

COURT OF APPEALS
PRISTINA

Case number: PAKR 234/14

Date: 25 June 2015

Basic Court: Gjilan, PKR 529/13

Original: **English**

The Court of Appeals, in a Panel composed of Kosovo Court of Appeals judge Xhevdet Abazi, as presiding judge and as panel members Kosovo Court of Appeals judge Tonka Berishaj and EULEX Court of Appeals judge Roman Raab, reporting judge, assisted by Alan Vasak, EULEX legal officer, acting in the capacity of a recording officer,

in the case concerning the defendants:

B.S., father's name Q., ..., Kosovo Albanian,

H.K., father's name M., born on 20 April 1965 in Koretice, Kosovo Albanian,

charged with indictment PPS 57/2011 of the Special Prosecution Office of the Republic of Kosovo (SPRK) filed 29 December 2011 and confirmed on 1 March 2012 (KA 1/112), with the following act:

that during 2009, particularly in the last quarter of this year the defendants in the capacity of official person. B.S. the former Mayor of Kamenica Municipality, while H.K. as Procurement Manager in Kamenica Municipality, with intent of illegal property benefit for themselves or for someone else, or for business organization or causing damage to other person, abused their official position, exceeded their competences and did not meet their official obligations in cases when they decided regarding some decisions for distribution of poverty aids which they distributed when in Kosovo and Kamenica Municipality was election campaign for local elections of 2009 without having requests from the poor people; expenses for fuel in which occasion they exceeded the amount foreseen by the Municipal Assembly; they allowed that with the money of Municipal Board to get fuel also private vehicles of the persons who were not employed at the Municipality expenses for beverages and food which exceeded several times from what was approved by the Municipal Assembly; expenses during the election campaign in

2009 during weekends when Municipality did not work at all, even on election day; regarding advertisements, making advertisements of candidates running for Mayor and members of Kamenica Municipal Council; in occasions when they establish various commissions for offer assessments and technical control and acceptance of accomplished works, appointing same candidates in two commissions of the same tender; in these cases they violated these provisions, but also they conducted violations of the Law on Local Governance and the Law on Management of Public Funds, in these cases they caused damage to the injured party Kamenica Municipality to the value of 178.280,88 Euro,

which said actions were classified as the following criminal offence:

Abusing Official Position or Authority in violation of the Article 339 §1, 2 and 3 of the Provisional Criminal Code of Kosovo (PCCK) in conjunction with Article 23 PCCK,

adjudicated in first instance by the Basic Court of Gjilan with judgment PKR 529/13, dated 20 November 2013, by which B.S. and H.K. were acquitted of the charge of Abusing Official Position or Authority as it was not proven beyond a reasonable doubt that they had committed the act as described above,

seised of the appeal filed by the SPRK against the aforementioned judgment,

having considered the motion of the appellate state prosecutor,

after having held a session on 25 June 2015;

having deliberated and voted on 25 June 2015;

acting pursuant to Articles 389, 390, 391, 394, 398 and 401 of the Criminal Procedure Code of Kosovo (CPC);

renders the following:

JUDGEMENT

I. The appeal of the Special Prosecution Office of the Republic of Kosovo against the judgment of the Basic Court of Gjilan PKR 529/13 dated 20 November 2013 is hereby rejected as unfounded.

II. The judgment of the Basic Court of Gjilan PKR 529/13 dated 20 November 2013 is hereby affirmed.

REASONING

I. PROCEDURAL BACKGROUND

On 29 December 2011 the SPRK filed with the Basic Court in Gjilan indictment PPS 57/2011 against the defendants B.S. and H.K. for the criminal offences of Abusing Official Position or Authority in violation of the Article 339 §1, 2 and 3 PCCK in conjunction with Article 23 PCCK.

On 1 March 2012 the confirmation judge of the District Court of Gjilan confirmed the aforementioned indictment against the accused B.S. and H.K. through ruling KA 1/12. During the confirmation hearing the defendants pleaded not guilty. With a ruling dated 25 February 2013 the Court of Appeals rejected as unfounded the appeals filed on behalf of the defendant B.S. and H.K..

The main trial against the defendants commenced on 25 September 2013. The defendants maintained their stances with regard to the charges and pleaded not guilty.

