COURT OF APPEALS

Case number: PAKR 1/2017

(Pkr no. 218/14 BC Pristina)

Date: **19 October 2017**

Judgment of the Court of Appeals of Kosovo, in a panel composed of EULEX Judge Elka Filcheva-Ermenkova, presiding and reporting, EULEX Judge Anna Adamska Gallant and Court of Appeals Judge Mejreme Memaj, as panel members, with the assistance of the EULEX legal advisor Vjollca Kroci-Gerxhaliu, acting as recording officer and in open sessions on 6 September 2017;

Defendant:

E.S. son of xxx, born on xxx in xxx, in detention since his arrest on xxx;

charged by the Indictment of the Special Prosecution Office PPS no. 467/2009 dated 24 April 2014, as amended on 27 April 2016, for: count 1: The criminal offence of *Incitement to Commit Aggravated Murder* in violation of Article 24 and 147 (3) and (9) of the Criminal Code of Kosovo (hereinafter "the PCCK"); count 2: The criminal offence of *Extortion* in violation of Article 267 (1) and (2) the PCCK, and count 3: The criminal offence of *Rape* in violation of Article 193 (1) and (2) the PCCK;

found guilty by the Judgment of the Basic Court of Pristina Pkr no. 218/14 dated 17 May 2016 for count one: the criminal offence of *Incitement to Commit Aggravated Murder* in violation of Article 24 and 147 (3) and (9) of the PCCK; and count two: the criminal offence of *Extortion* only under paragraph (1) of Article 267 the PCCK and sentenced to aggregate punishment of long-term imprisonment of 37 (thirty seven) years;

acting upon the appeals of defence counsel K. K. filed on 9 December 2016 and the appeal of defence counsel B.P. on 8 December 2016, both filed on behalf of the defendant **E.S** against the Judgment of the Basic Court of Pristina Pkr no. 218/14 dated 17 May 2016**;**

having considered the Responses to the appeals of the defence counsels, filed separately by the EULEX Special Prosecutor on 29 December 2016;

having considered the Motion of the Appellate State Prosecution of Kosovo no. PPA/I. No. 13/2017 filed on 20 March 2017;

having deliberated and voted on 7 September 2017 and 19 October 2017;

pursuant to Article 398 of CPCRK *renders the following*

JUDGMENT

I. The appeal of defence counsel K.K. filed on 9 December 2016 and the appeal of defence counsel B. P. filed on 8 December 2016, both filed on behalf of the defendant E.S in relation to count one, are partially granted;

II. The Judgment of the Basic Court of Pristina Pkr no. 218/14 dated 17 May 2016 in the part related to the criminal offence of Incitement to Commit Aggravated Murder in violation of Article 24 and 147 (3) and (9) of the PCCK (count one) is annulled and the case is returned for re-trial for this count;

III. The Judgment of the Basic Court of Pristina Pkr no. 218/14 dated 17 May 2016 in relation to the criminal offence of Extortion under paragraph (1) of Article 267 of the PCCK (count two), is modified as follows:

- **The defendant E. S., son of xxx, born on xxx in xxx, is acquitted for committing the criminal offence of Extortion under paragraph (1) of Article 267 of PCCK as provided in the Judgment of the Basic Court of Pristina Pkr no. 218/14 dated 17 May 2016;**

IV. In the remaining parts, the appeals of the defence counsel K.K. filed on 9 December 2016 and the appeal of defence counsel B. P. filed on 8 December 2016, both filed on behalf of the defendant E.S., are rejected as unfounded and the Judgment in the respective parts is affirmed.

REASONING

I. Procedural History

1. On 24 April 2014 the SPRK Prosecutor filed the Indictment PPS no. 467/2009 wherein the defendant was charged in three counts as follows: ***Incitement to Commit Aggravated Murder*** under Article 24 and 147 (3) and (9) of the Criminal Code of Kosovo ("the PCCK"), ***Extortion*** under Article 267 (1) and (2) the PCCK, ***Rape*** under Article 193 (1) and (2) the PCCK.

2. Initial hearing session was held on 30 April 2014.

3. By the Ruling dated 12 June 2014, rendered by the Presiding Trial Judge, the application of the defense counsel on behalf of the defendant **E.S** to dismiss the Indictment and to declare evidence as inadmissible, was rejected as ungrounded.

4. The Ruling rejecting the application was appealed by the defense counsel on behalf of **E.S..** In a Ruling dated 7 August 2014, the Court of Appeals, affirmed the ruling of the Presiding Trial Judge to which reference is made above.

5. Main trial sessions were held on 31 October 2014; 5, 6 10, 14, 19, 20, 21 November 2014; 16 December 2014; 10, 13, 14, 22, 27, 28, 29 January 2015; 11 and 12 February 2015; 4 and 31 March 2015; 27 and 30 April 2015; 25, 28 and 29 May 2015; 1, 2, 3, 15, 26 June 2015; 20, 21, 22 and 23 July 2015; 17, 18, 19, 20 and 21 August 2015; 1, 2, 5, 6, 29 and 30 October 2015; 2, 3, 4, 5. 6, 17, 18 and 30 November 2015; 1, 2, 3 and 4 December 2015; 25 January 2016; 2, 3, 7, 8 and 9 March 2016; 12, 13, 14, 19 2016. An Amended Indictment was filed on 27 April 2016 taking into account corrected SMS-timings. The main trial continued on 29 April 2016 and 12 May 2016.

