

SUPREME COURT

Prishtinë/Priština

Case number: **Pml-Kzz 42/2017**
(P No. 938/13 Basic Court of Mitrovicë/Mitrovica)
(PAKR No. 445/15 Court of Appeals)

Date: **10 May 2017**

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Krassimir Mazgalov (Presiding and Reporting), EULEX Judge Arnout Louter and Supreme Court Judge Emine Mustafa as Panel members, and EULEX Legal Officer Sandra Gudaityte as the Recording Officer, in the criminal case against, among others, the defendant

S.S., born on..., currently serving his sentence at Dubrava Detention Center;

charged under Indictment PPS 88/11 dated 8 November 2013 (hereinafter “Indictment”) with 7 (seven) counts of War Crimes against the Civilian Population, contrary to Article 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (Official Gazette SFRY No. 44 of 8 October 1976) (hereinafter “CCSFRY”) (currently criminalized under Articles 31 and 152 of the Criminal Code of Kosovo (hereinafter “CCK”) and in violation of common Articles 3 and 4 of the Additional Protocol II, all rules of international law effective at the time of the internal conflict in Kosovo and at all times relevant to the Indictment;

acting upon the request for protection of legality filed by defence counsel G.D.G.S. and C.R. on behalf of defendant S.S. on 13 February 2017;

having considered the reply to the request for protection of legality of the Office of the Chief State Prosecutor (hereinafter “Prosecution”) filed on 7 March 2017;

having deliberated and voted on 10 May 2017;

pursuant to Articles 432, 433 and 435 of the Criminal Procedure Code of Kosovo (hereinafter “CPC”)

renders the following

RULING

The request for protection of legality filed by defence counsel G.D.G.S and C.R. on behalf of defendant S.S. on 13 February 2017 is hereby dismissed as unpermitted.

REASONING

I. Procedural background

1. On 8 November 2013, the Special Prosecution Office of the Republic of Kosovo (hereinafter “SPRK”) filed the Indictment against S.S. and other defendant charging him with 7 (seven) counts of War Crimes against the Civilian Population, contrary to Article 22 and 142 of the CCSFRY (currently criminalized under Articles 31 and 152 of the CCK) and in violation of common Articles 3 and 4 of the Additional Protocol II, all rules of international law effective at the time of the internal conflict in Kosovo and at all times relevant to the Indictment.
2. The trial commenced on 22 May 2014, and was concluded on 27 May 2015. It consisted of 46 court sessions. On 27 May 2015, the Basic Court of Mitrovicë/Mitrovica rendered its Judgment P 938/13. S.S. was found guilty for the following criminal act: during the internal armed conflict in Kosovo, on several occasions, in August and September 1998, acting as a member of the Kosovo Liberation Army (hereinafter “KLA”), seriously violated Article 3

common to the four Geneva Conventions of 12 August 1949, because he intentionally committed violence, cruel treatment, and torture against Witness A, a Kosovo Albanian civilian detained in the KLA's detention facility in Likoc/Likovac (Skenderaj/Srbica municipality) who took no active part in hostilities by beating him with punches and slaps inside the detention cell, and this action, pursuant to Article 33(1) of the Constitution of the Republic of Kosovo is classified as a war crime in continuation under Articles 152(1) and (2)(2.1), and 81(1) of the CCK, in violation of Article 4(2)(a) of the Additional Protocol II to the Geneva Conventions (hereinafter will be referred to as "Count II" based on the paragraph number of the enacting clause of the Basic Court Judgement), and sentenced to 6 (six) years imprisonment. The defendant was acquitted of the criminal offences as detailed in the remaining 4 (four) counts.

