

Supreme Court of Kosovo
Ap-Kz no. 325/2011
19 June 2012

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Dr. Horst Proetel as Presiding Judge, EULEX Judge Gerrit-Marc Sprenger and Supreme Court Judge Emine Mustafa, assisted by Legal Officer Chiara Rojek in the capacity of recording clerk,

In the criminal case against R. K., born on *date of birth* ... in *Village place* ..., Municipality of Plava, father's name A. K., mother's maiden name N. K., Kosovo citizenship, currently residing at *address* ..., Pejë/Peć, owner of company ... (businessman), married and father of four children, commercial secondary school, literate and poor financial status,

And two other Defendants,

Charged as per in the Indictment PP 480-5/2007 filed on 17 July 2007 and confirmed by Ruling KA no. 132/08 dated 15 February 2008, with the criminal offence of Assistance in Abusing Official Position or Authority contrary to Articles 25 and 339 Paragraphs 1 and 3 of the Provisional Criminal Code of Kosovo (PCCK),

Convicted in first instance by Judgment P no. 403/2007 of the District Court of Prishtinë/Priština dated 23 June 2010 of the criminal offence of Assistance in Abusing Official Position or Authority contrary to Article 339 Paragraph 3 in connection with Paragraph 1, and Article 25 of the Criminal Code of Kosovo (CCK), and sentenced to a suspended sentence of six (6) months of imprisonment if the Defendant does not commit another criminal offence for the period of three (3) years and to a compensation of damage up to the amount of 28.400 Euros payable within two (2) years starting from the date when the judgment becomes final,

Acting upon the Appeal filed on 6 June 2011 by Defence counsel A. R. on behalf of Defendant R. K. against the Judgment P no. 403/2007 of the District Court of Prishtinë/Priština dated 23 June 2010, and taking into consideration the Reply to the Appeal of the Special Prosecutor Office of Kosovo (SPRK) filed on 1 July 2011 and the Opinion of the Office of the State Prosecutor of Kosovo (OSPK) to the Appeal filed on 26 September 2011,

After having held a public session on 19 June 2012 in the presence of Defendant R. K., Defence Counsel A. R. and Prosecutor Judit Tatrai representing the OSPK, having deliberated and voted on the same day,

Pursuant to Articles 420 and following of the Kosovo Code of Criminal Procedure (KCCP), issues the

JUDGMENT

The Appeal filed on 6 June 2011 by Defence Counsel A. R. on behalf of Defendant R. K. against the Judgment P no. 403/2007 of the District Court of Prishtinë/Priština dated 23 June 2010 is hereby **GRANTED**.

The Judgment P no. 403/2007 of the District Court of Prishtinë/Priština dated 23 June 2010 is hereby **MODIFIED** pursuant to Article 420 Paragraph 1 sub-paragraph 4 as read with Article 426 Paragraph 1 of the KCCP.

Defendant R. K., personal data above, is hereby **ACQUITTED** of the charge of Assistance in Abusing Official Position or Authority contrary to Article 339 read in conjunction with Article 25 of the CCK, pursuant to Article 390 Paragraph 3 of the KCCP.

All the costs related to the criminal proceeding against the Defendant R. K. shall be paid from the budgetary resources pursuant to Articles 99, 100 and 103 of the KCCP.

REASONING

I. Procedural background

On 17 July 2007, the Indictment PP 480-5/2007 was filed by the UNMIK Public Prosecutor, charging the Defendants Sh. Sh. and S. H. B. with the criminal offences of Abusing official position or authority, in co-perpetration, contrary to Articles 23 and 339 Paragraphs 1 and 3 of the PCCK (Count 1), and Fraud in Office, in co-perpetration, contrary to Articles 23 and 341 of the PCCK (Count 3). R. K. was charged with Assistance in Abusing official position or authority contrary to Articles 25 and 339 of the PCCK (Count 2).

By Ruling KA no. 132/08 dated 15 February 2008, the Indictment was confirmed in its entirety providing several modifications. In particular, Count 2 reads as 'Assistance in Abusing official position contrary to Articles 25 and 339 Paragraphs 1 and 3 of the PCCK, punishable under Article 65 Paragraph 2 of the PCCK'. The confirmation Judge furthermore accepted some corrections of technical relevance.