6. Pursuant to Article 541 of the CPC, which entered into force on 1 January 2013, the trial was conducted according to the provisions of the new Criminal Procedure Code while in relation to the criminal offences, the first instance court found the old criminal code more favourable to this defendant. The Judgment of the Basic Court of Pristina was announced in public on 17 May 2016.

7. The public session before the Court of Appeals Panel was held on 6 September 2017. The panel deliberated and voted on 7 September 2017 and 19 October 2017.

II. The first instance Judgement

Based on the principle of most favourable law, Article 3 PCCK, the first instance court applied the substantive law of the old PCCK.

The judgment (hereinafter: impugned judgment) finds the defendant guilty beyond the reasonable doubt in relation to count one and two of the Indictment of the Special Prosecution Office PPS no. 467/2009 dated 24 April 2014, as amended on 27 April 2016, as follows:

In relation to count one: The criminal offence of *Incitement to Commit Aggravated Murder* in violation of Article 24 and 147 (3) and (9) of the PCCK, the defendant was found guilty because on 30 August 2007, in Prishtina on the territory of Kosovo, **E.S** incited A.B.to deprive T.R. of his life who did so in co-perpetration with Rr. A. , I. A. and F. A. in a cruel and deceitful way and because of unscrupulous revenge or other base motive namely having a personal vendetta against the said T.R., a serving xxx xxx with the xxx. Prior to the murder the group, acting together, followed the movements of T.R. in order to track him down.

In relation to count two: Court of the first instance excluded the qualified form of criminal offence of *Extortion* as provided in paragraph 2 of article 267 of PCCK that was itemised in the indictment since it was never mentioned that defendant has committed this criminal offence using the dangerous instrument as this paragraph requires, therefore first instance court has found defendant **E.S** guilty for the criminal offence of *Extortion* only under paragraph (1) of Article 267 the PCCK, because, from the beginning of 2003 through to the end of 2004, the defendant extorted money in various sums and on numerous occasions from the injured party A.I.. Whilst she was living in an apartment in the xxx area of xxx, there were occasions when the defendant demanded and extorted money from her.

In relation to count three: The Basic Court of Pristina found the defendant **E.S** not guilty for committing the criminal offence of *Rape* in violation of Article 193 (1) and (2) the PCCK as specified under **count three** of the indictment since it has not been proven beyond reasonable doubt that the accused committed this criminal act.

For the criminal offense described in **count 1**, based on Article 3 (2) of the Criminal Code of the Republic of Kosovo in conjunction with Article 24 and Article 147 (3) and (9) and 36 (1) and 37 (2) of PCCK, the defendant was sentenced to a punishment of long –term imprisonment of 37 (thirty seven) years;

For the criminal offense described in **count 2**, based on Article 3(1) of the Criminal Code of the Republic of Kosovo in conjunction with Article 267(1) of PCCK, to imprisonment of 3 (three) years;

Based on Article 71 (2) of PCCK an aggregate punishment of long-term imprisonment of 37 (thirty seven) years was imposed on the defendant **E.S..**

Pursuant to Article 365 paragraph 1 sub-paragraph 5 of the CPC, the time defendant **E.S** spent in detention on remand, as specified in the first instance court Judgment, from 03.01 2014, was credited to the sentence.

Based on Article 367 paragraph 2 of the CPC, the detention on remand against E.Swas extended until the judgment becomes final.

In accordance with Article 453 paragraph 4 of the CPC defendant **E.S** was relieved from the duty to reimburse the costs of the criminal proceedings.

III. Submission of the parties

The judgement was served to the defendant on 24 November 2016. On his behalf the defence counsels K. K. and B. P. filed appeals respectively on 9 December 2016 and 8 December 2016. Both appeals are filed pursuant to article 478 (4) of CPC and in accordance with Article 380 of CPC.

The appeal filed by defence counsel K.K.

The defence counsel in her appeal challenged the Judgment on the grounds of essential violations of provisions of the criminal procedure code, erroneous and incomplete establishment of factual situation, violation of criminal code and on the decision on punishment.

a) **Essential violation of provisions of the criminal procedure code**: The defence counsel submits that the enacting clause of the impugned judgment is incomprehensible and controversial in its content. The court has not presented clearly and conclusively which facts are proven and which facts are not proven in both counts. She further submits that the court has failed to assess the accuracy of contradictory evidence. Therefore the judgment of the first instance court has violated article 384 (1) 1.12) in relation to article 370 (7) of CPC.
b) **Erroneous and incomplete establishment of factual situation:** The defence counsel submits that considerable number of factual elements have not been

assessed appropriately. The material evidence in favour or disfavour of the defendant was not provided in highest professional level. The existence of criminal offence according to the legal qualification made by the prosecutor in the indictment was never materialised with any evidence. The defence further submits that the evidence listed in the indictment describe the actions of A.B. and F. A.. The indictment and the first instance judgment contain only evidence in connection with the abovementioned persons and in no way connect the defendant **E.S.** with this murder.

c) **Violation of criminal code:** The defence submits that since the defendant has not committed the criminal offence he was found guilty for and that due to the violation of provisions of the criminal procedure code and erroneous and incomplete establishment of factual situation, the court has erroneously applied article 24 of CCK.

d) **Decision on punishment:** The defence claims that the decision on the punishment is unjust. She proposes to the the Court of Appeals to approve her appeal.

