

COURT OF APPEALS

Case number: **PAKr 603/15**

Date: **20 May 2016**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Radostin Petrov as presiding and reporting Judge, EULEX Judge Hajnalka Veronika Karpati and Kosovo Court of Appeals Judge Dritom Muharremi as panel members, with the participation of EULEX Legal Adviser Vjollca Kroçi-Gërxhaliu acting as recording officer, in the criminal proceeding against:

1. **N.K.**, son of xxx and xxx, Kosovo xxx, born on xxx in xxx, Municipality of xxx, xxx, graduated in xxx, currently employed as xxx, declared average financial status, with present residence at xxx, holder of the ID. card no. xxx;
2. **A.Z.**, son of xxx and xxx, Kosovo xxx, born on xxx in xxx, Municipality of xxx, xxx graduated in xxx, currently xxx, declared good financial status, with present residence in the xxx, Municipality of xxx, holder of the ID. card no. xxx;
3. **S.H.**, son of xxx and xxx, Kosovo xxx, born on xxx in xxx, Municipality of xxx, xxx graduated in xxx, currently xxx, declared good financial status, with present residence at xxx, holder of the ID. card no. xxx;
4. **S.F.**, son of xxx and xxx, Kosovo xxx, born on xxx in xxx, Municipality of xxx, xxx, graduated in xxx, currently xxx, declared average financial status, with present residence at xxx, holder of the ID. card no. xxx.

All initially charged by an Indictment PPS no.30/10 dated 5 November 2012, and by the amendment to the Indictment dated 28 March 2013 and now charged with the following criminal offences (as per the amended indictment and withdrawal of prosecution during the closing statements from the charges of Fraud in Office, in violation of Article 341 (1) and (3) in conjunction with Article 23 of the Criminal Code of Kosovo in force until 31 December 2012):

1. N.K.:

- (count one) Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1), read with Article 31 of CCK;
- (count two) Accepting bribes contrary to Article 343(1) pursuant to the Criminal Code of Kosovo in force until 31 December 2012;

- (count three) Entering into harmful contracts contrary to Article 237 (1) (2) pursuant to the Criminal Code of Kosovo in force until 31 December 2012;

2. A.Z.:

- (count one) Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1), read with Article 31 of CCK;

3. S.H.:

- (count one) Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1), read with Article 31 of CCK, and

- (count two) Accepting bribes contrary to Article 343(1) pursuant to the Criminal Code of Kosovo in force until 31 December 2012;

4. S.F.:

- (count one) Abusing official position or authority, committed in co-perpetration contrary to Articles 422 (1), read with Article 31 of CCK, and

- (count two) Accepting bribes contrary to Article 343(1) pursuant to the Criminal Code of Kosovo in force until 31 December 2012;

5. H.B.:

- (in relation to count two) Giving bribes contrary to Article 429 of CCK and
- (in relation to count one) Misuse of economic authorizations contrary to Article 236, (1.2) and (2) pursuant to the Criminal Code of Kosovo in force until 31 December 2012;

Adjudicated in the first instance by the Basic Court of Prishtina with Judgment PKR 144/13, dated 21 September 2015, by which:

The defendants **N.K.** as xxx at .M.T.I. (hereinafter: MTI), **A.Z.** as xxx at M.T.I, **S.F.** as xxx at M.T.I, and **S.H.** as xxx at MTI, were found guilty (for count one of the Indictment) for the criminal offence of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1), read with Article 31 of CCK because it has been proven that they abused their official position and damaged the budget of the Ministry of Trade and Industry in excess of 2.500 Euros and the said payment results in a material benefit exceeding 5.000 Euros to “xxx” company. Following an internal audit in the Ministry of Trade and Industry conducted in 2007 by the now defendant **A.Z.**, the economic operator “xxx”, owned by **H.B.**, was requested to return the above mentioned amount of 50,000 Euros – out of which only 5.000 Euros were returned by the defendant **H.B.**, on 10/04/2007. The defendants at the time held official positions

in the Ministry of Trade and Industry and through their joint acts, actions and omissions, they violated their duties and substantially contributed to the commission of the criminal offence. At the time the defendants behaved in the way described above, they were able to understand and control their acts, which they desired, knowing that their acts were forbidden and punishable by law.

In relation to count one, and in accordance with the said legal provisions, but read together with Articles 359, 360 (2), 361 and 363(3) of CPC, the court found that the defendant **H.B.** committed part of the acts he had been charged with. Therefore, for the lack of one of the elements of the constituent offence of Misuse of economic authorizations, the court of the first instance, pursuant to Article 360 (2) of CPC, requalified, the acts committed by the defendant **H.B.** to the criminal offence of Falsifying documents – pursuant to Article 332 (1) of the Criminal Code of Kosovo in force until 31 December 2012; Pursuant to Article 90 (1) 6) of the Criminal Code of Kosovo in force until 31 December 2012. the first instance court established that the term to the statutory limitation is 2 years and the absolute bar on prosecution of the criminal offence of falsifying documents is 4 years, as per Article 91(6) of the Criminal Code of Kosovo in force until 31 December 2012 and such term of 4 years has already elapsed on 21/07/2010 as the last document of the above mentioned case is dated 21/07/2006. According to the first instance court the said term had elapsed even before the date on which the prosecutor issued a ruling to initiate investigations, 10/12/2011. Therefore, accordingly, pursuant to Article 363 (1.3) of CPC, the court rejected this charge.

