

SUPREME COURT OF KOSOVO

Case number: **Pml.Kzz 36/2017**
Court of Appeals PAKR 52/2014
Basic Court of Pristina P 309/2010 and
P 340/2010

Date: **15 May 2017**

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Anna Bednarek as Presiding and Reporting Judge, and EULEX Judge Iva Niksic and Supreme Court Judge Enver Peci as panel members, assisted by EULEX Legal Officer Kerry Moyes as the recording officer, in the criminal case against:

LD;
AD;
DJ;
IR;
SH;
IB;
SD;

acting upon the Request for Protection of Legality KMLP.I 6/2017 filed by the Office of the State Prosecutor of the Republic of Kosovo on 14 February 2017 against the Judgment of the Supreme Court Pml Kzz 92/2016 dated 15 December 2016 (hereafter “the impugned Judgment”);

having considered the response of defence counsel Petrit Dushi filed on behalf of the defendant **AD** on 13 March 2017 and the response of defence counsel Valon Hasani filed on behalf of the defendant **LD** on 23 March 2017 ;

having deliberated and voted on 15 May 2017;

pursuant to Articles 432 and 435 of the Criminal Procedure Code (hereafter “the CPC”)

renders the following:

R U L I N G

The Request for Protection of Legality registered under the number KMLP.I 6/2017 filed by the Office of the State Prosecutor of the Republic of Kosovo on 14 February 2017 against the Judgment of the Supreme Court of Kosovo rendered in the case Pml Kzz 92/2016 on 15 December 2016 is dismissed as inadmissible.

REASONING

1. RELEVANT PROCEDURAL HISTORY

Indictment PPS No 41/09 was filed against the defendants **LD, AD, DJ, IR** and **SH** on 15 October 2010. On 20 October 2010 Indictment PPS No 107/10 was filed against the defendants **IB** and **SD**. The two indictments were joined into a single indictment on 29 November 2010 and confirmed on 27 April 2011.

The main trial commenced on 4 October 2011 and concluded on 24 April 2013. It was held before a Panel composed of two EULEX judges and one local judge. On 18 May 2012 the local judge was replaced. On 22 March 2013 and 17 April 2013, the Indictment was amended and expanded. Under the final Indictment, the defendants were charged as follows:

- COUNT 1: **LD, AD and SH**
Trafficking in Persons in co-perpetration under Articles 139 and 23 of the Provisional Criminal Code of Kosovo (hereafter “the PCCK”)
- COUNT 2: **LD**
Organised Crime under Article 274 (3) of the PCCK
- COUNT 3: **AD and SH**
Organised Crime under Article 274 (1) of the PCCK
- COUNT 4: **LD, DJ, IB, SD and SH**
Unlawful Exercise of Medical Activity in co-perpetration under Articles 221 (1) and 23 of the PCCK

- COUNT 5: **DJ**
Abusing Official Position or Authority under Article 339 (1) of the
PCCK
- COUNT 6: **IR**
Abusing Official Position or Authority under Article 339 (1) of the
PCCK
- COUNT 7: **LD, SH, IB, SD and AD**
Grievous Bodily Harm in co-perpetration under Articles 154 and 23 of
the PCCK
- COUNT 8: **LD and AD**
Fraud under Article 261 of the PCCK
- COUNT 9: **LD and AD**
Falsifying Documents under Article 332 (1) of the PCCK
- COUNT 10: **IR**
Falsifying Official Documents under Article 348 of the PCCK

On 29 April 2013, the Basic Court of Pristina announced its Judgment by which:

- a. **LD** was convicted of the criminal offences of Trafficking in Persons committed in co-perpetration (count 1) and Organised Crime (count 2). He was sentenced to imprisonment of eight years and fine of 10,000 Euros. The accessory punishment of prohibition from exercising the profession of urologist was imposed against him for a period of two years. The charges of Unlawful Exercise of Medical Activity, Grievous Bodily Harm, Fraud and Falsifying Document (counts 4 and 7—9) were rejected.
- b. **AD** was convicted of the criminal offences of Trafficking in Persons committed in co-perpetration (count 1) and Organised Crime (count 3). He was sentenced to imprisonment of seven years and three months and fine of 2,500 Euros. He was acquitted of the charge of Grievous Bodily Harm (count 7). The charges of Fraud and Falsifying Documents (counts 8 and 9) were rejected.
- c. **SH** was acquitted of the charge of Organised Crime (count 3) and convicted of the criminal offence of Grievous Bodily Harm (count 7). He was sentenced to imprisonment of three years. The accessory punishment of prohibition from exercising the profession of anesthesiologist was imposed for a period of one year. The charges of Trafficking in Persons and Unlawful Exercise of Medical Activity (counts 1 and 4) were rejected.