The main trial continued on 28 and 30 October 2013 and 19 and 20 November 2013 with the judgment publicly announced on 20 November 2013, by which B.S. and H.K. were acquitted of the charge of Abusing Official Position or Authority as it was not proven beyond a reasonable doubt that they had committed the act as described above.

The defendant B.S. was served with the written judgment on 20 February 2014. The defendant did not file an appeal.

The defendant H.K. was served with the written judgment on 20 February 2014. The defendant did not file an appeal.

The SPRK was served with the written judgment on 13 February 2014.
The SPRK filed an appeal on 25 February 2014.

The defendants did not file a response.

On 24 April 2014 the case was transferred to the Court of Appeals for a decision on the appeal.

On 29 April 2014 the appellate state prosecutor filed a motion.

The session of the Court of Appeals Panel was held on 25 June 2015. Since no imprisonment sentence was imposed in first instance, the parties were not sent a notification of the session, pursuant to Article 390 §1 CPC.

The Panel deliberated and voted on 25 June 2015.

II. SUBMISSIONS OF THE PARTIES

A. The appeal of the SPRK

The SPRK filed an appeal on the grounds of

- substantial violation of the provisions of criminal procedure;
- violation of the criminal law; and
- erroneous and incomplete determination of the factual situation,

and proposes the Appellate Court to annul the impugned judgment and return the case to the Basic Court of Gjilan for retrial. The Panel shall discuss in detail the below specific submissions filed by the SPRK.

B. The motion of the appellate prosecution

The appellate prosecutor filed a motion proposing the Court of Appeals to grant as grounded the appeal of the SPRK. The appellate prosecutor submits that the analysis and assessment of evidence proposed by the SPRK is indisputable and contains sufficient incriminating facts to establish the criminal liability of the defendants for the criminal offence of Abusing Official Position or Authority.

III. FINDINGS OF THE PANEL

A. Competence

Pursuant to Article 472 §1 CPC the Panel has reviewed its competence. 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 two Kosovo judges and one EULEX judge.

B. Admissibility of the appeal

The appeal was filed within the 15-day deadline pursuant to Article 380 §1 CPC. The appeal is further filed by an authorized person and contains all other information pursuant to Article 376 *et seq* CPC.

The appeal is timely filed and admissible.

C. Substantial violation of the provisions of criminal procedure

a. Enacting clause

The SPRK submits that the enacting clause of the impugned judgment is incomprehensible, due to contradictions and omissions within the clause.

The Panel notes that insofar as the prosecution argues that Article 370 §4 CPC (the prosecution erroneously refers to §7 CPC) is violated, such is not the case as the enacting clause of the impugned judgment satisfies all the requirements set out in Article 370 §4 CPC.

The enacting clause provides a coherent and comprehensive description of the decisive facts and contains all the necessary data prescribed by Article 370 §4 CPC in conjunction with Article 364 CPC. The enacting clause is fully coherent with the reasoning of the impugned judgment and reflects the findings elaborated therein. The basic court presented grounds for each individual point of its decision, as required by Article 370 §6 CPC.

The enacting clause read together with the detailed reasoning of the impugned judgment provides a sufficient assessment of the evidence and of the facts the Basic Court considered proven and not proven. In accordance with Article 370 §7 CPC the Basic court also made a detailed assessment of the reasons guiding the Basic Court in settling points of fact and law.

b. Independent financial expert

The SPRK submits that the Basic Court failed to provide a proper reasoning regarding the proposal for assigning an independent financial expert.

The Panel notes that the Basic Court discussed and proposed the assignment of an independent financial expert during the main trial, but that it was the prosecution itself who opposed such an assignment.¹ The submission is therefore ungrounded.

c. Evaluation of the evidence

The SPRK submits that the Basic Court failed to make a special evaluation of the contradictory evidence. The Basic Court further ignored numerous incriminating evidence and only focused on exculpatory evidence.

The Panel confirms that the Basic Court in the impugned judgment did not discuss every piece of presented evidence in detail as such. The Basic Court did however discuss in detail the specific situations and issues pertaining to all the evidence presented by the prosecution.

d. Municipality budget

The SPRK argues that paragraph 25 of the impugned judgment (English version pagination) is incomprehensible, because it first states that the municipality budget was realized for 100%, but further in the text it states that some expenditures were not realized to its fullest.