For count two of the charge, the defendants **N.K.**, **S.H.** and **S.F.**, were found not guilty for the criminal offence of Accepting bribes, contrary to Article 343(1) of the Criminal Code of Kosovo in force until 31 December 2012 because it has not been proven beyond reasonable doubt that the following accused have committed the acts with which they have been charged for;

In relation to count 3, the court found the defendant **N.K.** guilty after requalifying the criminal offence of Entering into harmful contracts contrary to Article 237 (1) and (2) of Criminal Code of Kosovo in force until 31 December 2012; as the established facts did not match all essential elements of this criminal offence but were constituent of the more lenient criminal offence Abusing official position or authority, committed in co-perpetration contrary to Article 422 CCK.

By the Judgment PKR 144/13, dated 21 September 2015 the defendants **N.K.**, **A.Z.**, **S.H.** and **S.F.** were sentenced as following:

For the charge under count 1: Criminal offence of Abuse of official position as per Article 422 of CCK, read together with Article 3 (2) and Article 31 of CCK in conjunction with Articles 41, 45 and 73 of CCK:

- a) The defendant **N.K.** was sentenced with 12 months of imprisonment;

- b) The defendant **A.Z.** was sentenced with 10 months of imprisonment;
- c) The defendant **S.H.** was sentenced with 8 months of imprisonment, and
- d) The defendant **S.F.** was sentenced with 7 months of imprisonment.

For the charge under count 3: Criminal offence of Abusing official position or authority contrary to articles 422 (1) and (2. 1) of CCK, the defendant **N.K.** was sentenced with 18 months of imprisonment. The aggregate punishment for the defendant **N.K.** was set in 26 months of imprisonment for the commission of two criminal offences of Abuse of official position.

In relation to the defendants **A.Z., S.H., S.F.**, the first instance court set that the punishments shall not be executed if the convicted persons do not commit other criminal offences during the verification time of two years.

The first instance court rejected the property claim filed by the Ministry of Trade and Industry since the requested amount was object of the civil claim that had been already adjudicated by a final Judgment;

Therefore, Court of Appeals (hereinafter: CoA), acts upon the following appeals filed against the Judgment of the Basic Court of Pristina PKR 144 /13 dated 21 September 2015:

1. The appeal of the defense counsel Bajram Tmava on behalf of the defendant **N.K.** dated 20 October 2015 and stamped by the Basic Court of Pristina on 22 October 2016;
2. The individual appeal of the defendant **N.K.** dated 23 October 2015 and stamped by the Basic Court of Pristina on 23 October 2015;
3. The appeal of the defense counsel Hasim Loshi on behalf of the defendant **A.Z.** dated 26 October 2015 and stamped by the Basic Court of Pristina on 29 October 2015;
4. The appeal of the defense counsel Sadri Godanci on behalf of the defendant **S.H.** dated 23 October 2015 and stamped by the Basic Court of Pristina on 26 October 2016;
5. The supplement appeal by the defense counsel Sadri Godanci and defendant **S. H.** dated on 13 November 2015 and stamped by the Basic Court of Pristina on 13 November 2015;
6. The appeal of the defense counsel Destan Rukiqi on behalf of the defendant **S.F.** dated 23 October 2015 and stamped by the Basic Court of Pristina on 26 October 2016;
7. The individual appeal of the defendant **S.F.** (not dated) stamped by the Basic Court of Pristina on 26 October 2016.

Having considered the Appellate Prosecutor's motion PPA/I. no. 573/15 dated 18 December 2015;

Having held the public panel session on 18 May 2016 in accordance with Articles 389, 390, 394, 398 of the Criminal Procedure Code of Kosovo (CPC);

Having deliberated and voted on 20 May 2016;

Pursuant to Articles 401 and 403 of CPC;

Renders the following:

JUDGEMENT

- I. The appeal of the defense counsel Bajram Tmava filed on behalf of the defendant N.K. and the individual appeal of the defendant N.K. against the Judgment of the Basic Court of Pristina PKR 144/13 dated 21 September 2015 are partially granted.**
- II. The Judgment of the Basic Court of Pristina PKR 144/13 dated 21 September 2015 concerning the defendant N.K. is modified in relation to the charges and in relation to the sentencing to be read as follows:**

The defendant N.K. is found guilty for the criminal offence of Abusing official position or authority in continuation with unindicted co-perpetrators as per Article 422 of CCK read together with Articles 81, 41, 45, 73, and 31 of CCK.

The court imposes the punishment of 1 (one) year and 6 (six) months of imprisonment. The punishment shall not be executed as per Article 51 of CCK if the defendant does not commit criminal offence for the verification time of two years starting from the date the judgment becomes final.

The remaining part of the Judgment of the Basic Court of Pristina PKR 144/13 dated 21 September 2015 in relation to the defendant N.K. is confirmed;

- III. The appeal of the defense counsel Hasim Loshi on behalf of the defendant A.Z., the appeal of defense counsel Sadri Godanci on behalf of the defendant S.H., the appeal of the defense counsel Destan Rukiqi on behalf of the defendant S.F. and the individual appeal of the defendant S.F. are granted.**
- IV. The Judgment of the Basic Court of Pristina PKR 144/13 dated 21 September 2015, in relation to the defendants A.Z., S.H. and S.F. is hereby modified as follows:**
 - 1. Pursuant to Article 364 of CPC, the defendants A.Z., S.H. and S.F. are ACQUITTED of all charges for committing the criminal acts of Abusing**

official position or authority, committed in co-perpetration (contrary to articles 422, par.1, read with art. 31 C.C.K.);

- 2. The defendants A.Z., S.H. and S.F. are released from obligation to pay the costs of the proceeding imposed by the Judgment of the Basic Court of Pristina PKR 144/13 dated 21 September 2015.**

REASONING

I. PROCEDURAL BACKGROUND

The investigation against the defendants began on 05/04/2008, when the Anti-Corruption Agency of Kosovo submitted to the SPRK information concerning possible corruptive behavior against suspects B. D., B. Z. and N.K..

