

SUPREME COURT OF KOSOVO

Case number:

**Pml. Kzz 216/2016
PAKR 266/2014 Court of Appeals
P. No. 766/2012 Basic Court of Pristina**

Date:

12 May 2017

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Elka Filcheva-Emrenkova (Presiding and Reporting), EULEX Judge Jorge Martins Ribeiro, and Supreme Court Judge Enver Peci as Panel members, and EULEX Legal Officer Kerry Moyes as the Recording Officer, in the criminal case number P. No. 766/2012 before the Basic Court of Pristina against the defendants:

- 1. AK;**
- 2. NK1;**
- 3. NK2;**
- 4. BL;**
- 5. FL;**
- 6. RM;**
- 7. NS;**
- 8. SS1;**
- 9. SS2;**
- 10. BS;**

Indicted in Indictment PPS No. 07/2010 dated 25 July 2011 and confirmed in the Ruling dated 26 August 2011 with committing one or more counts of the following criminal offences:

War Crime against the Civilian Population, under Articles 22, 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (hereinafter “CCSFRY”), currently criminalized under Articles 31, 152 of the Criminal Code of the Republic of Kosovo (hereinafter “CCRK”), in violation of Common Article 3 of the four Geneva Conventions of 12 August 1949 and Articles 4, 5 (1) of Additional Protocol II;

War Crime against Prisoners of War, under Articles 22, 144 CCSFRY, currently criminalized under Articles 31, 152 CCRK, in violation of Common Article 3 of the four Geneva Conventions of 12 August 1949 and Articles 4, 5 (1) of Additional Protocol II;

adjudicated in first instance by the Basic Court of Pristina with the Judgment P. No. 766/2012, dated 17 September 2013;

acting upon the Request for Protection of Legality KMLP.I No. 12/2016 filed by the Office of the State Prosecutor of the Republic of Kosovo on 12 August 2016 against the Judgment of the Court of Appeals PAKR 266/2014 dated 26 January 2016 (hereinafter “the impugned Judgment”);

having considered the Replies filed by: defence counsel Florim Vertopi and Xhafer Maliqi on behalf of the defendant **NK1** on 31 January 2017; defence counsel Bajram Tmava on behalf of the defendant **NS** on 3 February 2017; defence counsel Mexhid Sylja on behalf of the defendant **SS1** on 7 February; defence counsel Artan Qerkini on behalf of the defendant **BS** on 8 February 2017; defence counsel Fehmije Gashi-Bytyqi on behalf of the defendant **AK** on 13 February 2017; defence counsels Karim Khan and Tahir Recaj on behalf of the defendant **FL** on 13 February 2017;

having deliberated and voted on 12 May 2017;

pursuant to Articles 418 and Articles 432-441 of the Criminal Procedure Code (hereinafter “CPC”);

renders the following

JUDGMENT

The Request for Protection of Legality KMLP.I No. 12/2016 filed by the Office of the State Prosecutor of the Republic of Kosovo on 12 August 2016 against the Judgment of the Court of Appeals PAKR 266/2014 dated 26 January is rejected as ungrounded.

REASONING

1. Relevant procedural background

On 25 July 2011 the EULEX Special Prosecutor filed an Indictment, PPS No. 07/2010, charging the defendants **AK, NK1, NK2, BL, FL, RM, NS, SS1, SS2** and **BS** (hereinafter, collectively, “the defendants”).

On 21 March 2012, the Basic Court issued a Ruling where it found the evidence of the cooperative witness **AZ** inadmissible.

On 30 March 2012, the Basic Court severed the proceedings and issued a Judgment whereby it acquitted the defendants **AK, BL, RM, SS1, SS2, and BS** of all offences.

On 2 May 2012, the Basic Court issued a Judgment whereby it acquitted the defendants **NK1, NK2, FL** and **NS** of all offences.