The Response of the SPRK Prosecutor on the appeal of defence counsel K.K.:

The prosecutor in his response states that the defence in her appeal does not elaborate sufficiently her allegations that the impugned judgment is incomprehensible and controversial in its content. On the allegation that the judgment is not drafted in accordance with article 370 (7) of CPC thus violating article 384 (1) of CPC by not describing the facts and circumstances of the criminal offence, the prosecutor submits that the court has thoroughly explained the facts and the circumstances that support the guilty verdict. In relation to the defence's allegation that the defendant **E.S.** would not lower himself to the level of extortion for money ranging from 200-900 euros from the victim A.I., the prosecutor responds that during the investigation the prosecution has managed to collect sufficient evidence to support the criminal offence of Extortion. The reply on the allegations of the defence that the police violated the provisions of article 7 of CPC by not providing the details on how the defendant **E.S** incited A. B. to murder T.R.**,** the Prosecutor submits that the crucial aspects of the indictment were analysed and explained in the front of the court with sufficient evidence to support the charge that the defendant has incited and provided financial reward to the perpetrator and that these facts were clearly assessed by the first instance court.

In relation to the defence's allegations on erroneous and incomplete determination of factual situation that the Prosecution failed to establish the connection between the

defendant **E.S** and A. B., the Prosecutor states that the defence in her appeal used only the statement of A. B., given in the court when he claims that he had committed the criminal act on its own and not being incited by **E.S**. In relation to this, the prosecutor further states that the evidence presented in the court proved beyond reasonable doubt that the criminal offence of incitement to murder was committed.

On the allegation that the investigation was expanded to include **E.S** only after four months and that this time was 'needed for creating obstructions, fabrications, stages and for suppressing witnesses …", the prosecutor responds that such allegations are ungrounded since the prosecutor is free to expand the investigation any time when the legal threshold is met.

Further, on the assertion that the incitement aspects in this case are based on rumours and allegations, the Prosecutor replies the defence has overlooked the vast amount of evidence that support the charges mentioned in the indictment and included in the judgment. As to the claim of the defence that the defendant did not have a motive to commit this criminal act, the prosecutor asserts that events in relation to the motive were sufficiently argued during the trial.

The prosecutor argues that the argument of the defence that this case is based on allegations and prejudice is unsubstantiated since the administered evidence is collected with respect of the legal provisions set forth in the CPC.

In relation to the sentence, the Prosecutor in his appeal considers that the length of the sentence truly reflects the gravity of the criminal offences committed by the defendant and is in line with the leading position of the defendant in the group.

The prosecutor calls the Court of Appeals to reject the appeal of defence counsel as unfounded.

The appeal filed by defence counsel B. P.

Defence counsel filed an appeal on the grounds of essential violation of provisions of the criminal procedure code, erroneous and incomplete establishment of factual situation, violation of criminal code and on the decision on punishment. The arguments are detailed in the original appeals and it is sufficient here merely to summarize them.

a) **Violation of criminal code**: The defence first argues the violation of the criminal law as per article 385 (1) of CPC. In relation to this, the defence claims that the criminal act described in Count 1 of the enacting clause is not a criminal offence and that the accusation of committing the crime of incitement to commit aggravated murder is irrelevant unless there is concrete act that corresponds with this legal definition. He further submits that following the principle of legality, the enacting clause of the indictment that is included in the enacting clause of the impugned judgment should have contained the legal name of criminal offence, the exact time and place of commission of the criminal offence, the object upon which the criminal offence was committed and the instrument by which the criminal offence was committed. Based on this, the defence claims that the enacting clause of the impugned judgment is not structured in accordance with the law and it lacks the concrete description of the incitement. The defendant can be found guilty of incitement if his act was firstly precisely described in the enacting clause and secondly proven beyond reasonable doubt. The defence further elaborates that the first instance court based its decision on circumstantial evidence and that the judgment can be based on circumstantial evidence only in cases where the criminal offence has been properly defined and concretized in the enacting clause of the judgment.

b) **Substantial violations of the CPC**: The defence asserts that the first instance court violated Article 384 paragraph (2) of CPC by acting in contrary to Article 314 of CPC since it has prolonged the conclusion of the main trial. By this the first instance court has violated the right of the defendant to be tried within reasonable time bearing in mind that in the present case the defendant was deprived of his liberty during the whole course of the trial.

The defence further alleges that the court has violated Article 369 (1) of CPC that provides the timing and service of the judgment. The court has drawn and delivered the judgement to the defendant six months after the announcement.

The defence states that court has violated Article 361 (2) of CPC since the it based its conclusion entirely on the content of the closing statement of the prosecutor and did not asses conscientiously each item of evidence separately and in relation to other items of evidence in order to reach the right conclusion, as provided in this article.

The defence counsel argues that Article 10 of CPC was violated because several witnesses in this case were forced to speak against the defendant and that this was revealed during the main trial. In relation to these testimonies the defence counsel states

that the court based its decision on the statements of these witnesses given to the prosecutor although negated at the main trial.

