

COURT OF APPEALS

Case number: PAKR 139/13

Date: 4 July 2013

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Annemarie Meister as Presiding and Reporting Judge, and Kosovo Appellate Judges Vahid Halili and Tonka Berisha as Panel Members, with the participation of Beti Hohler, EULEX Legal Officer, acting as Recording Officer,

in the criminal proceedings against

- 1. R. B.,** ..., ..., born on ... in ..., residing ...,.../a municipality, Albanian with Kosovo citizenship, laborer, single, educated to secondary school level and of a poor economic background, held in detention on remand from 18.03.2012 until 17.09.2012 and in house detention from 17.09.2012 until 17.01.2013,
- 2. F. T.,** ..., born on ... in ..., residing at ..., Albanian with Kosovo citizenship, hairdresser, single, educated to primary school level and of a poor economic background, held in detention on remand from 18.03.2012 until 17.09.2012 and in house detention from 17.09.2012 until 17.01.2013;

charged under the Public Prosecutor's Indictment PP. 117/2011 dated 16.07.2012 as amended on 21.01.2013 with the criminal offence of *Unauthorised purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and analogues* under Articles 23 and 229(4)(1) of the Criminal Code of Kosovo (CCK) or Articles 31 and 273(2) of the Criminal Code of the Republic of Kosovo (CCRK);

convicted in first instance through the Judgment no. P 42/2012 of the Basic Court of Mitrovicë/a announced on 29.01.2013 (written judgment dated 25.03.2013) of the criminal offence of *Unauthorised purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and analogues, committed in co-perpetration by a group*, pursuant to Articles 31, 273(2) and 281(1.1) of the CCRK and Article 3(2) of the CCRK;

acting upon the following appeals filed against the Judgment of the Basic Court of Mitrovicë/a no. P 42/2012 dated 25.03.2013:

- **Appeal of defence counsel Vehbi Beqiri on behalf of the accused R. B., filed on 15.04.2013,**
- **Appeal of defence counsel Kadri Osaj on behalf of the accused F. T., filed on 10.04.2013;**

having reviewed the Opinion of the Appellate State Prosecutor no. 81/2013 dated and filed on 13.05.2013;

after having held a public session on 04.07.2013 in the presence of defence counsel Vehbi Beqiri and Eulex Appellate State Prosecutor Claudio Pala;

having deliberated and voted on 04.07.2013;

pursuant to Articles 389, 390, 394, 398, 401, 404(1) of the Criminal Procedure Code, Law no. 04/L-123 (CPC);

renders the following

JUDGMENT

The Appeal of defence counsel Vehbi Beqiri on behalf of accused R. B., filed on 15.04.2013 and the Appeal of defence counsel Kadri Osaj on behalf of accused F. T., filed on 10.04.2013, both against the *Judgment of the Basic Court of Mitrovicë/a no. P 42/2012 dated 25.03.2013* are hereby rejected as unfounded.

The Impugned Judgment of the Basic Court of Mitrovica no. P 42/2012 dated 25.03.2013 is hereby affirmed.

REASONING

I. Procedural history of the case

1. The Indictment no. PP 117/2011 against the accused **R. B., F. T., A. C., F. A. and L. K.** was filed on 16.07.2012 with the (then) District Court of Mitrovicë/a for the criminal offence of *Unauthorized Purchase, Possession, Distribution and sale of Dangerous Narcotic Drugs and*

Psychotropic Substances under Article 229 (4) 1) of the Criminal Code of Kosovo 2004 (CCK)¹ in conjunction with Article 229 (2) CCK. On 26.07.2012 the Confirmation Judge issued the Ruling on Confirmation of Indictment, confirming the Indictment in its entirety. The Confirmation Judge also granted the proposal of defence counsel Vehbi Beqiri and declared the record of the search of the house of **R. B.** conducted on 18.03.2012 to be inadmissible evidence.

2. The Indictment was amended during main trial orally on 21.01.2013 so that the reference to Article 23 CCK (co-perpetration) was added to the legal qualification. The factual description in the Indictment remained unchanged. The Trial Panel approved the amendment of the Indictment.²

3. The main trial against the six accused commenced on 21.01.2013 with further sessions held on 22.01.2013, 23.01.2013, 24.01.2013 and 28.01.2013. The Judgment was announced on 29.01.2013 (hereinafter: Impugned Judgment).