On 20 November 2012 and 11 December 2012, the Supreme Court annulled both Judgments and the Ruling finding that the evidence of **AZ** is inadmissible, and remitted the cases against all ten defendants back to the Basic Court for retrial. The cases were rejoined.

On 17 September 2013 the Basic Court again acquitted all defendants of all charges. The EULEX Prosecutor filed an appeal against this Judgment, which was rejected as unfounded by the Judgment of the Court of Appeals dated 26 January 2016.

On 12 August 2016 the EULEX Prosecutor of the Office of the State Prosecutor (hereinafter “the State Prosecutor”) filed a Request for Protection of Legality against the Judgment of the Court of Appeals dated 26 January 2016. Responses were received by defence counsel Florim Vertopi and Xhafer Maliqi on behalf of the defendant **NK1** on 31 January 2017, defence counsel Bajram Tmava on behalf of the defendant **NS** on 3 February 2017, defence counsel Mexhid Sylja on behalf of the defendant **SS1** on 7 February, defence counsel Artan Qerkini on behalf of the defendant **BS** on 8 February 2017, defence counsel Fehmije Gashi-Bytyqi on behalf of the defendant **AK** on 13 February 2017, and defence counsels Karim Khan and Tahir Recaj on behalf of the defendant **FL** on 13 February 2017.

2. Submissions by the Parties

2.1. The Prosecutor

The Prosecutor states that the impugned Judgment is in substantial violation of the criminal procedural law due to the unlawful extension of the time to file a reply, and that there are considerable doubts as to the accuracy of the factual determination such that Article 439 of the CPC applies.

a. Unlawful extension of the time to file a reply

The Prosecutor states that the Court of Appeals erroneously accepted several of the defence responses to the Special Prosecutor’s appeal as timely filed, thereby substantially violating Articles 432 (2), 384 (2.1), 388 (2) and 445 (1) of the CPC. The Special Prosecutor’s appeal against the Judgment of the Basic Court was filed on 29 November 2013. The Court of Appeals noted the eight days’ deadline to file responses to the appeal as provided for in the CPC, but held that it took into account

the additional instructions of the Basic Court given to the defence counsel via email on 12 December 2013, according to which the defence may file a response until ‘close of business’ on 31 December 2013. The State Prosecutor submits that the Court of Appeals erred in accepting the irregular procedure of extending a deadline for filing responses to an appeal. Article 445(1) of the CPC is clear, stating that prescribed periods of time envisaged by the present Code may not be extended unless the law explicitly so permits. The Court of Appeals did not provide any legal basis for allowing the extension of the deadline set in Article 388 (2) of the CPC, and only invoked the fact that such an extension is in favour of the defendants. This also violates the fundamental principle of equality of arms provided for in Article 9 (1) of the CPC. Further, the State Prosecutor states that if the Court of Appeals allowed this by applying the principle of *in dubio pro reo*, this principle does not apply to the procedural law and cites the Supreme Court Ruling Pml. Kzz No. 18/2013 dated 24 April 2013, which states that “The principle of *in dubio pro reo* and the presumption of innocence do only apply to the material criminal law, as reflected in the wording of the legal provision”.

b. Article 439 of the CPC – considerable doubts as to the accuracy of the factual determination

The State Prosecutor notes the general rule in Articles 432 (2) and 437 of the CPC that a Request for Protection of Legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation. She also notes Article 438 (2) of the CPC, which states that if the Supreme Court of Kosovo finds that a Request for Protection of Legality filed to the disadvantage of the defendant is well-founded, it shall only determine that the law was violated but shall not interfere in the final decision. However, the State Prosecutor claims that this general rule is not of an absolute character, and that there is an exception in Article 439 of the CPC. This Article provides that if considerable doubt arises as to the accuracy of the factual determination in a decision challenged by a Request for Protection of Legality, the Supreme Court shall annul that decision and order a new main trial to be held before the same or another Basic Court. The State Prosecutor claims that this Article applies even where the Request for Protection of Legality is filed to the detriment of the defendant. She cites the Supreme Court Judgment Pml. Kzz No. 170/2014 of 19 February 2015 to support her assertion, which states at paragraph 83 that: *“The defendant has presented several arguments which could not be qualified as violations of the criminal procedural law or of the criminal law...These arguments are dismissed as not admissible claims of an erroneous or incomplete determination of the factual situation pursuant to Article 432 paragraph 2 CPC. Article 439 CPC is not applicable here since no such “considerable doubt on the factual determination” of the challenged decisions could be found”*.