- d. **IB** was convicted of the criminal offence of Grievous Bodily Harm (count 7) and sentenced to suspended imprisonment of one year. The charge of Unlawful Exercise of Medical Activity (count 4) was rejected.
- e. **SD** was convicted of the criminal offence of Grievous Bodily Harm (count 7) and sentenced to suspended imprisonment of one year. The charge of Unlawful Exercise of Medical Activity (count 4) was rejected.
- f. **DJ**: The charges of Unlawful Exercise of Medical Activity and Abusing Official Position or Authority (counts 4 and 5) were rejected.
- g. **IR** was acquitted of the charge of Abusing Official Position or Authority (count 6). The charge of Falsifying Official Documents (count 10) was rejected.

By a separate Ruling dated 25 November 2013, the Basic Court ordered the closure and confiscation of the Medicus Clinic.

The defence counsels of **LD, AD, SH, IB** and **SD** and the Prosecutor appealed against the Ruling dated 25 November 2013 and the Judgment dated 29 April 2013. By Judgment rendered in the case PAKR 52/2014 dated 6 November 2015 the Court of Appeals partially granted the Appeals filed on behalf of the defendants and modified the Judgment of the Basic Court.

The defendant **SH** together with his defense counsel, and the defendant **LD** filed Appeals to the Supreme Court against the Judgment of the Court of Appeals. The Appeal filed by **LD** was dismissed by a Ruling as inadmissible. The Supreme Court rendered Judgment in the case PAII-KZII-2/2016 on 20 September 2016, through which it modified the Judgment of the Court of Appeals.

Requests for Protection of Legality were filed by defence counsel Petrit Dushi on behalf of **AD**, defence counsels on behalf of **LD** and by the Chief State Prosecutor. By the impugned Judgment the Supreme Court dismissed the Request for Protection of Legality filed by the Chief State Prosecutor as belated, and partially granted the Requests for Protection of Legality filed by defence counsels for **AD** and **LD**. The Judgment of the Basic Court of Pristina dated 29 April 2013, the Judgment of the Court of Appeals dated 6 November 2015 and the Judgment of the Supreme Court dated 20 September 2016 were partially annulled and the case is returned for re-trial to the Basic Court of Pristina.

2. SUBMISSIONS BY THE PARTIES

2.1 The Request for Protection of Legality filed by the State Prosecutor

The State Prosecutor states that the impugned Judgment is in substantial violation of the provisions of the criminal procedure provided for in Article 384 (1) and the provisions of criminal procedure that affected the lawfulness of the judicial decision pursuant to Article

432 (1) of the CPC, and on the ground of any violation of law pursuant to Article 432 (1.3) of the CPC.

The State Prosecutor notes that according to the impugned Judgment, the Judgment of the Basic Court violated Article 384 (1.2) read in conjunction with Article 40 (2.1) of the PCPC because the Presiding Judge should have been excluded from participation in the main trial. The Supreme Court found this violation of such a severe nature that it cannot simply modify the Judgments or confine itself to establish the violation, and annulled the convictions passed by the previous instances. The State Prosecutor notes that this issue has been brought to the attention of the Supreme Court a number of times and cites a number of decisions¹, and that the impugned Judgment stands in stark contrast with the previous practice of the Supreme Court in its interpretation of the law on this point. Further, the Supreme Court did not elaborate on how the alleged violation of the procedure code adversely affected the defendants and/or the fairness of the trial in any way. The State Prosecutor concludes that the Supreme Court violated procedural law and the Constitution of the Republic of Kosovo because it failed to state clearly and exhaustively the reasons for setting these points of law. It is alternatively submitted that in the composition of the panel in the impugned Judgment, which included Judge Emine Mustafa who previously decided the Prosecutor's application for extension of investigation in the same case, as well as Judges Emine Mustafa and Elka Filcheva-Ermenkova who decided defence counsel's request to stay execution of the Judgment of the Court of Appeals, the Supreme Court violates the very same principle which it asserted in the impugned Judgment.

The State Prosecutor notes that according to the impugned Judgment the replacement of one of the panel members was done without issuance of a Ruling adjourning the trial and without the trial starting from the beginning, and that this in turn violates the defendants right to a fair trial. The State Prosecutor concurs with the arguments put forward by EULEX Judge Elka Filcheva-Ermenkova in her dissenting opinion on this point.

The State Prosecutor submits that the Requests for Protection of Legality filed on behalf of the defendants **LD** and **AD** were filed before the Judgment of the Court of Appeals became final, and therefore they should have been dismissed as inadmissible. He does not agree with the Supreme Court reasoning on this issue, and states that the Supreme Court was not consistent in when it applied a strict and literal interpretation of the law. The Supreme Court was strict as to the composition of the first instance panel, flexible as to the admissibility of the requests filed by the defendants, and strict again regarding the Request for Protection of Legality filed by the State Prosecutor and dismissed it as belated.