3. On 7 August 2015 and 10 August 2015, the SPRK and the defence counsel on behalf S.S. filed their appeals against Judgment P 938/13 of the Basic Court of Mitrovicë/Mitrovica.
4. On 15 September 2016, the Court of Appeals rendered Judgement PAKR 455/15. The Court of Appeals granted the appeal of the defence counsel of S.S. and rejected the charge against the defendant as it is described in Count II as it was a material, factual part of a criminal offence in continuation for which the defendant was previously convicted. The Court of Appeals further partially granted the appeal of the SPRK, and modified Judgment P 938/13 of the Basic Court of Mitrovicë/Mitrovica finding defendants S.S. and J.D. guilty for the following criminal act: during the internal armed conflict in Kosovo, on one occasion between the beginning of August and the end of September 1998, acting as member of the KLA and in co-perpetration with each other as it is defined in Article 31 of the CCK, intentionally violated the bodily integrity and the health of an unidentified Albanian male from Shipol area in Mitrovicë/Mitrovica, detained in Likoc/Likovac detention centre by repeatedly beating him up, hereby classified as a war crime under Article 152(1) and (2)(2.1), (2.2) of the CCK and in violation of Article 4(2)(a) of the Additional Protocol II to the Geneva Conventions, in conjunction with Article 33(2) of the Constitution of the Republic of Kosovo (hereinafter will be referred to as "Count IV" based on the paragraph number of the enacting clause of the Basic Court Judgement). The Court of Appeals sentenced S.S. for this criminal offence to 5 (five) years and 3 (three) months of imprisonment. The Court of

Appeals further modified Judgment P 938/13 of the Basic Court of Mitrovicë/Mitrovica by finding defendants S.S. and S.L. guilty and acquitting defendant S.J. of the following criminal act: in their capacity as the KLA members and persons exercising control over the Likoc/Likovac detention centre, in co-perpetration with each other as it is defined in Article 31 of the CCK, they violated the bodily integrity and the health of an unidentified number of Albanian civilians detained in such detention centre by keeping them in inappropriate premises with lack of sanitation, inadequate nutrition, suffering frequent beatings, at least during August and September 1998, hereby classified as a war crime under 152(1) and (2)(2.1), (2.2) of the CCK, and in case of S.L., in conjunction with Article 161(1)(1.1) of the CCK, both in violation of Article 4(2)(a) of the Additional Protocol II to the Geneva Conventions, in conjunction with Article 33(2) of the Constitution of the Republic of Kosovo (hereinafter will be referred to as “Count IX” based on the paragraph number of the enacting clause of the Basic Court Judgement). For this criminal offence S.S. was sentenced to 8 (eight) years of imprisonment. Pursuant to Articles 80(1) and (2.2), and 82(1) of the CCK and taking into consideration the punishment imposed in the judgement of the Court of Appeals in case PAKR 456/2015 dated 14 September 2016, S.S. was imposed the aggregate punishment of 10 (ten) years of imprisonment.

5. On 13 February 2017, the defence counsel on behalf of defendant S.S. filed the request for protection of legality requesting the Supreme Court to reverse all contradictions in the impugned judgements and to dismiss all charges against the defendant, or, alternatively, to send the case for the re-trial in relation to all charges.
6. On 7 March 2017, the Prosecution filed its reply to the request for protection of legality filed by the defence counsel on behalf of defendant S.S. in which it moves the Supreme Court to dismiss the request as unfounded.

II. Submissions of the parties

Submissions on behalf of S.S.