The State Prosecutor states that this finding shows that the Supreme Court engaged itself in the analysis of the factual situation, and concluded that no considerable doubt

on the factual determination could be found. The State Prosecutor concludes that Article 439 of the CPC overrides the general prohibition of disturbing a final decision to the disadvantage of a defendant. The role of the Supreme Court in ordinary circumstances should be limited to hearing the challenges to the questions of law, however, the legislator made an exception to this general rule, and in this case the evidence should be analyzed again by a different Panel.

The State Prosecutor details what, in her view, are grave errors in the impugned Judgment. These, in sum, demonstrate considerable doubt as to the accuracy of the factual determination. In particular, the State Prosecutor notes that the Court of Appeals found that the reliability and credibility of the cooperative witness **AZ** is crucial for the outcome of the case due to the fact that the Indictment and the Judgment are mainly based on his evidence. The Court of Appeals also confirmed the finding of the Trial Panel that the evidence of **AZ** was unreliable, untrustworthy and not credible. The State Prosecutor claims that the Court of Appeals grossly abused its discretion in evaluating the credibility of **AZ**, and that this is of such an alarming proportion that they should collectively be considered as raising considerable doubt as to the accuracy of the factual determination, in accordance with Article 439 of the CPC.

The State Prosecutor moves the Supreme Court to annul both the first instance and the impugned Court of Appeals Judgment and to return the case to the Basic Court for a retrial before a different Panel, and to declare as erroneous the granting of the extension to the defence to file their replies.

2.2. The defence counsels

- a. The Response filed by Florin Vertopi and Xhafer Maliqi on behalf of the defendant **NK1**. The defence counsels state that the SPRK did not specify the date it received the Court of Appeals Judgment, and therefore it cannot be known if the Request for Protection of Legality was timely filed. Defence counsels state that Article 439 of the CPC is not applicable. This is because, pursuant to Article 438(2) the Supreme Court shall confine itself only to establishing the existence of a violation of law but shall not interfere in the final decision. Therefore the motion of SPRK is procedurally unacceptable and ungrounded. Regarding Article 439 of the CPC, the defence counsels reiterate that this is not relevant to Requests for Protection of Legality, and is only relevant to appeals against Judgment. The defence counsels motion the Supreme Court to reject the Request for Protection of Legality as ungrounded.
- b. The Response filed by Bajram Tmava on behalf of the defendant **NS**. Defence counsel states that it is not within the purview of the SPRK Prosecutor to assess whether or not the responses of the defence to the SPRK appeal were filed within the time limits. Defence counsel interprets Article 388 (2), which states that the opposing side ‘...may file a reply to the appeal within eight (8) days of service’ to mean that the time limit is

not imperative. Defence counsel also states that a Request for Protection of Legality cannot be filed on the grounds of erroneous and incomplete determination of the factual situation, pursuant to Article 432 (2) of the CPC. Further, Article 438 (2) of the CPC is clear in that the decision of the Supreme Court upon the Request for Protection of Legality cannot be to the detriment of the defendant. Otherwise, the Request filed by the Prosecutor is based on the Prosecutor's assessment of the credibility of the evidence, with which defence counsel disagrees. He proposes that the Supreme Court dismisses the Request for Protection of Legality as inadmissible.