The State Prosecutor motions the Supreme Court to declare that the impugned Judgment:

- a. Violated the provision of Article 384 paragraph 1.12 as read in conjunction with Articles 370 paragraph 7 and Article 44 of the CPC, and Article 53 of the Constitution

¹ Judgment AP 371/08 dated 10 April 2009; Judgment PKL 71/09 dated 10 November 2009; Ruling PML 64/2014.

of the Republic of Kosovo because it failed to state clearly and exhaustively the reasons by which it was guided in setting the abovementioned points of law;

- b. Violated the provision of Article 384 paragraph 2 as read in conjunction with Article 9 (equality of parties) and 433 paragraph 2 (permissibility of the Requests for Protection of Legality) of the CPC;
- c. Violated the very same principle it asserted in the impugned Judgment in breach of the provision of Article 384 (1.2) of the CPC as read in conjunction with Article 39 paragraph 2 of the CPC.

2.2 The Responses

Defence counsel Petrit Dushi on behalf of his client **AD** filed a response to the Request for Protection of Legality submitted by the State Prosecutor. He states that the making of a Request for Protection of Legality by the State Prosecutor in these circumstances conflicts with the case law of Kosovo. Further, the State Prosecutor has not provided any evidence or fact confirming that the impugned Judgment determined the factual situation erroneously, or provided evidence and facts that would serve to confirm the substantial violation of the provisions of criminal procedure. Defence counsel requests that the Request for Protection of Legality filed by the Special Prosecutor is rejected by the Supreme Court as ungrounded.

Defence counsel Valon Hasani filed a response to the Request for Protection of Legality on 23 March 2017. Mr Hasani does not state in his response which defendant he represents, however the Supreme Court is aware through previous communications that he represents **LD**. Therefore the Supreme Court accepts his response as filed on behalf of **LD**. Defence counsel states that Article 432 paragraph 2 of the CPC provides that a Request for Protection of Legality may not be filed against a decision of the Supreme Court of Kosovo in which a request for a Request for Protection of Legality was decided upon. Therefore this Request for Protection of Legality is legally prohibited and should be dismissed as inadmissible. Further, it is ungrounded. It is within the margin of appreciation for states to grant more procedural safeguards than those guaranteed by the ECHR. Moreover, the rules of procedure in this case have been violated a number of times to the detriment of the defendant. Defence counsel also underlines that the Prosecutor stated during the detention on remand hearing that the Judgment of the Court of Appeals was final. Now they have changed their position and are stating that the Judgment of the Court of Appeals was not final as it was subject to an appeal filed by the defendants **LD** and **SH**. He asks that the Request for Protection of Legality is dismissed as inadmissible.

3. FINDINGS OF THE SUPREME COURT

3.1 Applicable Procedural Laws

The Request for Protection of Legality was filed after the (new) CPC entered into force on 1 January 2013. Pursuant to Article 539 of the CPC, the Supreme Court procedure is therefore governed by the CPC.

3.2 Admissibility

The Request for Protection of Legality filed by the State Prosecutor is inadmissible. The Panel notes the content of Article 432 of the CPC entitled ‘Grounds for filing a request for protection of legality’. The State Prosecutor bases the Request upon Article 432 paragraph 3 of the CPC, which foresees that:

‘Notwithstanding the provisions under paragraph 1 of the present Article, the Chief State Prosecutor may file a request for protection of legality on the grounds of any violation of law’.

However, the Panel notes Article 432 paragraph 2 of the CPC, which states:

‘A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, nor against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon’.
(emphasis added).

The Panel therefore concludes that the authority of the Chief State Prosecutor to file a Request for Protection of Legality on the ground of any violation of law does not include the authority to do so against a Judgment of the Supreme Court that decided a Request for Protection of Legality. The Panel is of the view that this is clear from the wording of Article 432 paragraphs 1, 2 and 3 of the CPC, and that it unambiguously states the intention of the lawmaker on this issue. A thorough analysis of the content of paragraph 3 leads to a conclusion that the intention of the legislator was to widen the grounds listed in paragraph 1 of article 432 of the CPC and not to grant the Chief State Prosecutor the authority to file further Requests for Protection of Legality, notwithstanding the limitations expressed in the last sentence of the paragraph 2 of the Article 432 of the CPC. As a consequence, the inadmissibility of the Request makes it unnecessary for the Panel to consider the arguments submitted by the State Prosecutor on the merits.

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

Presiding Judge:

Anna Bednarek
EULEX Judge

Recording officer:

Kerry Moyes
EULEX Legal Officer

Members of the panel:

Iva Niksic
EULEX Judge

Enver Peci
Supreme Court Judge