On 15/11/2008 the Kosovo Police submitted to the Prosecution Office a criminal report, “2011-XI-248”, against the defendants N.K., A.Z., S.H., S.F. and H.B., for the grounded suspicion that they committed the criminal offences.

On 10/12/2011 ¹ the Prosecutor Besim Kelmendi issued a ruling to initiate the investigations against the above mentioned defendants, N.K., A.Z., S.F., S.H. and H.B., for the criminal offences of Abusing Official Position or Authority as per Article 339 (3) read with Article 23 of the PCKK in force until 31 December 2012 , Misappropriation in Office, Article 340 (3) read with Article 23 of the PCKK in force until 31 December 2012 , Fraud in office as per Article 341(1) (3) read with Article 23 of the PCKK in force until 31 December 2012 , whereas on 21/05/2012 the SPRK issued a ruling to expand the investigations against the defendants N.K. and S.F. to include the criminal offence of Accepting Bribes, from Article 343 (1) of the PCKK in force until 31 December 2012 and against H.B. to include the criminal offence of Giving Bribes from Article 344 (1) of the CCK. On 20/07/2012 another ruling was issued to expand investigations against N.K., for criminal offence of Entering into a Harmful Contract from article 237 (2) read with (1) of the PCKK in force until 31 December 2012 and against H.B. for misuse of economic authorization, from Article 236 (1) 2) and (2) of PCKK in force until 31 December 2012 .

The defendants were accused initially by Indictment PPS no. 30/10 dated 05/11/2012 by the SPRK. On 28/03/2013, the said Indictment was amended in relation to the relevant provisions of the criminal code that had entered into force on 01/01/2013, as SPRK was of the opinion that some of the new provisions would be more favorable to the defendants.

¹ Not 2012, as stated by mistake in the reasoning of the indictment.

The initial hearing took place on 28/03/2013 and on 18/06/2013 – on which day the pleas of the defendants were taken and all pleaded not guilty to every charge.

The main trial hearings, open to the public, were held on 14 April 2014, 13, 14, 27 and 28 May 2014, 04 and 05 June 2014, 16, 17 and 18 July 2014, 12, 26 and 30 September 2014/, 04 November 2014, 12 December 2014, 05 and 23 January 2015, 16 February 2015, 17 April 2015, 22 June 2015, 24 June 2015, 31 August 2015 and 17 September 2015.

The Judgment in the first instance court, namely Pristina Basic Court, was announced orally on 21 September 2015 in accordance with the provisions set in Article 366 of CPC in the presence of the SPRK, the defendants and their defense counsels.

Against the Judgment of the Basic Court of Pristina PKR 144 /13 dated 21 September 2015, the respective defense counsel filed the appeals on behalf of the defendants. In addition, the defendants **N.K.** and **S.F.** filed individual appeals.

The SPRK with the motion dated 25 November 2015 acknowledged that she would not file the response on the appeals filed on behalf of the defendants².

The Appellate Prosecutor filed the motion PPA/I. no. 573/15 on 18 December 2015.

On 18 May 2016 the public panel session was held at the Court of Appeals in the presence of the defendants, their respective defense counsel, with the absence of the prosecutor. Deliberation of the Appellate Panel was held on 20 May 2016.

II. SUBMISSIONS OF THE PARTIES

Against the above mentioned Judgment, the appeals have been filed as follows:

1. The appeal of the defense counsel Bajram Tmava on behalf of the defendant N.K.

The defense counsel in his appeal alleges that the first instance court, neither in the enacting clause nor in the reasoning of the judgment has provided sufficient evidence in accordance with the legal provisions. The first instance court has wrongly interpreted the provisions of the law which regulate the financial issues and the Law on Procurement. He further states that, pursuant to the Law on Management of Public Finances and the Law on Public Procurement (2003/17) his client does not bear any liability concerning the payment procedure. The defense counsel further submits that the MTI has not suffered any damage. In relation to the violation of the criminal law, the defense counsel states that the first instance court has violated the law on the detriment of his client since the court has found **N.K.** guilty twice for abusing the official position or authority. He states that since the Judgment contains the erroneous and incomplete factual

² Court Binder: Judgment and Appeals

situation, it has violated the criminal law to the detriment of the accused and any sentence imposed in such circumstances cannot be accepted as legally grounded. Therefore he proposes to the Court of Appeals to approve his appeal, to annul the impugned Judgment and return the case for the retrial or modify the impugned Judgment in a way of acquitting the defendant **N.K.**

2. The individual appeal of the defendant N.K.

The defendant in his appeal submits that the enacting clause of the Judgment is contradictory in itself and with the reasoning of the Judgment. He submits that there is a contradiction regarding the critical facts between what appears in the reasoning of the Judgment with the statements given in the procedure. This contributed on rendering the unlawful verdict. The rights of the defense were violated. He further alleges that the court has violated the Article 7 of CPC by not including the relevant facts which are a favor of the defendant, namely, the prosecutor has removed the sketch of witnesses rendered in by the investigator Y.H. in Kosovo Police. The court has violated the Article 6 of the European Convention on Human rights, violation of Article 30 and 31 of the Constitution of the Republic of Kosovo since the trial panel of the first instance court did not perform an objective and professional expertise. The defendant **N.K.** in his appeal further states that the court has violated the provision of the criminal code since the sentence for the criminal offence of Abuse of official position as per article 422 of CCK was once imposed for 12 months of imprisonment then another sentence for the same criminal offence with additional 18 months of imprisonment. He submits that the intent for purpose of obtaining the material benefit or harming of another person as an element of the criminal offence of Abuse of official position as per article 422 of CCK has not been proven during the trial nor were argued in the impugned Judgment.