Further defence submits that Article 384 (1) item 1.8 is violated since the impugned judgement is based on inadmissible evidence. Namely, the search conducted at xxx on 30 August 2007 was carried out without verbal court order by the judge. Despite that the police officers at the main trial stated that a verbal order existed from Judge D.H., but there is no proof or evidence confirming such statement. The prosecutor on duty at the time of critical event did not recall the existence of such verbal court order, neither it is indicated in the record of the search. In relation to this, the defence submits that the provisions of articles 107 (1) of the present procedural code and Article 246.1 of the code applicable at the time of search, were violated since the persons against whom the search was conducted were not informed of their right to a lawyer thus they were not able to effectively exercise their rights granted by the law. Further, the persons who should have been present in the search were brought by the police to the xxx only half an hour after the search had started. The defence also asserts that the confiscated items were not preserved even after the house search. Therefore the defence is of the opinion that the search of xxx on 30 August 2007 violated the provisions of the present and previous procedural codes, the Constitution of Kosovo and the provisions of European Convention of Human Rights stating that all evidence obtained by this search shall therefore, pursuant to article 111 of the present CPC, be inadmissible and as such these items should be excluded from the case file since the court may base its decision only on admissible evidence referring to 257 of CPC. The defence notes that the request to exclude that evidence has been filed by the defence on 17 August 2015.

In relation to the testimony of witness D2 the defence submits that the trial before the first instance court was not fair in the meaning that it had violated the rights of the defendant as postulated in Article 31 of the Kosovo Constitution read together with Article 22 therefore the criteria set in article 6 of ECHR are not met.

Further the defence submits that there is no evidence to show that the conditions in Article 224 of CPC for granting the status of anonymity to this witness are met, therefore the defence requests from the Appellate Court to exclude the testimonies of the witness D2 from the case file as inadmissible.

In relation to the evidence obtained from the phone interception, the defence counsel proposes extensive explanation as to why the orders to the PTK to provide the court with

the mapping for the certain dates and the second order to PTK to save the records of certain phone numbers, as specified in page 19 of his appeal, are issued in violation with the law and as such, orders and their implementation led to serious violation of the provisions of the Constitution of Kosovo and ECHR.

Defence further submits that the impugned Judgment is in violation of Article 384 (1) item 1.10 of CPC since it has exceeded the scope of the charge. The court based its decision on the conclusion that the amount of 63.000 euro was received via xxx by N. S. in coordination and at the disposal of the defendant. The court established that this money was given to A.B. as a reward for the murder of T.R.. In relation to this defence argues that by reaching this conclusion, the court has exceeded the scope of the indictment.

c) **Erroneous and incomplete establishment of the factual situation:** The defence presents the testimonies of the defendant **E.S.** and A. B. denying to be incited by the defendant.

   In relation to count one, the defence submits that there is not enough evidence to prove beyond reasonable doubt that the defendant **E.S** had motive to kill T.R.. In relation to count two, the defence submits that there is no proper assessment of the evidence to clearly show that the defendant has extorted money from A.I. neither that any organised criminal group existed.

   As to the decision on the sanction, the defence counsel states that both individual sentences as well as the aggregates sentence are not proportionate regarding all facts and circumstances relevant for the sentence.

   He proposes to the Court of Appeals to modify the impugned judgment by acquitting the defendant from charge in count 1 and 2 of the Indictment or to return the case for retrial, or apply more lenient sentence.

The Response of the SPRK Prosecutor on the appeal of defence counsel B. P.

On allegation of the defence counsel that the act described in count 1 is not a criminal act as in the enacting clause of the impugned judgment the concrete description of the incitement is lacking, the prosecutor replies that the trial panel determined that the criminal offence was committed by the defendant based on collected evidence.

In relation to the substantial violations of the criminal proceeding, namely violation of article 314 of CPC: prolonged main trial and art. 369 (1) of CPC: the violation of service of the written judgment after six months, the prosecutor replies that the number of factors should be considered including the large number of witnesses heard and other objective reasons led to the extended period of the main trial as well as the prolonged time to provide the judgment.

On the statement of the defence that the number of witnesses were forced to make statements, the Prosecutor states that this issue was raised during the main trial and was fully considered by the trial panel and that this issue was never raised by any of the witnesses before.

In relation to the allegation of the defence on the search, the accusation of planting the evidence, that money was stolen from the xxx during the search, that the search was illegal, the prosecutor explains that these issues were raised in the main trial and were rejected by the trial panel. The prosecutor considers that the search was conducted in good faith and respecting the legal provisions.

The prosecutor in his reply further refers to the allegation of the defence counsel that the defence was not able to address all questions to witness D2 as it was prohibited by the presiding judge. In relation to this, the prosecutor submits that when dealing with anonymous witnesses, the special provisions are to be considered and that the witness' right to life and physical integrity is more important than the right of the defence to ask questions The Prosecutor considers that the examination of witness D2 was conducted in accordance with the legal provisions.

Further on, the Prosecutor refers to the allegation of the defence that the communication operators have breached the time frame in which they have to store data regarding electronic communication by stating that the entire procedure regarding the triangulation analysis, including the court orders, the data retrieved and the result of the analysis is legally supported.

On the allegation of the defence that the court has exceeded the scope of the indictment and that this was done by the court when determining that the part of money received via xxx by N.S. was used to finance the murder of T.R. and that the part was used to reconstruct A. B. family house, and that this was not mentioned in the indictment but was established by the court, the Prosecutor considers that the defence has erroneous understanding of the concept of exceeding the scope of the indictment as provided in

article 384(1. 10) of CPC and that the court is not bound by the content of the indictment. The Prosecutor states that it is the court's duty to mention the new findings during the main trial, therefore the Prosecutor considers that all measures were taken to ensure all aspects of the fact charged in the indictment.