4. The Trial Panel found the accused **R. B.** and **F. T.** guilty of the criminal offence *Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances and Analogues* committed in co-perpetration by a group pursuant to Articles 3(2), 31, 273(2) and 281 (1.1.) of the Criminal Code of the Republic of Kosovo, Law no. 04-L-082 (hereinafter: CCRK).³ The Trial Panel sentenced **R. B.** to a fine of 30 EUR and imprisonment of 1 year and 6 months. The Trial Panel sentenced **F. T.** to a fine of 20 EUR and imprisonment of 1 year. The Trial Panel acquitted the accused **A. C.** and **F. A.** of the same criminal offence pursuant to Article 3(2) CCRK and Article 364(1.3.) CPC. The Trial Panel rejected the charge against **L. K.** pursuant to Article 3(2) CCRK and Article 363(1.1) CPC. The reasoned Judgment was finalized in March 2013 and is dated 25.03.2013. When referring to the Impugned Judgment the Court of Appeals will refer to the date of the reasoned Judgment.

5. The Court of Appeals is seized of two Appeals filed by defence counsel of the accused **R. B.** and **F. T.** respectively, against the Impugned Judgment.

6. The Court of Appeals held a public session in the case on 04.07.2013 in the presence of defence counsel Vehbi Beqiri and Eulex Appellate State Prosecutor Claudio Pala. The accused **R.B.** and **F.T.** and defence counsel Kadri Osaj did not attend the session. The Panel confirmed that both defendants and defence counsel were duly summoned to the session and proceeded with the session pursuant to Article 390 (4) CPC.

II. Submissions of the Parties

¹ Criminal Code in force from 06.04.2004 until 31.12.2012.

² See record of main trial, P 42/2012, session 21.01.2013, p. 7 (English version)

³ The Criminal Code entered into force on 01.01.2013.

The Appeals

(Appeal on behalf of R.B.)

7. Defence counsel Vehbi Beqiri does not specifically state in his Appeal on whose behalf the Appeal is filed, he simply uses the term defendant and states that the defendant was sentenced to 1 year and 6 months of imprisonment and ordered to pay a fine in the amount of 30 EUR. He only challenges the imposed sentence and proposes that the Court of Appeals amends the Impugned Judgment so as to render a more lenient sentence or an alternative measure. The defence counsel argues that the Basic Court failed to consider the following mitigating circumstances when deciding on the sentence:

- the remorse and acceptance of guilt by the accused,
- the conditions under which the criminal offence was committed, in particular regarding how the defendant obtained the quantity of narcotics,
- that the defendant played a relatively small role in the commission of the offence,
- that the defendant is of young age and lives in severe economic and social circumstances, and he is the only provider for his family,
- that the defendant cooperated with the authorities in the investigation, and with the Court,
- that the defendant's behavior since the criminal offence has been excellent,
- that the defendant has no prior criminal convictions and is not subject to any other criminal proceeding.

(Appeal on behalf of F. T.)

8. Defence counsel Kadri Osaj challenges the imposed criminal sanction. He proposes that the Impugned Judgment is annulled and the case returned for reconsideration to the Basic Court or the imposed sentence against **F. T.** is mitigated to 6 months of imprisonment or that the Court of Appeals renders a conditional sentence or punishment of fine. The defence counsel raises the following arguments:

- The Basic Court found **F. T.** guilty of the criminal offence under Article 273(2) CCRK, but the sentence was imposed on the basis of Article 273(1) and (3) CCRK. The minimum sentence pursuant to Article 273(2) CCRK is 2 years and by applying Article 74(3)3.10) and Article 76(1.4) CCRK the sentence can be mitigated to imprisonment of up to six months. The Trial Panel should have applied this provision and not Article 76 (1.3) CCRK, considering also that **F. T.** from the moment of his arrest pleaded guilty, has expressed remorse and has promised not to repeat the criminal offences.
- If mitigation of sentence to 6 months is not possible then the defence considers that an alternative measure should replace the remaining time of the sentence the accused still must serve pursuant to Articles 51 and 52 (4) CCRK.