The Panel notes that although paragraph 25 of the impugned judgment (English version pagination) could be perceived as somewhat ambiguous, the prosecution fails to attach any concrete legal consequence to this. It is in anyway clear from paragraph 25, with reference to the Financial Report for period 1-12.2009, that the budget was not exceeded. The submission is ungrounded.

e. Administered evidence

The SPRK submits that the parties were not notified of the administered evidence and were not given the opportunity to present other evidence as stipulated in Article 348 CPC. Neither was the prosecutor given the opportunity to make any statement on the matter of considering the documents as read.

The Panel confirms that the procedural code was not followed to the letter on this occasion.² However, the prosecution did not oppose the suggested course of events and therefore implicitly agreed with the procedure followed by the Basic Court. In any event, all parties were provided a list of the written evidence and thus had knowledge of the evidence. Given the consent of all

¹ Record of the main trial of the Basic Court of Gjilan (PKR 529/13) of the session held on 28 October 2013, MT Binder I/6, p. 2, p. 4 (English version).

² Record of the main trial of the Basic Court of Gjilan (PKR 529/13) of the session held on 19 November 2013, MT Binder II/29, p. 1-2 (English version).

parties, including the prosecution, regarding the undertaken course of proceedings of the Basic Court, the Panel rejects the submission.

f. Rejection of charges

The SPRK submits that the Basic Court did not assess the core matter when it rejected the charge, as it limited itself to the acquittal evidence and thus violated Article 370 §11 CPC.

It is to be mentioned, that Article 370 §11 CPC refers to a judgment rejecting the charge (pursuant to Article 363 CPC). In this case defendants were acquitted, so Article 370 §11 CPC is not applicable, thus the submission was rejected.

g. Signed records

According to the SPRK, the records of the sessions of the main trial were not signed by all of the parties as stipulated in Article 317 CPC.

The Panel notes that the Albanian records of the sessions of the main trial were indeed not signed by all the parties. The English records of the sessions of the main trial are however signed by the parties. Given that English is also an official language in cases with EULEX involvement, the submission is rejected.

D. Erroneous or incomplete determination of the factual situation

The SPRK challenges the determination of the factual situation by the Basic Court. The Panel notes however that although the prosecution challenges the determination of the factual situation regarding both defendants, the prosecution merely presented concrete submissions regarding the defendant B.S. and not directly relating to the defendant H.K..

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.³ 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 examine of documents and other material evidence is in general more accurate in the trial because often those piece of evidence have to be conjugated with other elements and subject to oral explanations by witnesses or

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

parties. Therefore, as affirmed by this court in other occasions⁴, “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”.⁵

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

The Basic Court in the impugned judgment in detail discusses the alleged charges. Here it is apparent that the trial panel has reasonably analyzed and weighed the evidence involving each of the defendants. Given the review of the evidence by the trial panel and their generally clear explanation of their reasons for their findings, except as indicated in particular aspects set out below, the Panel accepts the factual findings and reasoning of the trial panel. In general, the Panel concurs with acquittal of the defendants as the evidence presented by the prosecution predominately focuses on the factual acts and not the criminal liability of the defendants. The acts with which the defendants B.S. and H.K. are charged with therefore do not constitute a criminal offence and the Basic Court correctly and justly rendered the judgment of acquittal pursuant to Article 364 §1.1 CPC.

Before going into detail regarding the particular aspects raised by the prosecution the Panel first notes the following. In order for acts to constitute the criminal offence of Abusing Official Position or Authority, article 339 §1 PCKK specifies that the acts have to be committed with the intent to obtain an unlawful material benefit for himself, herself or another person or a business organization or to cause any damage to another person or business organization. As a general remark the Panel finds that overall the prosecution did not provide sufficient evidence for the element of intent regarding the concerned facts. The prosecution mainly focused on the facts themselves without providing sufficient proof that the defendants acted with the above described intent. Furthermore insufficient evidence was provided as to whom specifically benefited from the acts. The Panel additionally notes that a mere violation of administrative law does not entail criminal liability, further evidence has to be presented regarding the above mentioned elements.

a. Annual municipality budget

The SPRK submits that the Basic Court made an erroneous determination of the factual situation in concluding that the municipality did not exceed its annual budget. The Basic Court forgot the fact that at the end of 2009 the municipality in question failed to settle the debt it owed

⁴ PAKR 1121/12, judgment dated 25/09/2012.

⁵ 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.

companies, amounting to more than 300.000 Euros. These debts were settled through court proceedings, where the municipality was obliged to pay high amounts of interest, thus harm was caused to the municipality by the defendants.