In relation to the defence's allegation on erroneous or incomplete determination of the factual situation, the prosecutor in his response states that the defence is making speculation in order to give the evidence a different significance that have no support in the evidentiary proceedings.

The prosecutor states that there is no document to support the existence of a loan between N.A. on one hand and N. S. and A.E. on the other hand. This issue was raised and considered during the main trial.

The prosecutor in his reply states that witnesses made consistent and detailed statements of extortion used by the defendant.

As to the decision on criminal sanctions challenged in the appeal of the defence, the Prosecutor states that the sentence truly reflects the gravity of the criminal offences committed by the defendant.

The prosecutor proposes to dismiss the appeal submitted by the defence counsel as belated pursuant to Article 380 of CPC or reject the appeal of the defendant as unfounded.

The Motion of the Appellate Prosecutor

The Appellate Prosecutor in his motion *ex officio* refers to the statutory limitation of the offence under count 2: Extortion as per article 267 (1) of CCK stating that the defendant cannot be persecuted for this criminal offence under paragraph (1) since the event occurred on beginning of 2003 through the end of 2004.

In relation to the allegations that the search in xxx was unlawful because it was conducted without warrant and in absence of the persons specified in article 111 (1.6) of CPC, the Appellate Prosecutor states that the search procedure has to be assessed in accordance with the criminal procedure Code in force in 2007. As to whether the lawfully obtained evidence is admissible to the main trial, it has to be assessed on the basis of the current CPC as the applicable law to the entire criminal proceeding, if there is no exception.

In relation to the status of anonymous witness D2, the Appellate Prosecutor further states that the Presiding judge addressed this issue during the session of 2 June 2015 when explained the dangers the witness might be exposed to if he testifies in an open session, and again in the session of 20 August 2015, the court explained why it had considered that witness D2 was under serious risk, why the testimony had been relevant and why the witness had been considered credible.

The anonymity of witness D2 does not impair the defendant's right to a fair trial. Referring to article 31 of the Constitution of Kosovo, the Appellate Prosecutor states that the defence had the right to examine the witness D2 twice and in length.

There is also no violation of article 262 (3) of CPC that prohibits the Court to base the guilty judgment solely or to decisive extend upon a statement given by anonymous witness since the Court in its Judgment payed particular attention to corroborate the statement of witness D2 with other evidence.

As to the admissibility of triangulation data, the Appellate Prosecutor states that restricting the time of storing the data does not mean that if data is stored for a longer period of time would prohibit the authorities to consider the information as evidence.

The Appellate Prosecutor replies to the allegation of the defence that the several witnesses were intimidated and forced to speak against the defendant stating that the majority of the witnesses named by the defence are not relevant since they refer to count 2 of the indictment which should be annulled due to the statutory limitation. She further states that the court has relied solely on the evidence given in the main trial.

In relation to the allegation of the defence that the court has exceeded the scope of the indictment /violation of article 384 (1) 1.10) of CPC when concluded that **E.S** financed the murder of T.R., the Appellate Prosecutor states that while the court is bound by the charge under Article 360 (1) of CPC, it is not bound by the findings of the facts that evolve during the main trial which is also primary function of the court.

The appellate prosecutor further states that the judgment provides comprehensive decisive facts as per article 370 and 365 of CPC.

In relation to the violation of article 314 of CPC that the main trial exceeded the maximum of time limit provided in this article, and violation of article 369 (1) of CPC and that the appealed judgement was drawn up and served six months after its announcement, the Appellate Prosecutor submits that the arguments presented by the defence are valid. However law does not provide any remedy for this violation. In

relation to this, the Appellate Prosecutor invites the CoA to consider granting compensation to the defendant by declaring up to three months of the punishment as already enforced.

On the allegation of the defence that the court has violated article 383 (1.3) as provided in article 386 of CPC, the Appellate Prosecutor states that the defence has not demonstrated that the court has made a patently unreasonable error in relation to its findings or conclusion of facts. The records of the main trial show that the court gave due consideration to the evidence of the defence meaning that the court did not ignore the exculpatory evidence.

As to the allegation of the defence on violation of article 387 of CPC that the aggregate punishment and individual punishment are not proportionate to the circumstances of the case, the Appellate Prosecutor proposes to the CoA to assess whether there has been violation of article 385 (1.5) of CPC. She considers that there is no violation of aggregate punishment however she agrees with the arguments of the defence on the long-term imprisonment of 37 years.

The Appellate Prosecutor in her Motion argues that the court has released the defendant of the duty to reimburse the costs of the criminal proceedings without giving any information on his financial status. Referring to the provisions of the CPC, she proposes to the CoA to modify the Judgment of the Basic Court and impose the costs of the proceedings on the defendant.

The Appellate Prosecutor proposes to the Court of Appeals to modify the appealed Judgment in accordance with articles 398 (1.4) and 402 (3) of CPC by annulling the part of the appealed Judgement that refers to count 2; to imposes the costs of the criminal proceedings, reassess the concrete punishment for count 1, dismiss the appeal of defence counsel K. K. as inadmissible or as unfounded and to reject the remainder of the appeal of B. P. as unfounded.

Preliminary procedural issues

The Panel of the Court of Appeals held a session in the case on 6 September 2017; and held deliberation on 7 September 2017 and 19 October 2017.