The main trial commenced on 3 August 2009. On 23 June 2010, the District Court of Prishtinë/Priština issued the Judgment P no. 403/2007 by which R. K. was found guilty of having committed the criminal offence of Assistance in Abusing official position or authority contrary to Article 339 Paragraph 3 in connection with Paragraph 1 and Article 25 of the CCK, because "[b]etween 5 February 2004 and 12 November 2004, in Prishtina R. K. in connection with procurement of 90 Bridgestone tires by the Office of the President of Kosovo, intentionally assisted Sh. Sh. who in her capacity as an official persons and with the intent to obtain an unlawful material benefit exceeding 5000 Euro for him, abused her official position in the Office of the President of Kosovo, exceeded the limits of her authorization and did not execute her official duties as required by the law of Public Procurement,

to wit , R. K. prepared and submitted grossly inflated bids, false invoice and fraudulent documents in the course of the said procurement procedure and after seeking and receiving payment for tires far in excess of the true value of tires and in advance of their delivery to OPK in violation of the law of procurement , assisted in the concealing of the true location of the tires once delivered to Prishtina and prepared false documentation regarding the cost of the transport of the tires, by which he caused financial damage in the amount of 28.400 Euros.”

The Court imposed to R. K. a suspended sentence of six (6) months of imprisonment if the Defendant does not commit another criminal offence for the period of three (3) years, pursuant to Article 41 Paragraph 1 items 1, Articles 42, 43 and 44 Paragraphs 1, 2 and 3 and Article 66 Paragraph 2 of the CCK. Additionally, he was jointly and severally obliged to compensate the damage caused to the Office of the President of Kosovo (OPK) up to the amount of 28.400 Euros within 2 (two) years starting from the date when the judgment becomes final. The two other Defendants were convicted and sentenced.¹

On 6 June 2011, Defence Counsel A. R. filed an Appeal on behalf of the Accused R. K. The Special Prosecutor (SPRK) prosecutor filed a Reply to the Appeal on 1 July 2011. The Opinion of the OSPK was registered with the Supreme Court Registry on 26 September 2011.

II. Submissions of the parties to the criminal proceedings

A. Appeal of Defence counsel A. R. on behalf of Accused R. K.

The Defence proposes to the Supreme Court of Kosovo to modify the challenged Judgment as to acquit the Accused, or to annul the Judgment and send back the case to the First Instance for re-trial. He bases the Appeal on the following grounds: substantial violations of the provisions of the criminal procedure, erroneous or incomplete determination of the factual situation, violation of the criminal law, decision on criminal sanctions and decision on property claim.

Substantial violations of the provisions of the criminal procedure under Article 403 Paragraph 1 item 12 and Paragraph 2 of the KCCP

The Defence alleges that:

- The enacting clause of the challenged Judgment is inconsistent with the grounds of the judgment.
- The Judgment lacks of reasoning on the decisive facts.
- The decisive facts presented in the enacting clause are inconsistent with those presented in the reasoning part of the judgment with regard to the pieces of evidence collected and presented during the main trial.

¹ The District Court ordered the Defendants to pay the costs of the proceedings pursuant to Article 102 paragraph 1 of the KCCP.

In the Defence's view, the allegations that R. K. prepared fake invoices and falsified documents and that he assists in concealing the tires after their delivery, are not reasoned in the enacting clause, and are not supported by evidence. Finally, it was not proven that the Accused has caused any material damage. Hence, there are no grounds to support ordering him to compensate the damage up to 28,400 euros.

Erroneous or incomplete determination of the factual situation under Article 405 Paragraphs 2 and 3 of the KCCP

The Defence alleges that the Judgment is based on an erroneous determination of the facts. As a consequence, the First Instance Court reached wrongful conclusions. Lawyer R. stresses that:

- The allegations that R. K. forged documents do not stand.
- The Defendant fulfilled his obligations in accordance with the contract signed, without complaint from the OPK.
- He purchased ten tires for the personal needs of Sh. Sh.
- He was not involved in the storage, or even in the concealment of the tires.