- c. The Response filed by Mexhid Sylja on behalf of the defendant **SS1**. Defence counsel states that SPRK's Request is incomprehensible, confusing and contradictory, and it is unclear which judgment it is submitted against. Otherwise, Article 432 of the CPC clearly defines the reasons when a Request for Protection of Legality may be submitted. This does not include the erroneous and incomplete establishment of the factual situation, and Article 439 of the CPC does not allow for this possibility. Further, the Request does not mention **SS1**, and therefore defence counsel concludes that the Request does not concern him at all. Defence counsel proposes that the Supreme Court dismiss the Request for Protection of Legality as impermissible or reject it as ungrounded, and uphold the Judgment subject of the Request.
- d. The Response filed by Artan Qerkini on behalf of the defendant **BS**. Defence counsel states that the Request for Protection of Legality is not grounded in the CPC. The Prosecutor seeks to interpret the law selectively and contrary to the spirit of the law and the lawmaker's intention. The Prosecutor has endeavoured to give Article 439 of the CPC a distorted meaning by relying on Article 4 (2) of the CPC, which adds '...except when otherwise provided by the present Code' to mean that this can be used to apply Article 439 of the CPC. Article 4 cannot be used to give meaning to Article 439 because these Articles do not belong to the same Chapters of the CPC, and Article 439 is in Chapter XXI which pertains to ordinary and extraordinary legal remedies. Further, Article 438 (2) of the CPC states that 'if the Supreme court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it shall only determine that the law was violated but shall not interfere in the final decision'. This provision is very clear, and the lawmaker intended to leave no room to reverse the final Judgment to the defendant's detriment in these circumstances. Any other interpretation of these provisions would also be contrary to the principle of legal certainty. Defence counsel quotes Professor Rexhep Murati writing in the commentary to the CPC, who states that according to Article 438 (2) regardless of the weight and nature of the violation, the final judgment cannot be reversed to the detriment of the defendant. Further, if the lawmaker had wanted Article 439 of the CPC to also be used when a Request for Protection of Legality is filed against the defendant, it would explicitly say so. The Prosecutor is attempting to convert the Supreme Court into a court of facts, despite its legal mission to deal exclusively with legal matters of material and procedural nature. The SPRK position that the two courts of different adjudication instances made factual violations of such

an extent that there is considerable doubt as to the accuracy of key facts cannot be accepted. Defence counsel motions the Supreme Court to dismiss the Request for Protection of Legality as inadmissible or to reject it as ungrounded.

- e. The Response filed by Fehmije Gashi-Bytyqi on behalf of the defendant **AK**. The first instance court found **AK** not guilty and his innocence was affirmed by the Judgment of the Court of Appeals. Therefore Defence counsel proposes that the Supreme Court dismisses the Prosecutor's Request for Protection of Legality as ungrounded.
- f. The Response filed by Karim Khan and Tahir Recaj on behalf on the defendant **FL**. Defence counsels submit that the Prosecution's Request is filed under the wrong Code of Criminal Procedure and is procedurally invalid. The applicable law is the Provisional Criminal Procedure Code and not the Criminal Procedure Code which entered into force on 1 January 2013. This is because the Indictment in this case was filed on 25 July 2011. The defence counsels submit that the pursuit of **FL** by the EULEX Prosecutor at all costs and showing no restraint of judgement is part of the context of this case and also colours the substantive submissions in the Request. The Prosecution's allegations regarding the 'extension of time' permitted to the defence to file its reply before the Court of Appeals is an attempt to create grounds of complaint irrespective of lack of merit and in disregard of clear provisions of the law. The Prosecutor did not object at the time the extension was granted on 12 December 2013 or at the hearing of the Court of Appeals, or any time up until August 2016. Further, the Prosecutor may only file a Request for Protection of Legality concerning a violation of the law, and is not permitted to raise complaints related to factual determinations of the Court of Appeals, pursuant to Article 432 (3) of the CPC. The Prosecution merely disagrees with the judicial determinations of the court of second instance and this does not come within the terms of Articles 432, 438 and 439 of the CPC. Defence counsels give some detail as to why, in any event, the determination of the factual situation by the Court of Appeals was not erroneous. The defence counsels request that the Supreme Court dismisses the Request for being procedurally irregular and/or to reject the request as unfounded. Defence counsels also requests that the Supreme Court sanctions the Prosecutor for breach of the Code of Ethics and Professional Conduct for Prosecutors.