In relation to the erroneous determination of the factual situation, the defendant in his appeal states that the court has made mistakes on assessment of the evidence and conclusion since the statement of the witness is different from what was stated in the impugned Judgment.

The defendant alleges that the Indictment is lacking an explanation of the grounds for filing the indictment on the basis of the results of the investigation. He states that the indictment stipulates that there is no direct evidence. Even during the main trial the prosecutor has not achieved to prove the existence of any of the criminal offences that were presented in the Indictment PPS no. 30/2010. The defendant further states that the prosecutor during the main trial has several times emphasized that the defendant is using his right to defend in silence while in his closing argument he stated that the defendant did not deny his statement given on the pre-trial stage. In relation to this, the court was not supposed to interpret the silence as a weakness nor as culpability. In relation to the amount of 50 thousands Euros, the defendant states that it should have not been explained in the way prosecutor did because this amount of money was to be returned to the MTI budget and not to obtain any benefit.

3. The appeal of the defense counsel Hashim Loshi on behalf of the defendant A.Z.

The defense counsel of the defendant **A.Z.** in his appeal challenged the Judgment on the grounds of erroneous and incomplete determination of factual situation and on the decision on punishment. In his appeal, the defense counsel submits that the defendant at all stages of the criminal procedure stated that he did not commit the criminal offence he is charged for. He never signed the contested invoice no. 39/06. He claims that somebody else used his facsimile and signed the contested invoice. He further states that his client did not benefit from anyone. The defense counsel in his appeal submits that since the defendant **A.Z.** did not commit any crime, he should have not been sentenced. Therefore he proposes to the Court of Appeals to approve the appeals and acquit the defendant or return the case to the Basic Court on retrial.

Along with the appeal, the defense counsel submitted the closing remarks of the defendant **A.Z.** addressed to the Presiding Judge of the first instance court.

4. The appeal of the defense counsel Sadri Godanci on behalf of the defendant S.H.

The defense counsel of the defendant **S.H.** in his appeal challenges the Judgment on the grounds of essential violations of CPC, violations of criminal code, erroneous and incomplete determination of factual situation and on the decision on punishment³. He submits that his client did not co-operate with other defendants as Judgment alleges. He performed his duties pursuant to his authorization. The defense counsel further submits that the grounded suspicion was not established by the court. He states that his client signed the payment order after the Permanent Secretary signed it. The appealed Judgment is ungrounded because it contains substantial violations of provisions of CPC. Enacting clause is unclear and contradictory with the reasoning. The defense counsel proposes to the second instance court to acquit the defendant **S.H.** or send the case back for retrial.

5. The individual appeal of the defendant S.H.

The defendant in his appeal stated that he signed only the second payment which included only completed works and that he had acted in accordance with the contract rather than violating it. He states that he signed it as it appeared to be a payment for completed work and not as an advance payment. He further states that testimonies of the witnesses show that his actions were not intentional. He proposes to the second instance court to analyze and review the case and acquit him.

³ The original Albanian version of the appeal filed by the defence counsel contains the allegations on all grounds, while the translated English version does not contain the allegation of the defence counsel in relation to the appeal on punishment.

6. The appeal of the defense counsel Destan Rukiqi on behalf of the defendant S.F.

The defense counsel in his appeal submits that the impugned Judgment is ungrounded and legally unsustainable due to the essential violation of CPC, violations of criminal code in detriment of the defendant, erroneous and incomplete determination of factual situation. In his appeal he appeals the decision on criminal sanction as well.

In relation to the essential violation of CPC, namely the violation of Article 384 (1) 1.12, para (2) 2.1) of CPC⁴ the defense counsel states that the impugned Judgment is not drafted in accordance with Article 370 (4) and (7) related to Article 365 (1) 1.1) of CPC meaning that the enacting clause of the Judgment is incomprehensible and contradictory within itself. The Judgment does not contain sufficient reasons related to the crucial facts to decide the case. The enacting clause of the impugned Judgment lacks the factual description of the actions which constitute the figure of the criminal offence of Abuse of official position as per article 422 of CCK. First instance court made a violation of Article 384 (2) 2.1) when did not consider as evidence the statements of the defendants who remained silent given in a pre-trial stage. The defendant **S.F.** was one of the defendants that remained silent.

In relation to the erroneous and incomplete determination of factual situation, the defense counsel submits that the first instance court did not confirm fully and correctly the facts since the administrated evidence during the main trial were not evaluated one by one nor the concrete facts were proven as obliged by the Article 361 (2) of CPC. There is no evidence to show that **S.F.** was in charge to supervise the project for construction of the Industrial Park in Drenas nor he ever signed any document for payment.