This account is corroborated by several witness statements. Lastly, the Defence mentions the health condition of R. K.

Violation of the criminal law under Article 404 Paragraphs 2 and 3 of the KCCP

The Defence claims that the First Instance Court committed a breach of the criminal law to the detriment of R. K., as a consequence of the above-cited violations. It has not been proven that he has committed the criminal offence for which he was convicted. The First Instance Court did not act lawfully when it ordered the Defendant to compensate the damage. Moreover, R. K.'s health condition has worsened since he retired, and he cannot even afford to pay for his basic needs.

Decision on criminal sanctions and on property claim

The Defence alleges that the decision on punishment of the First Instance Court is illegal. The Defence also contends the decision on property claim.

B. Reply of the SPRK to the Appeal of the Defence

The Special Prosecutor proposes to the Supreme Court to reject the Appeal as ungrounded and to affirm the First Instance Judgment.

C. Opinion of the OSPK

The State Prosecutor suggests to the Supreme Court of Kosovo to:

- Annul the impugned Judgment and return the case to the first instance, only the part related to the decision on property claim pursuant to Article 424 Paragraph 5 of the KCCP;
- Modify the Judgment by removing from the enacting clause the sentence “assisted in the concealing of the true location of the tires once delivered in Prishtina” as per in Articles 424 Paragraph 4 and 426 Paragraph of the KCCP; and
- Reject all the other grounds as unfounded.

Erroneous or incomplete determination of the factual situation under Article 405 of the KCCP and violation of the criminal law under Article 404 of the KCCP

The State Prosecutor is of the opinion that the First Instance Court thoroughly assessed the evidence presented by the parties, including the witness statements. The OSPK puts forward that: R. K. had no previous experience in tires supply, and was helped by Sh. Sh. to place the two bids; the price of the tires was grossly inflated to grant the Defendant unreasonable material benefit at public expenses; R. K. submitted false invoices and fraudulent documents in the course of the procurement procedure; the only reason for the purchase of tires was the urge to spend as much public money as possible with the aim of obtaining an unlawful material benefit for Defendant K.

Substantial violations of the provisions of the criminal procedure under Article 403 of the KCCP and violation of the criminal law under Article 404 of the KCCP

The OSPK finds the contention that there is no evidence to support that R. K. presented fake invoices or falsified documents, without merit. It was proven that R. K. did so, and he was not able to provide any explanations as to the issuance of two transport invoices to two different companies for the same load of tires. This fact confirms the Defendant’s intention to assist Sh. Sh. by producing false documents in order to justify highly unreasonable prices. The State Prosecutor considers the assertion concerning the concealment of tires grounded as no reasoned explanation on how and why the convicted person assisted the other co-Defendants in such concealment can be found in the Judgment.

Decision on criminal sanctions and on the property claim under Article 406 of the KCCP

The OSPK agrees with the conclusions of the First Instance Court in respect to the decision on punishment. As for the decision on property claims, the State Prosecutor notes that the District Court imposed on R. K. and Sh. Sh. the compensation of loss in the amount of 28,400 Euros. Still, the OSPK could not find a property claim in the case file, or any reasoned explanation in the Judgment relating to the calculation of the compensation. There is only a 14 January 2010 letter sent by the OPK to the Presiding Judge in

which mention is made of 28,400 Euros as the damage suffered. In the State Prosecutor's opinion, the First Instance Court should have elaborated on this in the reasoning of the judgment, notably considering that the assessment of the market price of tires made by the expert witness heard by the Trial Panel is different from that one in the letter.

III. Findings of the Supreme Court of Kosovo

The Appeal filed by the Defence is admissible.

The Supreme Court Panel finds the Appeal grounded. The Defendant R. K. is acquitted of the charge of Assistance in Abusing Official Position or Authority contrary to Article 339 read in conjunction with Article 25 of the CCK, pursuant to Article 390 Paragraph 3 of the KCCP.