Court Competency and the Composition of the Panel

The Court of Appeals is the competent court to adjudicate upon the appeals filed by the Parties against first instance court judgments, pursuant to Articles 17 and 18 of the Law on Courts (Law No. 03/L-199).

In accordance with 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 05/L-103, the case is considered as an 'on going case' and consequently falls under the jurisdiction and competence of EULEX judges, in accordance with Articles 1, paragraphs 1 and 2, and 3, paragraph 5, Law 05/L-103 with its current amended wording.

The composition of the panel with a majority of EULEX judges, presided by a EULEX Judge in this case is based upon the KJC Decision KGJK, nr. 126/2017 dated 27 April 2017;

Findings on the merits:

The Panel notes that the first instance court has found the defendant **E.S** guilty in relation to the criminal offence of Incitement to Commit Aggravated Murder in violation of Article 24 and 147 (3) and (9) of the CCK and the criminal offence of Extortion only under paragraph (1) of Article 267 the CCK and not guilty for the criminal offence of Rape in violation of Article 193 (1) and (2) the CCK as specified under count three of the indictment since it has not been proven beyond reasonable doubt that the accused committed this criminal act.
The panel will first discuss the charge under count one, namely the criminal offence of Incitement to Commit Aggravated Murder in violation of Article 24 and 147 (3) and (9) of the CCK.

Count one:

Violation of Article 384 (1) 1.12) in relation to article 370 (7) of CPCK and Article 365 of CPCK:
As noted already, the defence counsels argue that the impugned Judgment contains essential violation of the provisions of CPCK. They submit that the enacting clause of the impugned Judgment is incomprehensible and controversial in its content.
After careful review of the case file and the impugned Judgment, the Panel of the Court of Appeals agrees that the Judgment of the Basic Court contains essential violation of the provisions of the CPCK, namely violation of Article 384 (1.12) of CPCK in relation to Article 370 (4) and Article 365 (1.1) ibid. The latter provides that "in the judgment pronouncing the accused guilty the court shall state: 'the act of which he or she has been found guilty, together with facts and circumstances indicating the criminal nature of the

act committed, and facts and circumstances on which the application of pertinent provisions of criminal law depends'.

The enacting clause of the impugned Judgment lacks the factual description of the criminal offence, which is qualified as Incitement to Commit Aggravated Murder. The Judgment gives overall description of the criminal activity of the alleged criminal group of **E.S.,** and it gives the description of the aggravated murder itself which was committed by A.B., but it in no way specifies the action or actions of the defendant on how he, **E.S.,** incited A.B. to murder T.R.. The Judgment literally repeats the indictment and the latter lacks a description of the facts that could be subsumed under the heading "incitement to commit aggravated murder". For that matter, this Panel notes that according to Article 241 (1)1.15) of CPCK the indictment shall contain 'circumstances necessary to determine the criminal offence with precision'. This requirement is not fulfilled. And this omission is duplicated in the Judgment.

Namely, the defendant **E.S** is found guilty as charged for the criminal offence of Incitement to Commit Aggravated Murder in violation of Article 24 and 147 (3) and (9) of the PCCK, but it is not formulated on the objective side what is it that the defendant did which could be qualified as inciting A.B. to murder T.R.. From a theoretical point of view, a crime is characterized with its objective and subjective parts. Objectively the crime is described as an act, a human manifestation. It is always a deliberate and purposeful act, caused by the individual to adapt the existing reality to his or her needs. The act can be manifested in two basic forms, action or inaction. Without further elaboration on theoretical explanations from the material criminal law, the Panel refers to the concrete case and asserts that one cannot be simply indicted and sentenced for incitement for committing a murder, without any proper description to be given as to what acts (actions or inactions) this particular person did in order to incite the physical executioner to commit the murder itself.

For that matter, and for the purpose of clarifying the stance in the enacting clause, without going into the establishment of the factual state (which will be for the trial panel to assess), the Panel of the Court of Appeals finds it necessary to explain the elements of the criminal offence in the case. In order to make its elaborations pertinent to the Kosovo context, the Panel refers to the Commentary of Criminal Code of Kosovo (authors Ismet Salihu, Hilmi Zhitija, Fejzullah Hasani, from March 2014). Related to Article 32 of the CCRK (corresponding to Art 24 of the PCCK), the Commentary explains that the incitement is a manner of acting to intentionally create or strengthen the decision of another person to commit a certain criminal act. From this it derives that Incitement can be committed by creating the idea to commit the criminal act, and the other form is to strengthen the existing idea to commit the certain criminal act. The theory and judicial

practice demonstrate that the incitement can be committed by an act to convince the other person to commit a criminal offence by giving or promising a material benefit, or by pleading, threatening, giving the instructions etc. to commit the certain specified criminal offence against the certain person or group of people. The list is not conclusive, but in any event the incitement is some kind of act of the part of the inciter in order to convince the physical executioner of the crime to commit the crime.

In the case at hand, the first instance court did not give any possible description, nor any relevant facts that indicate the criminal act committed by the defendant. In a kind of assumptive manner in its argumentative part, the Judgment suggests that the physical executioner and the defendant were in a relationship of absolute subordination, where **E.S** would issue an order and A.B. would strictly follow it without challenging it, even if it would mean for him to kill someone. On the other hand the Judgment alludes that this was a type of monetary, financial incitement, where A.B. murdered T.R. in order to be financially compensated in the form of **E.S** allegedly paying for the construction of the new house of B. family.