In relation to the violations of criminal code in detriment of the defendant, defense counsel provides that the requirements of the criminal offence of Abuse of official position as per article 422 of CCK are not fulfilled, thus any criminal sanction imposed on the defendant **S.F.**, would be illegal. He proposes to the Court of Appeals to approve his appeal, amend the impugned Judgment acquitting the defendant **S.F.** or at least to annul the impugned Judgment and return the case to the first instance Court for retrial and decision.

7. The individual appeal of the defendant S.F.

The defendant in his appeal states that the impugned Judgment is illegal, unjust and ungrounded since it has ignored all exculpatory evidence and has fabricated incriminating scenario without any legal basis, thus the first instance court has violated his legal and constitutional rights for equality in front of the law. In relation to this, the defendant argues that the contract between him and MTI dated 07/06/2004 to which the Judgment refers is not presented as evidence in any stage of the criminal proceedings. This piece of evidence was in a favor of the defense and was not included in the case file nor was obtained during the main trial. In relation to the

⁴ The English version refers wrongly to CCK .

implementation of the payments to company 'xxx', the defendant refers to the statements of the prosecution witnesses which exclude his responsibility. He asks the Court of Appeals to acquit him based on his appeal and the evidence.

8. The Motion of the Appellate Prosecutor

The Appellate Prosecutor in his motion states that he finds the appeals as unfounded since the allegations of the defense are unsupported by evidence. In their appeals, the alleged violations are merely prescribed and referred in a rather abstract and general way without any evidence, testimony, reasoning or any concrete and justifiable argumentation. He further argues that the challenged judgment does not contain essential violations of provisions of the criminal procedure; its enacting clause is comprehensible, clear and not contradictory with its reasoning part or with the judgment contents as the appeals allege. The decisive facts are not in contradiction with the administered evidence; the factual situation in the challenged judgment was correctly and fully determined. Therefore, based on such correctly determined factual situation, the first instance court has correctly applied the criminal law when finding that acts of the accused do contain essential elements of the criminal offence, for which the accused were found guilty and convicted. The court considered the mitigating and aggravating circumstances when imposed the punishment. The Appellate Prosecutor proposed to the Court of Appeals to reject the appeals of the defendants as unsustainable.

III FINDINGS OF THE COURT OF APPEALS

Court Competency and the Composition of the Panel

Pursuant to Article 472 (1) of CPC the Panel has reviewed its competence and since no objections were raised by the parties, the Panel will suffice with the following: In accordance with the Law on Courts and the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273 and clarified through the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, the Panel concludes that EULEX has jurisdiction over the case and that the Panel is competent to decide the respective case in the composition of one Kosovo judge and two EULEX judges.

Admissibility of the Appeals and of the Response

The CoA finds the appeals were submitted timely by the authorized persons in accordance with Article 380 and Article 381 (1) of CPC and are therefore all admissible.

Merits of the Case

The Panel of the CoA will address points of the enacting clause by the order as stated above.

The CoA findings in relation to the defendant N.K.

The appeal filed on behalf of the defendant **N.K.** alleges the erroneous and incomplete establishment of the facts, violation of the criminal law and decision on criminal sanction.

The alleged erroneous and incomplete establishment of the facts

In relation to the erroneous and incomplete establishment of the facts, the defense counsel states that the evidentiary material was wrongfully evaluated.

The Appellate Panel reminds that when the law defines the terms “erroneous determination of the factual situation” and “incomplete determination of the factual situation”, it is referring to errors or omissions related to “material facts” that are critical to the verdict reached.⁵ Only if the Basic Court committed a fundamental mistake while assessing the evidence and determining the facts will the Court of Appeals overturn the judgment.

As a general principle the evaluation of evidence should rely on a direct and immediate examination of oral testimonies and statements by a panel of judges. The reading of the record of the evidence examined in the trial, however faithful and accurate it may be, is always a less reliable instrument for evaluation of evidence. Even the examination of documents and other material evidence is in general more accurate in the trial because often those pieces of evidence have to be supported and consisted with other elements and subject to oral explanations by witnesses or parties. Therefore, as affirmed by this court in other occasions⁶, “*it is a general principle of appellate proceedings that the Court of Appeals must give a margin of deference to the finding of fact reached by the Trial Panel because it is the latter which was best placed to assess the evidence*”. This is in line with the standard applied by the Supreme Court “*to not disturb the trial court’s findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous*”.⁷

With this in mind the Panel has carefully analyzed the evidence in this criminal proceeding along with the reasoning of the Basic Court in the impugned judgment. Although the impugned Judgment is not drafted in full accordance with the standards, the Panel of the CoA finds it comprehensive and sufficiently reasoned. Read together with other evidence in the case file, it creates the clear picture of the events thus supporting the CoA’s findings.

⁵ B. Petric, in: Commentaries of the Articles of the Yugoslav Law on Criminal Procedure, 2nd Edition 1986, Article 366, para. 3.

⁶ PAKR 1121/12, judgment dated 25/09/2012.

⁷ Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, paragraph 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, paragraph 30.

The Panel further has carefully reviewed the arguments presented in the appeal and the motion of the Appellate Prosecutor.

The Panel thoroughly examined the factual findings in the impugned judgment (English version), and concurs entirely with the findings. The Basic Court in the impugned judgment in detail analyzed the evidence administered during the main trial in relation to the defendant N.K.. In the view of the Panel, the first instance Court comes to logical conclusions in its assessment of the evidence.