3. Findings of the Panel

3.1 Admissibility

The Judgment of the Court of Appeals dated 26 January 2016 was served on the State Prosecutor on 13 May 2016. The Request for Protection of Legality was filed by the prosecution service on 12 August 2016, and it is therefore timely filed.

The Supreme Court notes that in accordance with Article 432 paragraph 3 the Chief State Prosecutor may file a request for Protection of Legality on the grounds of any violation of

law. The Supreme Court accepts the first ground [432 (3)CPC] of the Prosecution's Request for Protection of Legality, which concerns the time permitted by Article 388 paragraph 2 for the filing of a reply to an appeal, as sufficient in substance to meet the requirement of Article 432 paragraph 3. The Request for Protection of Legality is therefore admissible on this basis.

The second ground of the Prosecution's Request for Protection of Legality, which concerns Article 439 entitled 'Consequences of Factual Doubt in Decision Challenged by Request', is not an independent ground for filing a Request for Protection of Legality. The Panel considers that this is apparent from the wording of Article 439 which states, '*If in proceedings on a request for protection of legality considerable doubt arises as to the factual determination in a decision challenged by the request...*' (emphasis added). The application of Article 439 is a matter for the Supreme Court Panel to apply ex-officio if needed while it is considering a Request for Protection of Legality and in case considerable doubt arises as to the accuracy of the factual situation. This prerogative of the Supreme Court is applicable under certain conditions on which the Court will elaborate further on under the merits of the request.

A Response was filed by Florin Vertopi and Xhafer Maliqi on behalf of the defendant **NK1** on 31 January 2017. A Response was filed by Bajram Tmava on behalf of the defendant **NS** on 3 February 2017. A Response was filed by Mexhid Sylja on behalf of the defendant **SS1** on 7 February 2017. A Response was filed by Artan Qerkini on behalf of the defendant **BS** on 8 February 2017. A Response was filed by Fehmije Gashi-Bytyqi on behalf of the defendant **AK** on 13 February 2017. A Response was filed by Karim Khan and Tahir Recaj on behalf of the defendant **FL** on 13 February 2017.

The responses are therefore admissible and timely filed.

3.2 Merits of the Request for Protection of Legality

a. Unlawful extension of the time to file a reply

The Prosecution states that the Court of Appeals, erroneously and in violation of Article 388 (2) of the CPC, accepted several of the defence responses to the Prosecution's appeal as timely filed, giving as its reason the instructions of the Basic Court to the defence counsel via email allowing them until 'close of business' on 31 December 2013. The responses were all filed before this deadline. The Prosecution submits that this is a substantial violation of criminal procedure, as per Article 384 paragraph 2, item 2.1. The Supreme Court agrees that paragraph 2 of Article 388 entitled 'Procedure of Filing Appeals of Judgments' is quite clear in stating that a reply to an appeal may be filed within eight (8) days of service. Article 445, entitled 'Prescribed Periods of Time', states in paragraph 1 that 'The prescribed periods of time envisaged by the present Code may not be extended unless the law explicitly so permits.', and this is equally clear.

