the present Code and Constitution of the Republic of Kosovo.'

The Panel reminds that the evaluation of evidence should rely on a direct and immediate examination of oral testimonies and statements by a panel of judges. It is not only practical

principle but it is also strictly set by law that “*The court shall base its judgment solely on the facts and evidence considered at the main trial*”/Art. 361(1),CPC. Moreover, “*The court renders its decision on the basis of the evidence examined and verified in the main trial* “Article 8 (2), CPC. Therefore, the Panel concurs with the findings and correct evaluation of this witness by the first instance court as not serious and not sufficiently reliable and credible to find someone guilty upon.

In its process of rendering the Judgment, the court should be convinced without any hesitation that the judgment is just and based on evidence. The assorted statements of the witness Xh.H. cannot serve as immaculate source to ground the guilty judgment. At the same time no other evidence could conclusively relate the defendant to the criminal offences at hand or make court to decide differently. The participation of the defendant was not conclusively established therefore his participation in the criminal offences as charged was not proven. None of the reliable witnesses positively testified about the participation of the defendant in the event, as described in the indictment.

The Panel thoroughly examined the factual findings in the first instance judgment (English version), and concurs entirely with the findings. In the view of the Panel, the first instance court comes to the logical conclusions in its assessment of evidence.

For the reasons set forth, the Panel of the CoA rejects the Prosecution’s allegation in her appeal and confirms the judgement of the Basic Court of Prishtina/Pristina as provided in the enacting clause of this judgment.

#### **IV. Ex officio matters**

The Panel of the Court of Appeals, although not a subject of the enacting clause of this judgment, must note the issue of the criminal offence of Damaging Movable Property under Article 260 (2) of CCK. Namely, this criminal offence has reached the statutory limitation. Pursuant to Article 91 of CCK, the period of statutory limitation on criminal prosecution commences on the day when the criminal offence was committed. The criminal offence occurred on 4 April 2012. The punishment for this criminal offence is up to one year of imprisonment, as stipulated in Article 260 (2) of CCK. Therefore, pursuant to Article 90 Paragraph (1) 6) of CCK, the statutory limitation for this criminal offence is two years. Moreover, the law sets an absolute bar for prosecution, meaning that regardless of the actions of the authorities, the prosecution is prohibited after that period of time: Article 91 Paragraph (6) of CCK stipulates that the, ‘*criminal prosecution shall be prohibited in every case when twice the period of statutory limitation has elapsed (absolute bar on criminal prosecution)*’.

As the criminal offence was committed on 4 April 2012, the absolute bar on criminal prosecution has been reached on 4 April 2016, already before the CoA has received the case on 3 August 2016.

Therefore, the absolute statutory limitation for criminal prosecution against the accused **K.D.** in relation to the charge of Damaging Movable Property under Article 260 Paragraph (2) of CCK had been reached before the date the appellate panel deliberated in the case.

As stated above, pursuant to Article 401 of CPC the Court of Appeals decided as in the enacting clause.

*The Judgment is drafted in English language.*

**Presiding and Reporting Judge**

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Roman Raab, EULEX Judge

**Panel Members**

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Hava Haliti, Kosovo CoA Judge

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Abdullah Ahmeti, Kosovo CoA Judge

**Recording Officer**

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Vjollca Gërxhaliu-Kroçi, EULEX Legal Advisor