Namely, the panel of the CoA finds that there is sufficient evidence to prove beyond reasonable doubt that the defendant N.K. has committed the criminal offence of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK. At the time, the defendant N.K. held the position of xxx at the MTI. From the evidence administered in the first instance court, it has been established beyond reasonable doubt that the defendant has abused his official position intentionally by approving the payment of 135.278,20 Euros on 25/07/2006 to 'xxx' company that won tender for the projection and construction of infrastructure in the industrial park in Drenas. In this amount, the sum of 50.000 euros was not deducted as it was previously paid to 'xxx' company as an advanced payment on 07.06.2006 as part of the total amount of 140.689,62 euros as per the document as 'Situacioni I Pare' dated 31.05.2006 despite the fact that the base Contract between MTI and 'xxx' company states 0% advanced payment.

It has been also established beyond reasonable doubt that the defendant N.K., following the announcement of the tender on 22/07/2005 for the "Projection and Construction of the Infrastructure of the Industrial Park in Drenas" where "xxx" company was selected, on 07/10/2005 signed the contract for the project on behalf of the MTI and "xxx Company", represented by H.B., in the amount of 144.000 Euros / price per unit 69.825,25 Euros.

The said contract was changed by the first annex contract dated 20/07/2006, between "xxx Company" and the Ministry of Trade and Industry, signed by the defendant N.K. on behalf of the Ministry, whereby parties agree to mutually change the condition of payment thus the total value of the contract shall be 1.730.000 Euros (...). After this change to the contract through the said annex contract dated 20/07/2006, another annex contract was made between the Ministry of Trade and Industry, signed again by the defendant N.K., and "xxx Company", represented by its owner, H.B., on 28/09/2006, stating: "Considering that the parties listed above have made a contract for carrying on works in the project Industrial Park Drenas based on the works carried out which came after the approval of the request on negotiated procedure before the announcement of the contract with the PPA, hereby we enter this annex contract (...) Article 1: The original contract dated 07/10/2005 as mutual agreement between parties the total value of which is 1.730.000 Euros (...) Article 2 The total value of the annex contract shall be 14.580,00 Euros (...)". Despite the amount of the initial contract dated 07/10/2005 was changed only with

the first annex contract (article 4 of such annex), dated 20/07/2006, one month early, on the 20/06/2006 the defendant N.K. had already submitted to the Public Procurement Agency, pursuant to section 34, par. 3 (amongst others), of the Law on Procurement 2003/17, a Request To Use Limited or Negotiated Procedures for additional work stating: “approximate value of contract: 1.700.000 Euros, foreseen value: value of additional works: 14.580 Euros”, when at that time (on 20/06/2006) the amount of the contract dated 07/10/2005 (the only contract existing) was 144.000 Euros / price per unit 69.825,25 Euros, not 1.700.000 Euros. By acting as described, the panel of the CoA holds the defendant N.K. criminally liable. The above mentioned incriminating actions carried out by the defendant demonstrate the substantive elements of the criminal offence of abuse of the official position which is fully supported by evidence administered during the main trial.

The Panel of the CoA concurs entirely with finding of the Basic Court that the defendant was able to understand and control his acts, which he desired, knowing that his acts were forbidden and punishable by law. There is no doubt that the defendant N.K. has committed the criminal offence of the Abuse of Official position intentionally considering the fact that, as described above, he has several times taken unlawful actions by signing the Agreement on behalf of MTI as well as documents for the payment to ‘xxx’ company.

Therefore the Panel finds that the judgment does not contain an incomplete or erroneous determination of the factual situation. Furthermore, the Basic Court correctly comes to a logical conclusion in the assessment of each piece of evidence hence presenting the overall culpability of the defendant. The appeal of the defense is therefore rejected as unfounded on this ground.

The alleged Violation of the Criminal Law

Defense counsel of the defendant N.K. in his appeal opposes the decision in the impugned Judgment to find the defendant guilty for two criminal offences of Abuse of Official Position and Authority.

The Panel of the CoA agrees with the appeal of the defense counsel in this regard since from the actions of the defendant it can be concluded that the defendant has committed the criminal act of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK. Namely, from the incriminating actions of the defendant, it can be determined that the defendant N.K. has incriminatory acted in continuation sufficiently to meet all requirements of Article 81 of CCK. Therefore, Panel of the CoA grants the appeal on behalf of the defendant in this regard to consider that the defendant N.K. committed the criminal offence as stated above to include Article 81 of CPC. The defendant committed only one criminal offence of Abusing official position or authority in continuation with unindicted co-perpetrators - Article 422 (1) read with Article 81 and Article 31 of CCK.

Decision on criminal sanction

Defense counsel in his appeal states that since the judgment is based on erroneous established factual state, the sentence imposed by the first instance Court is unlawful.

The Panel of the CoA has to reject these allegations, since the factual situation is rightfully and justifiably established; therefore the sentence has to be imposed. However, following the fact that the Panel of the CoA establishes the legal qualification of the criminal offence of Abusing official position or authority as the criminal offence in continuation as per Article 81 of CPC, it has to point out that it affects itself the sentence imposed by the first instance court. Therefore the sentence has been modified by sentencing the defendant N.K. with 1 (one) year and 6 (six) months of imprisonment. Considering the degree of criminal liability, the past behavior of the perpetrator, his clear criminal record, the Court of Appeals finds that by a suspended sentence the purpose of punishments as per Article 41 CCK will be reached. Therefore the Court of Appeals imposes suspended sentence to the defendant N.K., which shall not be executed as per Article 51 of CCK if the defendant does not commit criminal offence for the verification time of two years starting for from the date the judgment becomes final.

The CoA findings in relation to the defendant A.Z.

By the impugned Judgment, the defendant A.Z. was found guilty for the criminal offence of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK.