7. The defence claims that Judgment of the Court of Appeals PAKR 455/15 dated 15 September 2016 is based on incorrect, inconsistently applied legal standards, a failure to consider evidentiary record as a whole, and misinterpretations about the actual trial evidence and contains legal errors. Therefore, the defence moves the Supreme Court to reverse the convictions and to dismiss all charges against defendant S.S. or, alternatively, to send the case for the re-trial in relation to all charges.
8. The defence claims that the Court of Appeals failed to provide a reasoned opinion when it refused to address or resolve the request for an investigation of the improper manner in which the trial panel was constituted. In this regard, the defence raises a number of allegations related to the composition of the panel in another case dealt with by the Basic Court of Mitrović/Mitrovica, Drenica II (P 58/14) and requests to schedule a hearing to investigate those irregularities.
9. The defence further claims that the Basic Court and the Court of Appeals erred in declaring that there was no violation in law in the trial panel's failure to provide a verbatim record of the trial. The defence claims that there was no verbatim record made for the trial. There were also no reasonable grounds to refuse the defence's request to allow verbatim audio, video or stenographic record. There is no record to show that the typed trial minutes are accurate and whether they reflect differences in translations. Lack of verbatim record in complex war crime trials, where evidence consists exclusively of the testimony of witness affect the ability to fully and objectively determine the credibility, reliability and sufficiency of the evidence. Failure to maintain accurate record undermined the rights of the accused. Secondly, the presiding judge monitoring and correcting the record violated the ethical duties of the judge to be impartial. Therefore, the refusal to have verbatim record violated the fundamental rights of the defendant. The Court of Appeals erred in concluding that there were no violations.
10. The first and second instance judgements violated the domestic and international law by allowing the SPRK to use inaccurate pre-trial witness statements. Those witnesses are Witness A, F.M., Witness F, Witness B, Witness I, Dr. B.G., and Witness C. The witnesses were asked to sign the statements which were not translated to them. The Basic Court

erroneously relied on these pre-trial statements granting a “hostile” witness status to one of the SPRK’s witnesses, and assessing witness credibility. The defence claims that it presented new evidence to the Court of Appeals related to the testimony of a EULEX Legal Officer in the case Prosecutor v. M.Z. and R.R. on the manner of recording of the pre-trial statements by the EULEX Prosecutor. This evidence proves that the pre-trial statements given in the present case are not accurate. However, according to the defence, the Court of Appeals refused to address this issue and claimed that the defence simply challenged the general admissibility of the pre-trial statements.

11. The Basic Court and the Court of Appeals did not apply international or local standards which require to prove the criminal charges beyond reasonable doubt. It did not assess the evidence as a whole, took into consideration only selected evidence, and thus violated the principle *in dubio pro reo*.
12. The defence further claims that the defendant cannot be found guilty for Count IX under the theory of command responsibility because this mode of liability had never been dealt with by the trial panel. The Indictment has never charged S.S. with command responsibility. The defence alleges that S.S. was charged as a co-perpetrator for this crime; therefore the defendant did not have a chance to challenge the concept of command responsibility. Additionally, the Court of Appeals failed to establish the elements of command responsibility.
13. The Court of Appeals erroneously found the defendant guilty for the criminal offence described in Count IX by substituting the reasonable findings made by the Basic Court with its own conclusions. The Court of Appeals is not authorized to conduct the *de novo* review; the Court can overturn the findings of the Basic Court only if these findings are unreasonable. There is no evidence in the case file showing mistreatment in the detention. The only testimony is given by Witness A, and it is not corroborated by other evidence.
14. The defence claims that the conviction for the criminal offence described in Count IV must also be overturned as the Court of Appeals again substituted the reasoning of the Basic Court with its own opinions. The Court of Appeals relied on only selected portions of the trial

record and ignored all inconsistencies in the testimony of Witness A. Further, Witness A is the only person who gave any testimony about the unidentified man from Shipol area in Mitrovicë/Mitrovica. The testimony of Witness A should be rejected as not credible due to inconsistencies and contradictions.

15. The conviction of S.S. rests solely upon the testimony of one witness, and the courts ignored all evidence that undermined the credibility of Witness A's testimony. The Court of Appeals did not address the evidence in the case file about Witness A's mental illness and dismissed this evidence as irrelevant. Further, testimony of EULEX medical expert Dr. B. directly contradicted the testimony of Witness A and Witness K.