Neither of these possible hypotheses are explicitly stated either in the indictment or in the Judgment, which in the opinion of the Panel of the Court of Appeals reflects negatively upon the proper assessment of the evidence as it is not clear which factual description the court found proven and on the basis of which evidence. In other words, it is not evident what is it that the Basic court found to be the facts of the crime, and whether it was a kind of social dependency of B. which made him strictly to follow any order S. would issue without objection even if it would mean to commit an aggravated murder, or whether it was a pure financial encouragement in which **S.** "purchased" B., and the latter committed the crime for remuneration. And in that regard, if it was one or the other what was the evidence that proved it.

Considering the seriousness of the indictment and that a crime can only be defined with its objective and subjective elements, a guilty verdict should always clearly show from the objective side what was the act committed, which is qualified as a crime. A verdict cannot simply refer to an Article in the material criminal law without describing the facts which constitute the crime itself. The qualification in the material law does not substitute for the factual circumstances of the crime.

Following the above reasoning, and being bound by the absolute essential violations as specified in Article 384 (1) 12 CPCK found in the impugned Judgment in the case at hand, the Court of Appeals is circumscribed to act pursuant to Article 403 of the CPC since the errors made by the first instance court cannot be rectified only by modifying the impugned Judgment. Therefore, Count one of the case, namely the criminal offence of

Incitement to Commit Aggravated Murder in violation of Article 24 and 147 (3) and (9) of the PCCK is sent back to the first instance court for re-trial.

During the re-trial the Basic court will undertake measures to clarify the indictment to the fullest extent possible, and when issuing its Judgment (regardless of whether it will be a guilty verdict or an acquittal) to clearly state what are the elements of the crime that the defendant is charged with.

In addition the Panel of the Court of Appeals notes the following contentious points that need to be examined during the retrial, namely: the credibility of statement of witness D2 and its probative value, the legality of the search conducted in xxx, and finally the admissibility and the probative value of the documents from PTK and the related triangulation data.

The so called witness D2 is anonymous and is the only witness that links **E.S** with the commission of the criminal offence of Incitement, and the first instance court held his statement crucial to find the defendant guilty for such a severe criminal offence.

In the re-trial the first instance court shall asses the accuracy of the statements of witness D2, and shall establish whether this statement is supported by any other evidence to prove beyond reasonable doubt that **E.S** incited A. B. to commit an aggravated murder. The first instance court should clearly state in what form the incitement had been manifested or not, and the evidentiary basis for one or the other conclusion.

The impugned Judgment does not provide sufficient arguments to support the Basic court's conclusion that the procedure conducted during the search in xxx followed the prescriptions of the criminal procedure code at the time. It was not proven whether a verbal order was obtained, which is a possibility under Article 245 (3) PCPCK. In addition, the Basic court admitted that no report was sent post factum, either to the public prosecutor or to the pre-trial judge as required in Article 245 (6) of PCPCK, and regardless of this the court accepted that this was 'not basis for inadmissibility under Article 246 of old CPC' . In this respect, during the re-trial, the first instance court will need to re-assess whether the conduct of the search was legally grounded and in accordance with the provisions of the PCPCK.

Further, the first instance court did not reason the admissibility of the documents, allegedly originating from the telecommunication company (PTK). It is claimed that they do not, but no clear reasoning is given on that account. During the re-trial the first instance court will have to respond to this allegation, and related to that to assess again whether the data, if originating from PTK, is admissible in the context of possible time limits for preserving such data. Reference here is made to the Law on Electronic Communications (Law No. 04/L-109) from 4 October 2012 and the Law on Telecommunications (Law No. 2002/7) from 12 May 2003. The assessment should begin

with which would be the applicable legal framework at the time of the commission of the crime, and whether and to what extend the time limits prescribed in Art. 68 of the Law on Electronic Communications apply to data which was preserved prior to the entering into force of this law, if they do apply at all. After the assessment of the admissibility and evaluating the probative value of the documents, the court needs to refer to technical expertise (related to the triangulation) in order to establish clearly the relevant facts.
In summary, in the re-trial, the first instance court has to assess the credibility of witness D2 and the probative value of his witness statements; the admissibility of the data of the PTK; the probative value of these documents; the related triangulation data; the admissibility of the evidence obtained during the search in xxx, as well as the probative value of each piece of evidence relevant to the purpose of charging the defendant with Incitement.
Finally, and in order to establish the decisive facts of the case, during the re-trial the first instance court will have to hear as witness Rr. A. , who is a defendant in a separate criminal case on the charge of assistance to perpetrators after the commission of the murder of T.R.. The case of Rr. A. was pending with the Basic Court in Pristina (reference is made to the Ruling of the Court of Appeals in case PAKR.no.140/16 from 5 may 2016).

Count two:

The Panel of the Court of Appeals concurs with the Appellate Prosecutor that the criminal offence of Extortion under paragraph (1) of Article 267 of PCCK has reached the statutory limitation.
Namely, the defendant **E.S** was charged in the Indictment of the Special Prosecution Office PPS no. 467/2009 dated 24 April 2014, as amended on 27 April 2016 for the criminal offence of Extortion in violation of Article 267 (1) and (2) the PCCK. The court of the first instance excluded the qualified form of the criminal offence of Extortion, as provided in paragraph 2 of Article 267 of the PCCK, that was itemised in the indictment since it was never mentioned that the defendant has committed this criminal offence using the dangerous instrument that this paragraph requires, therefore the first instance court has found the defendant **E.S** guilty for the criminal offence of Extortion only under paragraph (1) of Article 267 the PCCK. This criminal act was allegedly committed from the beginning of 2003 through to the end of 2004. For this criminal offence, Article 267 paragraph (1) of PCCK foresees the punishment to be a maximum of five years of imprisonment.