Prosecution Response to the Appeals

9. The Eulex Basic Prosecution Office in Mitrovicë/a filed a response to both Appeals on 29.04.2013. The prosecutor in the case submits that the Appeals should be dismissed or alternatively rejected as unfounded.

10. The prosecutor submits that the Appeal of defence counsel Vehbi Beqiri fails to include the following information prescribed by the CPC: the name of the defendant (Article 361 (1.1.) CPC); description of the legal basis of the request (Article 376(1.5.) CPC), description of the legal basis for the remedy (Article 376 (1.7.) CPC), statement of the defendant that he consents to the request made by his defence counsel (Article 376 (1.8.) CPC), signature of the appellant (Article 382 (1.4.) CPC). The prosecutor, relying on Articles 376 and 382 CPC, argues that the Appeal should not be considered. In the alternative, the prosecutor submits that the Trial Panel properly considered the mitigating and aggravating circumstances, including that **R. B.** played a leading role in the criminal group.

11. The prosecutor submits that the Appeal filed by defence counsel Kadri Osaj lacks the following information: description of the legal basis for the remedy (Article 376 (1.7.) CPC), statement of the defendant that he consents to the request made by his defence counsel (Article 376 (1.8.) CPC), signature of the appellant (Article 382 (1.4.) CPC). The prosecutor, relying on Articles 376 and 382 CPC, argues that the Appeal should not be considered. The prosecutor also opposes the Appeal on the merits. He submits that the reference to Article 273(3) CCRK under the heading ‘sentencing’ is a typing error. It is clear this typing error did not influence the Basic Court’s decision on sentencing. Further, the defence counsel failed to acknowledge that the accused **F.T.** was found guilty of committing the criminal offence as a member of a group in accordance with Article 281(1.1.) CCRK, for which the minimum term of imprisonment is 3 years.

Motion of the Appellate State Prosecutor

12. The appellate state prosecutor supports the Response filed by the prosecutor in the case.

13. With regard to the Appeal filed by defence counsel of **F. T.**, the appellate state prosecutor submits the Appeal lacks a statement of being submitted with the consent of the accused. This is made evident by using the term “ex officio” in the Appeal. The appellate state prosecutor considers that the Appeal should be dismissed as impermissible pursuant to Article 400 CPC as read in conjunction with Article 376(4) CPC.

14. On merits, the appellate state prosecutor submits that, based on the charge and the reasoning of the Impugned Judgment, the reference to Article 273(3) CCRK is a typing error and emphasizes that enacting clause and reasoning must be read together as a whole.

15. With regard to the Appeal filed by defence counsel of **R. B.**, the appellate state prosecutor submits the appeal lacks the name of the defendant and a statement from the defendant that he consented to the request made by the defence counsel. He proposes that the Court of Appeals

dismisses the Appeal as impermissible. On merits, the appellate state prosecutor submits that all circumstances referred to in the Appeal, except the argument of young age, were considered by the Trial Panel and properly assessed. He considers the Appeal is unfounded.

III. Findings of the Court of Appeals

Competence of the Court of Appeals

16. The Court of Appeals is the competent court to decide on the Appeals pursuant to Articles 17 and 18 of the Law on Courts (Law no. 03/L-199).

17. The Panel of the Court of Appeals is constituted in accordance with Article 19 (1) of the Law on Courts and Article 3 of the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law no 03/L-053). Pursuant to the decision of the President of the Assembly of EULEX Judges no. 2013.OPEJ.0289-001 dated 03.07.2013, taken in accordance with Article 3.7. of the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, the Panel was composed of one EULEX Judge and two Kosovo Court of Appeals Judges.

Admissibility of the Appeals

(Admissibility of Appeal filed by defence counsel Vehbi Beqiri)

18. The Appeal is admissible.

19. The Appeal filed by defence counsel Vehbi Beqiri does not explicitly state the name of the accused on whose behalf it is filed. However, having considered the content of the Appeal and the information provided therein (sentence imposed, personal circumstances), and the fact that Vehbi Beqiri throughout the proceedings acted as defence counsel for **R. B.**, it is evident that the Appeal is filed on behalf of accused **R.B.**

20. The Appeal contains all the information specifically listed in Article 382 (1) 1.1.) to 1.4.) CPC,⁴ including the signature of the defence counsel.⁵ The Prosecutor's observation that the signature of the appellant is missing, is thus factually incorrect.