Submissions of the Prosecution

16. The Prosecution in its reply moves the Supreme Court to reject the request for protection of legality as unfounded. The Prosecution further points out that the request for protection of legality can be filed only against final judicial decision or against judicial proceedings which preceded the rendering of that decision, after the proceedings have been completed in a final form. The Prosecution points out that in the present case, the defence of S.S. filed a third instance appeal against Judgement PAKR 455/15 of the Court of Appeals. The appeal is still pending which means that that the judicial decision is still not final and the request for protection of legality should be dismissed as it was not filed in compliance with the provisions of the CPC.
17. The Prosecution further points out that the allegations in relation to the composition of the Basic Court panel are related to case PAKR 456/16; P 58/14. While the panel in the present case was in line with the requirements. Therefore, the Prosecutor claims that this allegation should not be a subject of the present request for protection of legality.
18. The Prosecution claims that the lack of verbatim record does not constitute a ground for filing a request for protection of legality pursuant to Articles 432(1.2) and 384(1) of the CPC. Further, even if this would be a serious violation of procedural law, the defence would have

to show that this violation affected the lawfulness of the judicial decision. In accordance to Article 315(2) of the CPC, the Presiding Judge has a right to decide on how the main trial is recorded.

19. The Prosecution claims that the law does not set a strict requirement to audio-video record the pre-trial testimony. Article 131(4) of the CPC is flexible on this matter, and allows summarizing the pre-trial interview. Further, the Basic Court followed the requirements set in Article 123(2) of the CPC and did not read the pre-trial statements into the record; these statements were merely used to assess the accuracy and reliability of the testimonies.
20. Further, the Prosecution indicates that the assessment of the evidence and the witness credibility falls outside the scope of the review of the request for protection of legality.

III. Composition of the Panel

21. The Panel established that on 28 March 2017 (KJC No. 90/2017), the Kosovo Judicial Council (hereinafter “KJC”) confirmed that the request for protection of legality in the present case shall be adjudicated by a panel composed of a majority of EULEX judges and presided by an EULEX judge.

IV. Findings of the Panel

22. The Panel notes that according to Articles 418(3) and 432(1) of the CPC, the request for protection of legality can only be filed against a final judicial decision or against judicial proceedings which preceded the rendering of that decision after the proceedings have been completed in a final form. The only exception of this rule is set in Article 432(4) of the CPC indicating that “*a request for protection of legality may be filed during the criminal proceedings which have not been completed in a final form **only** against final decision ordering or extending detention on remand*” (emphasis added).
23. The request for protection of legality, as one of the extraordinary legal remedies, is the exceptional legal remedy aiming to correct possibly wrong application of the material and

procedural law. Strict requirements of the admissibility are designed to ensure that this legal remedy would not be used as a general third instance against all decisions in the criminal proceedings. Therefore, the provisions of the CPC strictly allows requests for protection of legality only against final decisions or after the proceedings have been completed in a final form with one exception set in Article 432(4) of the CPC. The Supreme Court has, in its previous decisions, interpreted this article strictly according to the wording of the law (*see* Supreme Court of Kosovo, Pml.Kzz 207/14, 6 November 2014, pages 3 and 4; Pml.Kzz 66/2015, 14 May 2015, paragraph 4.3; Pml.Kzz 100/2015 and 136/2015, 25 June 2015, page 3).

24. The current request for protection of legality is filed against Judgment of the Court of Appeals PAKR 455/15 dated 15 September 2016. On 29 and 30 November 2016, defendants S.S., S.L. and J.D. filed the third instance appeals against this judgement. The appeals are still pending at the Supreme Court. Therefore, Judgment of the Court of Appeals PAKR 455/15 cannot be considered as final judicial decision. For this reason, the Panel considers that the requirements for the request for protection of legality set in Article 432(1) of the CPC are not met. The request for protection of legality against Judgment of the Court of Appeals PAKR 455/15 could be potentially filed only after the judgement becomes final, that is only after the Supreme Court adjudicates the third instance appeals.
25. For this reason, the request for protection of legality filed by defence counsel G.D.G.S. and C.R. on behalf of defendant S.S. on 13 February 2017 is dismissed as unpermitted.

For the above it has been decided as in the enacting clause.

Presiding Judge

Recording Officer

Krassimir Mazgalov

Sandra Gudaityte

EULEX Judge

EULEX Legal Officer

Panel members

Arnout Louter
EULEX Judge

Emine Mustafa
Supreme Court Judge