The Panel notes that although it might indicate bad practice regarding budget management, the mere fact that there were debts does not prove that the defendants acted with the intent to cause any damage to another person or business organization.

b. Citizens in need

The SPRK argues that it is not true that for the aid allocated by the defendant B.S., there were requests from citizens in need, because a document issued by the municipality itself on 1 October 2013, confirmed by witness V.K., proves that there were no requests. Furthermore, none of the decisions taken by the defendant B.S. included concrete names of the benefiting poor people.

The Panel finds that although no particular requests for help were filed by poor people, the decisions of support, including names, were rendered.⁶ Moreover the prosecution failed to present evidence that the money was not spent on providing aid for poor people or that the defendants themselves received the money. Thus there is no evidence that the defendants acted with the intent to obtain an unlawful material benefit for themselves or another person or a business organization.

c. Procurement procedure

The SPRK argues that the contract signed between the Kamenica Municipality and Goni Company was not subject to the procurement procedure. The aid was allocated based on the contract of 2009, and not that of 2007. In view of the matter that numerous expenditures were not subject to procurement procedures, the defendants claimed that the law on procurement provides for exceptions, but Article 3 of Law No. 2009/03-L-158 clearly defines the cases when exceptions may apply, and in this case such exceptions have nothing to do with the actions of the defendants.

The Panel notes that the procurement procedure in 2009 followed by the Kamenica Municipality might not have been in complete accordance with Law no. 2009/03-L-158, this however does not automatically entail criminal liability. Although it might indicate bad practice, the mere circumstance that certain procurement procedures might not have been rigidly followed does not prove that the defendants acted with the intent to obtain an unlawful material benefit for themselves or another person or a business organization or with the intent to cause any damage to another person or business organization.

d. Law on Elections

⁶ Defence Binder 23 & Financial Evidence Binder 8 (English version).

The SPRK submits that the provisions of Articles 2 and 35 of the Law on Elections were violated in the case of aid distribution.

The Panel notes that the prosecution in the appeal did not further elaborate the grounds of the alleged violation of Articles 2 and 35 of the Law on Elections and no relevant evidence to this point was referred to. The Panel therefore finds no grounds in this submission.

e. Vehicle usage

The SPRK submits that the Basic Court made an erroneous determination when it stated that the vehicle of the defendant B.S. had been used for official purposes. It is not true that the municipality did not have sufficient vehicles, because during the trial it was ascertained that the municipality had donated its vehicles and the financial report covering the period of January - December 2009, page 12, proves that the municipality had plenty of vehicles and huge amounts of money are spent for registering them. Thus there was no need for the defendant to use his private vehicle for official purposes.

The Panel finds that the evidence presented by the prosecution does not prove that the defendant B.S. did not use his private vehicle for official purposes. The mere fact that the municipality might have had other vehicles available does not prove that the defendant B.S. did not use his vehicle for official purposes. Thus there is no evidence that the defendant B.S. acted with the intent as described above.

f. Fuel

The SPRK submits that witness A.K. stated that during the period of 8 September 2011 and 8 October 2013 there were no frequent power cuts; see also the monthly sheet of generator operation attached to the evidence of fuel received as of 21 December 2012. Thus the assertion that during that time there were frequent power cuts is not true. Furthermore the expenditure for fuel was forecasted for 8.275,00 Euros for the Office of the Mayor and of the Assembly, whilst only the Office of the Mayor itself exceeded this forecast. Also, the high amounts of expenditures incurred are disputable, seeing as the witness A.K.2 stated that no more than 230 liters of fuel was spent, whilst the expenses incurred reached an amount of over 12.000 Euros, see also the testimony of the witness A.K.2 given during trial, 9 October 2013.

Furthermore, the Court has erroneously determined the factual situation when specifying that only one person who was not an employee of municipal administration received fuel from the municipal budget, seeing as from the fuel expenditure list of 2009, it was ascertained that also J.S. and A.A., as well as other persons, who did not work in the municipal administration, on several occasions had received fuel supplies paid from the Kamenica municipal budget.