21. The Appeal does not contain a statement that it is filed with the consent of the accused, however the lack of such statement in the view of the Court of Appeals does not justify the dismissal of the Appeal. The Court finds that dismissal on this ground would be justified only if there was compelling data that an appeal was filed against the will of the accused. Nothing in the

⁴ An indication of the judgment against which the appeal is filed, the grounds for challenging the judgment under Article 383 CPC, a motion to reverse the challenged judgment in whole or in part, or to modify it and the signature of the appellant.³⁵

⁵ See original Albanian submission, duly signed and stamped at the bottom of the document, p. 2 of the Appeal.

respective Appeal or case file suggests that the accused **R.B.** did not support the filing of the Appeal on his behalf.

22. The Court of Appeals remarks that even if it did consider the Appeal lacked necessary information, it would not be entitled to dismiss it without first seeking supplementation pursuant to Article 442(4) CPC.

23. The Court of Appeals further notes that the provisions of the Code must be read as a whole and particular consideration given to specific provisions dealing with appeals against judgments. Whereas article 376(4) CPC in the general part of the chapter relating to all requests for legal remedies sets out that no objection or request shall be considered which does not comply with the respective Article, the Code includes specific provisions in respective subchapters on when the Court may dismiss the legal remedy.

24. Insofar appeals against judgments are concerned, the Code specifically lists the circumstances when an appeal against a judgment can be dismissed. These provisions must be considered *lex specialis* as opposed to the general clause included in Article 376(4) CPC. Articles 399 and 400 CPC prescribe that the appeal against a judgment can be dismissed only if it is belated or “if it is established that it was filed by a person not entitled to file an appeal or by a person who has renounced the appeal, or if withdrawal from the appeal is established or if it is established that after withdrawal the appeal was filed again or if the appeal was not permitted under the law”.

25. Other provisions of the subchapter, also point to the conclusion that the dismissal of an appeal against judgment is allowed only in limited circumstances. For example, pursuant to Article 382(2) CPC, the Court is not allowed to dismiss an appeal against the judgment filed by an unrepresented accused or injured party, even if the appellant does not comply with an instruction for supplementation, as long as the information needed can be readily discovered. Further, when an appeal against judgment contains nothing more than an indication of the judgment and the signature of the appellant, the Court pursuant to Article 394(2) CPC is still obliged to perform the *ex officio* review under Article 394(1) CPC and examine the decision on punishment, mandatory rehabilitation treatment and material benefit.

26. A systematic reading of the Code reveals that dismissal of appeals against Judgment is envisioned only exceptionally and the Code favors addressing the appeal on the merits as far as possible.

27. The Appeal filed by Defence Counsel Vehbi Beqiri includes the relevant information to be addressed and was filed by an authorized person. The appeal is admissible and will be addressed on the merits.

(Admissibility of Appeal filed by Defence Counsel Kadri Osaj)

28. The Appeal is admissible.

29. The Appeal of defence counsel Kadri Osaj is filed on behalf of accused **F. T.**

30. The Appeal contains all the information specifically listed in Article 382 (1) 1.1.) to 1.4.) CPC, including the signature of the defence counsel.⁶

31. The Appeal does not contain a statement that it is filed with the consent of the accused, however the lack of such statement in itself does not justify the dismissal of the Appeal, as already discussed above in relation to defence counsel Beqiri's Appeal. The Court finds that dismissal on this ground would be justified only if there was compelling data that an appeal was filed against the will of the accused. Nothing in the respective Appeal or case file suggests that the accused **F.T.** did not support the filing of the Appeal on his behalf.

32. Insofar the Prosecution moves also for the dismissal of this Appeal on information missing pursuant to Article 376 (1) CPC, the Court refers to its reasoning above under paras. 22-26. The same reasoning applies to this Appeal.

33. The Appeal filed by Defence Counsel Kadri Osaj includes relevant information to be addressed and was filed by an authorized person. The Appeal is admissible and will be addressed on the merits.