A. Competence of the Supreme court of Kosovo

The Supreme Court has competence to decide on this Appeal pursuant to Article 26 Paragraph 1 and Articles 398 and following of the KCCP. The Supreme Court Panel has been constituted in accordance with the Law on the jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo dated 13 March 2008 and the guidelines on case allocation system.

B. Admissibility of the Appeal

The verdict was announced on 23 June 2010. The Accused R. K. received the challenged Judgment on 21 May 2011. The delivery slip as to Lawyer A. R. does not bear any date. The Appeal of the Defence was sent by mail on 1 June and registered in court on 6 June 2011. It was communicated to the SPRK Prosecutor on 22 June. A Reply to the Appeal was filed on 1 July 2011. The Appeal is timely filed by an authorized person pursuant to Article 398 Paragraph 1 and Article 399 Paragraph 1 of the KCCP.

C. Merits of the Appeal

The Supreme Court Panel finds the Appeal founded on the grounds of erroneous determination of the factual situation under Article 405, a violation of the criminal law under Article 404, a substantial violation of the provisions of the criminal procedure under Article 403 Paragraph 1 item 12 and on the decision on criminal sanctions and property claim under Article 406 of the KCCP.

The Supreme Court finds that the First Instance Court did not properly determine the factual situation in respect to the alleged inflated invoices and to the previous contact between Sh. Sh. and R. K., thus committing a violation under Article 405 Paragraph 2 of the KCCP. The facts established by the District Court do not suffice to establish that Defendant R. K. has unlawfully assisted Sh. Sh. in committing the offence under Article 339 Paragraph 3 read with Article 25 of the CCK.

In the Supreme Court's opinion, the District Court has drawn erroneous conclusions from the evidence available, notably the findings of the expert as to the value of the tires. In the case at hand, the market price of the tires is decisive, not their value. No accurate data was collected on the average price for such tires which were not on the market in Kosovo at the relevant time, and had to be assessed in other neighbouring countries. In his Expertise dated 22 January 2010, the Expert Xh. K. proceeded to a comparison of the prices in Kosovo, Macedonia and Slovenia. The invoice of *company name* ... for 90 tires amounted 47,820 euros. He estimated that the market prices for 90 tires would vary between 18,955 and 24,094 euros. He reached the conclusions that the Defendants abused of their official position damaging the Kosovo budget up to 23,790.80 euros.²

The amount suggested by the Expert, though may be of accuracy, does not include the expenditures to be added on the purchase, e.g. costs of transport and taxes. Consequently, the purchase price on which the District Court has based its further conclusions is not decisive. These additional costs should have been taken into consideration in the calculation of the total estimation on the purchase of the 90 tires.

In addition, as rightly pointed by the State Prosecutor, the letter filed on 14 January 2010 by the Division of Judicial representation of the Ministry of Justice with the Presiding Judge of the Trial Panel regarding the material damage suffered by the OPK due to the purchase of the tires cannot be considered as accurate. To reach the amount of 28,400 euros, the Division based its calculation on the invoice dated 14.12.2005, no. 70023918, originated from the prices of Eurogoma in 2004,³ and concluded that the difference between the inflated price and the real price is of 28,400 Euros. In addition, doubts arise on whether this letter can be considered as a property claim within the meaning of Chapter XII of the KCCP. Worth mentioning is also the confusion shown by the OPK Representative during the trial as to his intent to file a property claim and the amount of the damage suffered. The Presiding Judge repeatedly drew his attention to have a property claim filed. On 12 October 2009, the OPK Representative was reminded that the motion for property claim can be filed no later than the end of the main trial.⁴ On 14 May 2010, the Presiding Judge mentioned that the OPK Representative filed a motion related to the financial loss estimated to 20,000 Euros, whereas the Prosecutor declared a financial loss of 40,000 euros. The Presiding Judge asks the Representative to verify this point with his superiors for the next session, which was not done according to the court records.