However, the Panel is of the opinion that the fundamental consideration of this issue is that the filing of the responses by defence counsel after the time permitted by the CPC

was not the fault of the defence counsel. Defence counsel did so in reliance of a direction by the Court, and within the timescale of that direction. Therefore, they must not suffer detriment as a result, regardless of whether the direction was in accordance with the procedural law or not. The Panel does not agree that this position violates the principle of equality of arms or is in pursuance of the principle of *in dubio pro reo*. This Panel of the Supreme Court would have reached the same view had it been the Prosecutor who had filed a response later than the time permitted by the CPC in reliance of a Court direction. It would be entirely inequitable, and contrary to the principles governing the right to a fair trial, to penalize either party for a Court's erroneous application of procedural law.

The Panel is also mindful of the requirement foreseen in Article 432 paragraph 1 item 1.3 of the CPC, which states that a Request for Protection of Legality may be filed on the ground of another violation of the provisions of criminal procedure if such violation affected the lawfulness of a judicial decision. The Panel is of the view that this requirement also applies to Requests for Protection of Legality filed by the Prosecution pursuant to Article 432 (2), as in this case. The Panel is of the view that this procedural error clearly did not affect the rendering of lawful and just decisions. The extension of the time to file a response is an issue which arose in the appeals proceedings of this case, and which therefore post-dates the decision of Basic Court. Neither has the Prosecution provided a concrete example of how the extension of time permitted the defence counsel affected the rendering of a lawful decision of the Court of Appeals. It cannot be presumed that the defence counsel would not have filed responses if the timescale permitted by Article 388 of the CPC had not been extended by the Court, nor can it be presumed that the Court of Appeals would have reached a different decision had they considered as belated any responses filed by the defence counsel after the timescale permitted by Article 388 of the CPC.

The Panel considers that there is no reason to conclude that the extension of time directed by the Court for the defence counsel to file a reply affected the rendering of a lawful and just decision by the Court of Appeals, or to be more precise, the merits of the decision. The Panel therefore rejects the Request for Protection of Legality as ungrounded.

b. Article 439 of the CPC

As noted above, the Panel is of the view that Article 439 of the CPC in itself is not a ground for filing a Request for Protection of Legality, but rather is a matter for the Panel of the Supreme Court to apply ex-officio while it is considering a Request for Protection of Legality and in case considerable doubt arises as to the accuracy of the factual situation.

The Panel has found that the Request for Protection of Legality filed by the Prosecution is admissible on the basis of Article 432 (3), and therefore the Panel will consider the submissions made regarding the applicability of Article 439. The Prosecution submits that Article 439 constitutes an exception to Article 438 (2), which states that if the Supreme Court of Kosovo finds that a Request for Protection of Legality filed to the disadvantage

of the defendant is well-founded, it shall only determine that the law was violated but shall not interfere in the final decision. The Prosecution submits that Article 439 applies even where the Request for Protection of Legality is filed to the detriment of the defendant.

Article 439 states that:

'If in proceedings on a request for protection of legality considerable doubt arises as to the accuracy of the factual determination in a decision challenged by the request, the Supreme Court of Kosovo shall in its judgment on the request for protection of legality annul that decision and order a new main trial to be held before the same or another Basic Court.'

The Prosecution moves the Supreme Court to find that there is considerable doubt as to the accuracy of the factual determination in the impugned Judgment, and to annul both the impugned Judgment and the Judgment of the Basic Court, and to return the case to the Basic Court for a retrial before a different Panel.

The Panel is of the view that, in pursuance of Article 439, the Supreme Court can nullify a verdict and return the case for a retrial only if there is a possibility of a more favorable verdict for the defendant to be rendered in the new proceedings. Article 439 must be read subject to Article 440, which foresees at paragraph 4 that where a final Judgment is annulled and the case returned for retrial, 'In rendering a new decision, the court shall be bound by the prohibition under Article 395 of the present Code.' Article 395 of the CPC provides for the restriction *Reformatio in Peius* and, while this Article is applicable only to the legal classification of the offence and the criminal sanction imposed, Article 438 (2) is broader in scope and refers to 'the disadvantage of the defendant'.