The defense counsel of the defendant A.Z. in his appeal challenged the Judgment on the grounds of erroneous and incomplete determination of factual situation and on the decision on punishment.

The Panel of the CoA finds the allegations in the appeal grounded.

It is acknowledged that the case was initiated by Anti-Corruption Agency with the Report dated 15 April 2008 based on information given to this authority. Based on this information the Anti-Corruption Agency filed the criminal report with the Prosecution office that consequently filed the Indictment. The Panel of the CoA finds that the indictment does not specify the incriminating actions of A.Z.; it rather describes it with short sentences. There is no specific page dedicated to A.Z. in the indictment to describe his criminal actions.

When reading the impugned Judgment and the evidence presented during the main trial, it can easily be concluded that the first instance court has erred in interpreting the evidence and testimonies presented during the main trial regarding the involvement of A.Z. in this criminal offence. Namely, during the session of 26 September 2014, Z. clearly explained the procedure which was supposed to be followed for completing the payment. He states that in a chain of persons who should have allowed the payment, he was somehow skipped as a xxx. It is known

that A.Z. was acting xxx from 18 May 2006 until 26 November 2006 which covers the period of irregularities in payment to 'xxx' company. After him, in position of xxx was selected B.Z.. After ending the mandate of acting xxx, A.Z. went back to the xxx position to work according to the working plan and one of the checkpoints was the work of industrial park in Drenas. Carrying the internal audit on 2008, A.Z. noticed the irregularities in the invoice 39/2006 dated 21 July 2006 that contained 50.000 euros as advanced payment and his forged signature in this invoice. The case file for audit was brought to him by H.K., at that time in the position of xxx. After detecting the irregularities and forged signature, he informed the Minister and several meetings were held and N.K., the xxx admitted that the mistake occurred with this payment.

A.Z. explains that the signature that appears in the document that committed the funds for the project is not disputable. He expresses his concern about the signature in the invoice 39/06 dated 21 July 2006 stating that in the original invoice without a date, his signature does not appear, while later on the invoice no. 39/06 dated 21 July 2006 contained his forged signature. He convincingly denies that he has ever signed that invoice since he had refused to sign said payment when presented to him while in a position of Acting xxx. He refused to sign it as the payment was against the law, as stated in the Anti-Corruption Agency report.

The disputable invoice no. 39/06 dated 21 July 2006 in total sum of 135,278.20 euro includes the disputed 50.000 euro that was supposed to be returned to the budget of MTI. At the time while acting as xxx at MTI, he had an accident in Macedonia and his right arm was injured and could not sign any document. In order to not stop the flow of work at the MTI, he had made the facsimile with his signature. He compellingly claims that the facsimile was forged and used in contested invoice. This is again stated by him during the main trial session on 26 September 2014 that his signature was used without his knowledge or was forged.

In addition to the persuasive statement of A.Z., none of the witnesses stated that he has signed the disputable invoice 39/2006 with the intent to acquire any benefit for himself or another person or to cause damage to another person or to seriously violate the rights of another person. In this regard, the prosecutor failed to prove the intent. The prosecution did not bring any witness or any convincing evidence to confirm that the defendant A.Z. has signed the invoice 39/06 intentionally with the intent to acquire any benefit for himself or another person or to cause damage to another person or to seriously violate the rights of another person. The Panel of the CoA finds that the court of the first instance has not established beyond reasonable doubt that A.Z. has committed the criminal offence he has been found guilty for. The criminal offence Abusing official position or Authority can be done only intentionally, and the lack of intent means lack of the elements of the criminal offence. Therefore, the Panel grants the appeal filed on behalf of the defendant A.Z. and acquits him.

The CoA findings in relation to the defendant S.H.

Defendant S.H. was found guilty for the criminal offence of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK since, according to the impugned Judgment, he, in a capacity of certifying officer approved the payment of 135,278.20 euro to 'xxx' company, the sum that contained 50.000 euros as advanced payment.

His defense counsel in the appeal challenges the Judgment on the grounds of essential violations of CPC, violations of criminal code, erroneous and incomplete determination of factual situation and on the decision on punishment

In relation to S.H., Panel of the CoA notes that at the time the criminal offence occurred, S.H. was holding the position of xxx at MTI. At the time when the amount of 50.000 euros was allowed to be paid as a payment for advanced work included in the invoice of 135,278.20 euro, S.H. was replacing by authorization the certifying officer B. S.. He was acting and replacing B. S. also by the authorization of his chief M. B.. In relation to the acts of S.H., B. S. testified in the capacity of the witness in the trial session on 4 June 2014. She was asked to explain the procedure of the payment, and the witness clearly stated that since the documents of the project payment were all initially signed by all needed authorities, she would also certify the payment. Just like S.H. did. Panel finds that his acts cannot be classified even to be carried out by negligence. He acted so because first of all he was replacing the certifying officer B.S., second: the invoice and other documents seemed to be all as it should be and the invoice was signed by the xxx, unknown of forgery fact at that time.

The panel notes that the first instance court did not clearly state on what proven evidence is grounded the charge of Abusing official position or authority, committed in co-perpetration by this defendant. There is neither direct evidence nor witness statement to point at S.H. confirming that he was the one that consciously signed and approved the irregular invoice with excessed amount and fake signature intentionally. Therefore, the Panel grants the appeal filed on behalf of the defendant S.H. and acquits him.

The CoA findings in relation to the defendant S.F.