² See financial expertise of Expert Xh. K., N.I. *company name* ..., Working Unit Expertise, dated 22 January 2010, reference no. 28/2009 (Binder Main trial verdict)

³ Letter dated 14 January 2010 by the Division of Judicial representation of the Ministry of Justice: "the price for summer tires in amount of 200 €, whereas for winter tire in amount of 223 € of the size 235/65-R17, also based on the year 2009, a price of 210 € for summer tires and 223 € for winter tires according to the contract was for winter tires 40 x 588 = 23520, summer tires 50 x 486 = 24300 €, which cost 47820 € comparing with the real price ZPRK proposed that based on the market price winter tires 40 x 223 = 8920 € and summer tires 50 x 210 = 10500 = 19420 € in total."

⁴ See case P no. 403/2007, District court of Prishtinë/Priština, minutes of main trial dated 12 October 2009, 6 January 2010; minutes of confirmation hearing dated 13 February 2008, pages 2 and 3

In the Supreme Court's view, the District Court Panel as well reached wrongful conclusions in respect to the intent of R. K. to assist in the commission of the criminal offence under Article 25 of the CCK. The findings of the First Instance Court concerning the affiliation of the Defendant and the official person, Sh. Sh., are not convincing. The contested Judgment lacks of reasoning when stating "R. K. knew Sh. Sh. long before the he put in bids for procurement and he knew that Sh. Sh. was an official person."⁵ The District Court has not established the intent and the knowledge of R. K. concerning the misuse of Sh. Sh. authorizations in favour of the Defendant.

The only reference to a participation of R. K. in a tender procedure on the University Library and Sh. Sh.'s support to help him in applying can at best provide explanations of the intent of the latter to act to the benefit of the Defendant. However, it is noted that this bid was not won by R. K. The fact that Sh. Sh. purchased ten tires for her private use from R. K. may only underline her readiness to favour the Defendant, but does not allow drawing any reasonable conclusions on K.'s criminal intent. The extensive reasoning of the challenged Judgement is related to the role of Sh. Sh. The intent of the Defendant to assist Sh. Sh. in unlawful manipulations of the tires bid procedure has not been proven.

Furthermore, the Supreme Court disagrees with the District Court's findings mentioned in the enacting clause that "...R. K. prepared and submitted grossly inflated bids, false invoice and fraudulent documents in the course of the said procurement procedure and after seeking and receiving payment for tires far in excess of the true value of tires and in advance of their delivery to OPK in violation of the law of procurement, assisted in the concealing of the true location of the tires once delivered to Prishtina...". The First Instance Court did not make any mention in the reasoning of the Judgment on the involvement of R. K. in the concealment of the tires.⁶ Out of the case file, it is established that E. L. was tasked by E. H. to arrange the storage of the tires, upon the request of Sh. Sh.,⁷ and that the Defendant has not participated in any means in their concealment.

Moreover, the Supreme Court Panel finds that the statement of grounds in the enacting clause is unclear in respect to the amount of the compensation and considers that a violation of Article 403 Paragraph 1 item 12 of the KCCP was committed.

⁵ See case P no. 403/2007, District court of Prishtinë/Priština, First Instance Judgment, page 12

⁶ See case P no. 403/2007, District court of Prishtinë/Priština, First Instance Judgment, 23 June 2010, page 24: "The witness **E. H.** as a chief of logistic in the Office of the President of Kosovo, [...] This witness confirmed the information that the tires had been received round October or November 2004 and stored in private premises of F. K. the former bodyguard of the President due to lack of space in the warehouse. The reason for sending the tires to that specific place was that "*We should not have to pay rent.*" The witness also mentioned that the inventory list of the tires in question was written up and that 20 new tires were used to replace the old ones."; *ibid* page 31

⁷ See Report on search dated 28.07.2006, case no. 2006 ZX 001, search done at F. K.'s house and Sh. Sh.'s private and business premises (same location), 77 tires (bridgestone and continental brands) were stored in a room in a flat of F. K. (Binder UNMIK investigation folder 1/9, page 480); See case P no. 403/2007, District court of Prishtinë/Priština, minutes of main trial, 15 October 2009, pages 9 and fol., testimony of E. H.; minutes of main trial dated 22 October 2009, pages 14 and fol., testimony of E. L., pages 24 and following (Blue binder EULEX Sh. Sh., from Indictment)