Findings on merits

Applicable Criminal Law

34. Pursuant to Article 3 of the CCRK, the law in effect at the time the criminal offence was committed is applied to the perpetrator. However, in the event of a change in the applicable law to a given case prior to a final decision, the law most favorable to the perpetrator shall apply.

35. Determination on most favorable law must not be based on an abstract or objective comparison of the laws in question, i.e. by determining which law is more lenient in abstract terms and overall. Instead, the court must look at the provisions applicable in the specific case to the specific perpetrator. By thoroughly comparing the provisions that would apply in the concrete case, the court can determine which law is more favorable for the specific accused. In other words, it is possible that a law that is objectively considered less lenient will be assessed more lenient in relation to a particular perpetrator and a particular crime. In order to determine which law is most favorable for the offender, the court must take into account various elements and differences between the laws, as they relate to the offender in question.⁷

⁶ See original Albanian submission, duly signed and stamped at the bottom of the document, p. 2 of the Appeal.

⁷ See http://wcjp.unicri.it/deliverables/docs/Module_5_Domestic_Application_of_International_Law.pdf (last accessed 3.09.2013) for an overview:

36. Accused **F.T.** and **R.B.** were indicted with the criminal offence of *Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances* pursuant to the Criminal Code of Kosovo as the law applicable in 2012 when the criminal offence was committed. On 01.01.2013 a new Criminal Code of the Republic of Kosovo entered into force. The Trial Panel in its Judgment dated 25.03.2013 applied the new Criminal Code (in force since 01.01.2013) to the defendants, concluding the latter is more favorable for the accused.

37. The reasoning of the Trial Panel on applicable law is scarce and in the view of the Court of Appeals does not support the conclusion reached. However, the Court of Appeals, albeit on different grounds, also concludes that the new CCRK is the law more favorable for the accused **R.B.** and **F.T.**.

38. The Trial Panel's comparison of both laws is limited to the analysis of the term "to broker" in Article 273(2) CCRK.⁸ In comparison to Article 229(2) CCK, Article 273(2) CCRK namely includes three additional actions that are criminalized under the new provision: 'brokering', 'dispatching' and 'dispatching in transit'. Whereas under the old Code this type of action would arguably have been prosecuted as a form of assistance, under the new Code it is criminalized in its own and amounts to *commission* of the respective criminal offence. The scope of Article 273(2) CCRK is therefore broader than that of Article 229(2) CCK and as such *not* more lenient for the perpetrator. In other words, whereas a defendant brokering the sale would arguably only be charged with assistance in the criminal offence, under the new Code he would be charged with committing the criminal offence. The reasoning of the Trial Panel in this regard is therefore flawed.

39. The Court of Appeals however notes that the inclusion of brokering as a form of commission is not material for determining the most favorable law in the case at hand. Both accused, according to the factual findings of the Trial Panel which are undisputed on appeal, have namely *transported* the narcotics, transportation being an action criminalized both under the CCRK and CCK.⁹

⁸ The Trial Panel reasons as follows: "The Court considers that "to broker" under Article 273(2) of the CCRK can cover a situation where an agreement is reached between two principals, it is not necessary for the activity to involve the perpetrator only as an intermediary in any agreement between two other principals. In English the verb "brokers" means to arrange or negotiate an agreement while the Albanian version of the CCRK refers to "ndërmjetëson" which translates as "mediates". This means the activity is broader than only that carried out by a broker or intermediary and can involve two principals to an agreement." Para. 39 of the Impugned Judgment.

⁹ The Court of Appeals remarks that if defendant **F.T.** would have only been found of brokering the sale, in such case, at least with regard to him the CCK would be the more lenient and thus applicable law, since the CCK did not specifically criminalize brokering as does Article 273(2) CCRK.