There is no possibility of a more favorable verdict in a retrial of the defendants in this case as all defendants have been acquitted of all criminal offences. Therefore, even if hypothetically considerable doubts in the meaning of Article 439 would have had arisen, there would be no purpose in annulling the impugned Judgment and returning the case to the Basic Court for retrial.

In addition if Article 439 would have been applicable to the detriment of the accused/defendant, it would have turned Article 438 (2) obsolete. According to the said provision the decision upon the request for protection of legality filed to the detriment of the accused does not affect an effective verdict, but can only have the declaratory effect of announcing that the law was violated.

The Prosecution refers to Article 4 of the CPC entitled '*Ne Bis in Idem*' and specifically to paragraph 2 of Article 4 which states that '*a final decision of a court may be reversed through extraordinary legal remedies only in favor of the convicted person, except when otherwise provided by the present Code*'. The Panel does not agree with the Prosecution that an exception to Article 4 (2) is provided by Article 439 to the detriment of the defendant, as Article 438 (2) would then have no meaning, as already noted above. Only

the opposite would be possible under Article 439 – if doubts would cause a retrial that may lead to a more favorable decision. Exceptions under Article 4 (2) to the detriment of the accused can only be found in Article 423 (2) in relation to Articles 423 (1.1) and 423 (1.2) regarding the reopening of criminal proceedings. The law there explicitly provides that criminal proceedings terminated by a final judgement may be reopened to the detriment of the defendant if it is proven that circumstances under Articles 423 (1.1) and 423 (1.2) have been a result of a criminal offence committed by the defendant or a person acting on his/her behalf against a witness, expert witness, interpreter, state prosecutor, judge or those close to such persons. These are the only exceptions that can be subsumed under Article 4 (2).

As an *obiter dictum* the Court finds useful to reiterate the principle of in *dubio pro reo* and the obligation of the courts to interpret the doubts regarding the existence of facts relevant to the case in favor of the defendant. This is mentioned because the prosecution restates numerous times that there are doubts in the proper establishment of the facts but should this be the case all these doubts should be interpreted in favor not to the detriment of the defendants.

Article 438 (2) clearly prohibits the Supreme Court from interfering with a final decision where a Request for Protection of Legality is filed to the disadvantage of the defendant and where it is found to be well-founded. This entirely reflects the intention of the lawmaker to be consistent and which can be concluded from a systematic reading of Articles 4, 432, 438, and 439 of the CPC.

The Court notes as well that the institute of Article 439 is not new for the legal tradition in Kosovo. A provision like that existed in the Provisional Criminal Procedure Code of Kosovo (2003), where it was reflected in Article 458. Before that when Kosovo was part of the former Yugoslavia the issue was regulated on federal level in Article 423 of the Yugoslav Criminal Procedure Code. The jurisprudence of the back then Supreme Court has been consistent in the understanding (which the current Panel shares completely in line with the systematic reading of the criminal procedure as outlined earlier) that there is “no sense in nullifying a verdict and sending a case back for a retrial” if there is no possibility for a more favorable decision (see decision of the Supreme Court of Yugoslavia Kz. 17/70 of 19 November 1970, referred to in the commentaries of the articles of the Yugoslav Law on Criminal Procedure – page 231 in the English translation). And in cases as the one at hand the most favorable verdict has already been rendered.

As a consequence, it is unnecessary for this Court to consider the arguments related to the accuracy of the factual determination on the merits. For the reasons explained above the Panel finds that it would not serve any legitimate purpose to enter into a discussion and assessment of the facts of the case, or of the contents of the impugned Judgement.

For the reasons above, it is decided as in the enacting clause.

Presiding Judge

Elka Filcheva-Ermenkova

EULEX Judge

Recording Officer

Kerry Moyes

EULEX Legal Officer

Panel members

Jorge Martins Ribeiro

EULEX Judge

Enver Peci

Supreme Court Judge