The District Court sentenced R. K. (and Sh. Sh.) to “jointly and severally compensate the damage caused to OPK at the amount of 28.400 euros within 2 (two) years starting from the date when the judgment becomes final”.⁸

This part of the enacting clause is confusing and wholly unclear as the Trial Panel ordered the payment of the compensation of damage under the part on the sentencing. The Supreme Court notes that clarity of the enacting clause is of utmost importance, and a flawless distinction is to be made between the part on sentencing and the one referring to the property claim. Furthermore, there is no relevant provision mentioned in the enacting clause, as base of the imposition of a compensation of damage up to 28,400 euros. At last, no precise calculation can be found in the reasoning of the contested Judgment.⁹

A violation of the criminal law under Article 404 Paragraph 4 of the KCCP similarly occurred. The wrongful determination of the amount of damage also has an impact on the legal designation of the criminal offence under Article 339 Paragraph 3 of the CCK, as it was not firmly established that the material benefit made by the Defendant exceeded 5,000 euros. As this fact has not been properly determined at the first instance level, the correct provision applicable in the instance may have been exclusively Article 339 Paragraph 1 of the CCK, exempt from the aggravating circumstance foreseen under Paragraph 3.

The Supreme Court finds that the First Instance Court wrongfully decided on the criminal sanctions and the property claim as a consequence of the aforementioned violations, thus committing a breach under Article 406 of the KCCP. This Panel also notes that according to the challenged Judgment, the compensation of damage should be paid ‘jointly and severally’ by R. K. and Sh. Sh., even though R. K. was only convicted for Assistance in Abusing official position or authority under Article 25 of the CCK.

The undersigned Panel therefore concludes that, having regard to the evidence presented during the main trial, it cannot be established that R. K. has committed the criminal act for which he is charged. As no new evidence can be gathered at the first instance level and the repetition of evidence will be superfluous, the undersigned Panel finds that sending back the case to the first instance for re-trial will not serve the interests of the Defendant or the interests of justice.

⁸ See case P no. 403/2007, District court of Prishtinë/Priština, First Instance Judgment, 23 June 2010, page 5

⁹ See case P no. 403/2007, District court of Prishtinë/Priština, First Instance Judgment, 23 June 2010, page 12: ““The court established the following facts: [...] The market price of the said tires was in fact much lower than the price offered in these two tenders. According to the opinion of expert witness Xh. K. assuming reasonable profit margin for the importer, the overall value of 90 Bridgestone winter and summer tires would be €24.029,20. Collation of this value with the overall amount paid by the Office of the President of Kosovo - €47.820,00 leads to one logical conclusion that the price was grossly inflated, taking the possibility to make substantial profit at public expense, despite the fact that the Office of the President of Kosovo did not have appropriate premises at its disposal.”; see also pages 33, 34 and 36

Considering the above, the Supreme Court of Kosovo has to apply the principle *in dubio pro reo* in the instance, and acquits the Defendant pursuant to Article 390 Paragraph 3 read with Articles 420 Paragraph 1 sub-paragraph 4 and 426 Paragraph 1 of the KCCP. The established facts do not suffice to establish the guilt of the Defendant R. K.

The Supreme Court Panel furthermore holds that Article 419 of the KCCP is not applicable as the reasons which governed its decision are of ‘a purely personal nature’ and therefore cannot be applied to the advantage of the other Defendants.

The decision on the costs of the proceedings is based on Articles 99 and following of the KCCP. The Defendant has been acquitted and has to be released from the payment of the costs of the first instance proceedings.

Therefore it has been decided as per in the enacting clause.

Presiding Judge:

EULEX Judge Horst Proetel

Panel member:

Supreme Court Judge Emine Mustafa

Panel member:

EULEX Judge Gerrit-Marc Sprenger

Recording Clerk:

Legal officer Chiara Rojek

SUPREME COURT OF KOSOVO

19 June 2012

Ap – Kz 325/11

Prishtinë/Priština