40. The Court of Appeals notes the difference in prescribed punishments between Article 273(2) CCRK and Article 229(2) CCK.¹⁰ However, these are irrelevant as the defendants were found to have committed the criminal offence as members of a group, under the qualified form of the criminal offence. This is a factual finding uncontested in the proceedings. Accordingly, the comparison of prescribed punishments must be made on the basis of the punishment prescribed for the qualified form of the criminal offence. The punishment is the same under both laws - a fine and imprisonment from three (3) to fifteen (15) years (see Article 229(4)1) CCK and Article 281(1.1.) CCRK).¹¹

41. **R. B.** and **F. T.** pleaded guilty to the criminal offence. Specific relevance is given to a new provision, previously not included in the CCK, relating to accused who plead guilty or enter into a plea agreement. Pursuant to Article 75(1.3.) CCRK, the court in such cases is not constrained by the limits of mitigation of punishment provided in Article 76 CCRK. The court can render a sentence that is lower than the generally prescribed limits of mitigation set out in the law. The Court of Appeals finds this provision decisive in determining the most favorable law in the case at hand.

42. Since pursuant to Article 75(1.3) CCRK the punishment for an accused who has entered a guilty plea can be mitigated below the limits prescribed by Article 76 CCRK, the new CCRK is more favorable for accused **R.B.** and **F.T.**. The law in force at the time of the commission of the offence did not anticipate such possibility.

43. The Court of Appeals notes that the Trial Panel reached the same conclusion, albeit with different reasoning which, as elaborated above, is not supported by the Court of Appeals. The Trial Panel did not refer at any point to Article 75(1.3.) CCRK which the Court of Appeals finds most relevant in the assessment.

44. The Court of Appeals reiterates for future reference that the courts must perform the assessment of applicable law carefully and provide clear reasoning, in particular when they apply the Code not in force at the time of the criminal offence pursuant to the exception under Article 3(2) CCRK. The Court of Appeals finds that such clear assessment is lacking in the Impugned Judgment, although the ultimate conclusion of the Panel is correct.

Appeal on behalf of accused R.B.

¹⁰ The new Code prescribes a longer term of imprisonment for the respective criminal offence than did the previous Code. Article 273(2) CCRK prescribes a punishment of fine and a term of imprisonment from two (2) to twelve (12) years, whereas Article 229(2) CCK prescribed a punishment of fine and imprisonment from one (1) to eight (8) years.

¹¹ The Court of Appeals notes that whereas the CCK included the qualified form of the criminal offence (perpetrator acting as a member of the group) in the same Article as an additional paragraph, the new Code opted for a different systematic approach. In the current Code the qualified forms of the criminal offences in the chapter are included in a separate Article (Article 281 CCRK), instead as additional paragraphs under each of the respective Articles. The different systematic approach however has no impact on the substance of the provision. Article 229(4)1) CCK fully corresponds to Article 281(1)1.1.) CCRK.

45. The Trial Panel mitigated the accused's punishment below the limits provided for in the law. Reference to Article 74(3.10.) CCRK in the Impugned Judgment would imply that the Trial Panel considered the guilty plea to be the circumstance on which the Trial Panel based its conclusion on said mitigation. The Trial Panel however makes no reference in the Impugned Judgment to Article 75(1.3.) CCRK, which enables the court to mitigate the punishment below the limits set out in Article 76 CCRK. The Trial Panel in fact did so with regard to the fine imposed. In determining the punishment of imprisonment, the Trial Panel stayed within the constraints of Article 76(1.3.) CCRK and imposed a sentence of imprisonment of one year and six months.

46. The Appeal alleges that the Trial Panel failed to consider a number of relevant mitigating circumstances when determining the punishment for the accused.

47. The Trial Panel considered the following circumstances as mitigating circumstances: the acceptance of guilt by the accused, his co-operation with the investigation, that he does not have prior convictions, the type and quantity of the substances seized.

48. The accused did not fully cooperate with the Police and Prosecution. Specifically, the accused pleaded guilty to his involvement, but has not cooperated with the investigation into the identity of the supplier of drugs, as also pointed out by the Trial Panel. The accused thus cannot be credited with full cooperation with the investigation.

49. The Court of Appeals concurs with the evaluation of the Trial Panel that the accused **R.B.** played a leading role in organizing the purchase and delivery of the prohibited substances. This is based on the factual situation established by the Trial Panel and accepted by the accused. The notion that the accused played a minor role in the criminal offence is thus rejected. Likewise, the Court of Appeals rejects the argument that the accused was of a young age when he committed the criminal offence. The accused was 36 years old at the time, which is not a young and impressionable age that could be treated as a mitigating circumstance.