Article 90 paragraph (1) of the PCCK provides that the criminal prosecution may not be commenced after:

'Five years from the commission of a criminal offence punishable by imprisonment of more than three years' (Article 90 paragraph (1) (4) of PCCK).

Pursuant to Article 91 of the PCCK, the period of statutory limitation on criminal prosecution commences on the day when the criminal offence was committed. In the case at hand, the alleged criminal offence was committed from the beginning of 2003 through the end of 2004. For the criminal offence in continuation, the statutory limitation starts from its last act, which in this case would be 31 December 2004.

It is true that each act undertaken for the purpose of prosecution interrupts the period of statutory limitation, but the law sets an absolute bar for prosecution in the case when the period of statutory limitation in twice elapses, meaning that regardless of the actions of the authorities, the criminal prosecution is prohibited after that period of time. Article 90 Paragraph (1) 4) of the PCCK should be read in conjunction with Article 91 paragraph (6) of the PCCK which states 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 last act of the criminal offence was allegedly committed on 31 December 2004, the absolute bar on criminal prosecution has been reached on 31 December 2014, thus acts under paragraph (1) of Article 267 of the PCCK were banned from prosecution due to the absolute statutory limitation even during the course of the main trial that started before the first instance Court on 31 October 2014.

The provisions of the criminal law of Kosovo, as described above, would suffice to support the finding that the prosecution of a certain criminal offence has reached statutory limitation and bars prosecution. However, the international legal standards that amount to fundamental human rights and freedoms require an assessment of the facts of the case whenever conditions for acquittal would exist. In this way, the Court provides a higher degree of protection and an affirmation of the presumption of innocence in accordance with Article 6 (2) of the ECHR.

After careful assessment of the case, the Panel finds that there is no evidence to prove beyond reasonable doubt that the defendant has committed the criminal offence of Extortion under paragraph (1) of Article 267 of the CCK, as specified in the impugned Judgment.

This charge was mainly based on the testimony of the witness A.I.. She testified before the trial panel on 27 April 2015 in the capacity of an injured party and key witness, as stated in the impugned Judgment. In the main trial she stated that she had no personal problems with the defendant **E.S.,** thus deviating from the testimony given before the

prosecutor on 25 October 2007 when she stated that the defendant extorted money from her on various occasions. When asked why her testimony was different, she claims that it was the statement of a moment and that she was affected by the tragedy since the interview took place shortly after the murder of T.R.. In relation to this, the first instance panel held that the reasons for changing the testimony are not credible, and therefore based its Judgment of guilt on the testimony of A.I. given in the pre-trial stage.

The Court of Appeals Panel notes that Article 361 of the CPC in paragraph 1 clearly states that the court shall base its Judgment solely on the facts and evidence considered at the main trial. It is obvious that the first instance court did not base its Judgment on the evidence administered in the main trial in relation to count two of the charge.

The legislator provides that it is in the discretion of the court to assess the evidence as proven, but the court is bound to assess conscientiously each item of evidence separately and in relation to other items of evidence, and on the basis of such assessment to reach the conclusion whether or not a particular fact has been established (Article 361 (2) of the CPC). As to 'in relation to other items of evidence', the first instance court again incorrectly based its Judgment on the pre-trial testimony of M. and M.I..

After careful consideration of the evidence in relation to count two, the Panel of the Court of Appeals finds that there is no evidence to prove beyond reasonable doubt that **E.S** committed the criminal offence of Extortion under paragraph (1) of Article 267 of the CCK, and therefore acquits the defendant of the charge under count two of the impugned Judgment.

Detention:

In relation to the detention measure, this is the subject of a separate Court of Appeals Ruling.

Closing remarks:

With regard to the impugned Judgment of the Basic Court, the Panel of the Court of Appeals, for the reasons elaborated above, partially grants the appeals filed by the defence counsels K.K and. B.P. filed on behalf of the defendant **E.S** in relation to count one.

The Panel concludes that a new main trial before the Basic Court is necessary because of the substantial violation of the provisions of criminal procedure.

In relation to count two, the Panel of the Court of Appeals modifies the impugned Judgment by acquitting the defendant, as specified in the enacting clause of this Judgment.

In the re-trial, the first instance court shall examine all the contentious points described above and render its Judgment following the recommendations as listed above. In addition, the first instance court shall hear as a witness **Rr. A.**
The impugned Judgment in relation to count 3 is affirmed.

Done in English, an authorized language.

Presiding Judge

_____

Elka Filcheva-Ermenkova
EULEX Judge

Panel member

_____

Mejreme Memaj

Kosovo Court of Appeals Judge

Panel member

_____

Anna Adamska Gallant
(Dissenting Opinion)
EULEX Judge

Recording Officer

_____

Vjollca Kroci - Gerxhaliu
EULEX Legal Advisor

COURT OF APPEALS OF KOSOVO
PAKR 1/2017
19 October 2017