Defendant S.F. was charged by the first instance court for the criminal offence of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK. Against the guilty Judgment of the first instance court, the defense counsel filed an appeal on behalf of the defendant on the grounds of essential violation of CPC, violations of criminal code in detriment of the defendant, erroneous and incomplete determination of factual situation and on decision on the sentence.

After a thorough assessment of the case file, the Panel of the CoA finds the appeal as grounded on all grounds. The Panel notes that the defendant S.F., at the time when the criminal offence

occurred, was in a position of xxx at MTI. The Judgment of the Basic Court finds him guilty because *'he failed to oversee the process and works related to the industrial park in Drenas [...] that he did not stop or report about, hence allowing it, as he was also tasked with the supervision of the project'*, referring to the payment of 135,278.20 euros that includes 50.000 euros of advanced payment that were not supposed to be paid.

From the case file and evidence administered in the main trial, S.F. does not appear to be responsible person to supervise the works of Industrial park in Drenas. It is true that S.F. has signed the Request for commitment of the funds for the project that was addressed to M. B., but this did not give him the authority to supervise the work. This fact was confirmed several times by the witnesses during the main trial and the Panel of CoA gives full credibility to these statements. It must be referred to the statements of the witnesses A. P., N.G. and H. K.: it clearly appears that the body to supervise the work of Industrial Park in Drenas conducted by 'xxx' company was 'xxx' company contracted by MTI. Namely, the work of 'xxx' company at Industrial Park in Drenas was firstly supervised by the construction engineer H. B. and from May 2006 and 'xxx' company took over the supervision of the work. Moreover, S.F. was only a xxx within the umbrella of Department for Politics of the Development of the Private Sector with the director, N.G..

According to the impugned Judgment, the responsibility of S.F. stems from his Employment Contract signed with MTI. By checking the minutes of the main trial sessions and the case file the Panel established that the Employment Contract of S.F. had never been part of the evidence in the main trial nor had it been administered at any stage of the criminal proceedings of this case.

In relation to this, the Article 361 (1) of CPC stipulates:

"The court shall base its judgment solely on the facts and evidence considered at the main trial"/Art. 361 (1) CPC

And, Article 8 of CPC specifies that:

"The court renders its decision on the basis of the evidence examined and verified in the main trial "Article 8 (2), CPC

The Panel of the CoA, without any doubt establishes that the first instance court, by grounding its guilty judgment on the evidence that was not presented nor administered in the main trial, has gravely breached the abovementioned provisions of CPC.

Revolving to the qualification of the criminal offence, the Panel of the CoA finds that action or more precisely the omission of S.F., as documented in the case file and administered in the main trial, do not constitute the elements of the criminal offence he has been found guilty of, nor

triggers the criminal responsibility at all. As correctly pointed out by defense counsel, none of the requirements of the criminal offence of Abusing official position or authority as per articles 422 of CCK corresponds with the role of S.F. More precisely, he did not exceed his authority nor has failed to perform his official duty or had caused any damage to others, and above all, there was no intent at all since he had no knowledge about the developments and about the contested amount of money. Everything happened away from his sight and knowledge.

The Panel of the CoA finds that it has not been established that S.F. has committed the criminal offence of Abusing official position or authority individually or in co-perpetration.

Therefore, the Panel grants the appeal filed on behalf of the defendant S.F. and his individual appeal and acquits him.

F. Other issues

Silence of the defendants.

The Basic Court decided not to give probative value to the statement of the defendants who remained silent in the main trial. The Court of Appeals finds as it is correctly stated in Destan Rukiqi's appeal, that the statements of the defendant S.F. given during the pre-trial procedure should be considered during the main trial. The Court of Appeals opines that this omission does not affect the final outcome and the second instance court's finding that S.F. did not commit the criminal offence of Abusing official position or authority in co-perpetration with others. Therefore the Court of Appeals will not go in details about the omission of the Basic Court. However the Court of Appeals emphasizes that the statement of the defendant given in the pre-trial stage in accordance with the provisions of the law (proper warning) has to be read out as evidence during the main trial in case the defendant decides to remain silent.

Conclusion

The Panel finds that there is sufficient evidence to prove beyond reasonable doubt that the defendant N.K. committed the criminal act of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK. The Panel of the CoA confirms that Article 422 (1) should be read with Article 31 CCK, because the manner the criminal offence is committed, there are grounds that the perpetrator N. K. acted with persons who were not indicted.

The Court of Appeals modifies the impugned judgment in relation to the defendant N.K. as in the enacting clause by imposing the punishment pursuant to Article 51 of CCK.

The Panel finds that there is insufficient evidence to prove that the defendants A.Z., S.H. and S.F. have committed the criminal act of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK. Therefore the Panel of the CoA, pursuant to Article 364 (1.3.) of CPC acquits the defendants A.Z., S.H. and S.F. and releases them from the obligation to pay the costs of the proceeding imposed by the Judgment of the Basic Court of Pristina PKR 144/13 dated 21 September 2015.

As stated above, pursuant to Article 401 of CPC and Article 403 of CPC the Court of Appeals decided as in the enacting clause.

Reasoned written judgment completed on 13 June 2016.

The Judgment drafted in English language.

Presiding Judge

Radostin Petrov, EULEX Judge

Panel Members

Hajnallka Veronika Karpati, EULEX Judge

Driton Muharremi, Kosovo CoA Judge

Recording Officer

Vjollca Gërxhaliu-Kroçi, EULEX Legal Advisor

KOSOVO COURT OF APPEALS

PAKR no. 603/15

20 May 2016