50. The alleged economic circumstances of the accused also cannot be considered a mitigating circumstance. The accused is a healthy individual with high school education, thus fully capable of providing for himself by finding lawful employment instead of seeking income by resorting to criminal offences.

51. With regard to the accused's behavior after the criminal offence, the Court of Appeals notes that the Trial Panel already considered as mitigating circumstances the accused's guilty plea, his cooperation with the authorities, and his acceptance of criminal responsibility. The Court of Appeals finds the mentioned mitigating factors are all demonstrations of the accused's behavior after the criminal offence, thus the latter cannot be separately considered as an additional mitigating circumstance.

52. The Court of Appeals finds that that the Trial Panel correctly assessed the mitigating circumstances in the case and imposed a proportionate sentence in accordance with the law.

53. Insofar the imposed term of imprisonment is concerned, the Court of Appeals concurs with the Trial Panel that imprisonment of one year and six months is proportionate to the gravity of the offence and the conduct and circumstances of the offender. It is again noted that the sentence is substantially reduced. In the view of the Panel any further reduction, although allowed by law, would not be justified considering that the accused played a prominent role in a criminal group involved in transport and sale of narcotics.

54. The Court of Appeals therefore affirms the Trial Panel's decision regarding the imposed sentence.

Appeal on behalf of accused F. T.

55. The Court of Appeals rejects the submission that the Trial Panel based its decision on Article 273(3) CCRK instead of Article 273(2) CCRK. The Court of Appeals confirms that the enacting clause of the Impugned Judgment dated 25.03.2013 in the sentencing part contains reference to Article 273(3) CCRK, however this is evidently a typing error. Elsewhere in the Impugned Judgment (e.g. enacting clause in the finding of guilty and in the reasoning) the Trial Panel at all times refers to Article 273(2) CCRK. Paragraph (3) of Article 273 CCRK deals with import and export of the prohibited substances and this was never considered or referred to by the Trial Panel, thus clearly the reference to that paragraph in the sentencing part of the enacting clause is a typing mistake.

56. The Court of Appeals also clarifies that the accused did not enter into a plea agreement with the prosecution, but pleaded guilty in the proceedings before the Court. The references in the Appeal to a 'plea agreement' are therefore misplaced.

57. Finally, the Appeal fails to acknowledge that the accused was found guilty of the qualified form of the criminal offence, committed in a group. The minimum prescribed term of imprisonment for this criminal offence is not two years but three years. Article 76(1.3.) CCRK allows for the punishment to be mitigated to imprisonment of up to one year, not six months as argued by the defence counsel. It is noted however, as elaborated above, that the court in this case by virtue of Article 75(1.3.) CCRK is not constrained by mitigation limits prescribed in Article 76 CCRK.

58. The Court of Appeals however finds that any further reduction of the term of imprisonment would be disproportionate and would not satisfy the objectives of the punishment. The Court of Appeals notes that the minimum term of imprisonment prescribed for this criminal offence is three years and the maximum is fifteen years, thus a mitigation to one year of imprisonment is already generous. The Court of Appeals notes that the criminal offence for which accused **F.T.**

was convicted was directed against public health and he committed the offence as a member of a group, showing an organized activity connected with the distribution of narcotics.

59. The Court of Appeals concurs with the Trial Panel regarding the imposed sentence and does not find a further reduction or an alternative sentence proportionate to the criminal offence committed. The Trial Panel's decision regarding the imposed sentence is affirmed.

Conclusion

60. In accordance with the above findings, the Court of Appeals rejects the Appeals challenging the imposed criminal sentence, as unfounded.

61. The Court of Appeals also finds no violations pursuant to Article 394 CPC.

62. Accordingly, the Court of Appeals rejects both Appeals and affirms the Impugned Judgment pursuant to Article 401 CPC.

63. It is therefore decided as in the enacting clause.

Done in English, an authorized language.

Reasoned Judgment completed on 03.09.2013.

Presiding Judge

Annemarie Meister

EULEX Judge

Panel member

Tonka Berisha

Judge

Panel member

Vahid Halili

Judge

Recording Officer

Beti Hohler
EULEX Legal Officer

COURT OF APPEALS OF KOSOVO
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04 July 2013