The Panel finds that contrary to the submission of the prosecutor there is no evidence that there were no power cuts. Witness A.K. clearly states that there indeed were power cuts.⁷ Furthermore, this witness also states that the operation sheet of the generator was not kept up to date, as some of the sheets are missing and the automatic system monitoring use of the generator was out of work, thus a clear overview of fuel consumption of the generator is lacking.⁸ Moreover he states, there were more people authorized to supply the generator with fuel and switch it on. Although this might indicate bad practice, this does not proof that the defendants acted with the intent to obtain an unlawful material benefit for themselves or another person or a business organization or with the intent to cause any damage to another person or business organization.

With regard to the expenditure plan, the Panel notes that the Basic Court in the impugned judgment correctly determined the criminal evidentiary value of such plans. The mere circumstance that an expenditure plan might have been exceeded does not automatically entail criminal liability. Also in this case, it might indicate bad practice, but this does however not proof that the defendants acted with the intent to obtain an unlawful material benefit for themselves or another person or a business organization or with the intent to cause any damage to another person or business organization.

Regarding the witness statement of witness A.K.2 the Panel notes that his statement does not provide sufficient proof that the declared expenses do not correspond with the amount of actual fuel spent. As witness A.K.2 himself stated, he merely gave a partial estimate based on informal evidence. Thus sufficient evidence is lacking that the declared expenses do not correspond with the amount of actual fuel spent.

With regard to the alleged fuel consumption by J.S. and A.A.2, the Panel notes that it is not sufficiently proven that the fuel was not spent in the interest of the municipality. The purpose of the use of fuel by those people is not clear, but no evidence was taken to proof they misused it. The mere fact they were not the employees of the municipality does not ground any relevant conclusions concerning the intent of the defendants.

g. Procurement planning

The SPRK submits that the Basic Court made an erroneous determination when it observed that the final procurement planning was irrelevant, seeing as it was adopted by the competent bodies and it was established that the planning can have a variation of not more than 5%, whilst in the case in question expenses were four times higher, and that without procurement procedures.

The Panel notes that the assertion of the prosecution that the procurement planning cannot have a variation of more than 5% has no criminal evidentiary value; if this at all has a legal implication. Witness I.A. mentioned the 5% variation without basing this percentage on substantial laws, but

⁷ Record of the main trial of the Basic Court of Gjilan (PKR 529/13) of the session held on 8 October 2013, MT Binder I/12, p. 4-7 & Pre-trial Examination Witness Binder 5, p. 3 (English version).

⁸ Record of the main trial of the Basic Court of Gjilan (PKR 529/13) of the session held on 8 October 2013, MT Binder I/12, p. 6 (English version).

merely mentioned this variation based on his university studies.⁹ As noted with regard to other circumstances, the exceeding of the planning might indicate bad practice, but this does however not prove that the defendants acted with the intent to obtain an unlawful material benefit for themselves or another person or a business organization or with the intent to cause any damage to another person or business organization.

h. Internal audit

The SPRK argues that the reports provided by the independent auditors and by the municipality internal auditor rightly determined all the violations of the law committed by the defendants in 2009. The violations were also ascertained by most of the witness testimonies, in particular R.H., I.A. and S.S.. Furthermore, the Basic Court made a grave error in determining that the testimonies R.H. and S.S. were not credible.

Once again the Panel must note that although the reports provided by independent auditors might indicate bad practice by the Kamenica Municipality in 2009, the reports do not contain sufficient evidence for the criminal liability of the defendants regarding the intent to obtain an unlawful material benefit for themselves or another person or a business organization or the intent to cause any damage to another person or business organization.

As to the statement provided by S.S., the Panel fully concurs with the assessment of his statement by the Basic Court, more specifically addressed in paragraph 66 of the impugned judgment (English version pagination).

With regard to the witness R.H. the Panel notes that the prosecution rightly submits that the Basic Court did not assess this witness in the impugned judgment. The Panel has therefore carefully assessed the statements of witness R.H.. He described his observations concerning the use of municipality funds. The Panel however finds that his testimony does not contain sufficient evidence to prove the criminal liability of the defendants. Moreover no evidence supporting his allegations were taken.

With regard to the witness I.A. the Panel also notes that the Basic Court did not assess this witness in the impugned judgment. The information given by the witness I.A. is however also to be found in the audit reports. Nonetheless, the Panel has carefully assessed the statements of witness I.A. and finds that his testimony does not contain sufficient evidence to prove the defendants committed the criminal offence of Abusing Official Position or Authority. Witness I.A. does mention that the system of Kamenica Municipality had certain errors and failed at times, what he presented as “failure of the system”, he however failed to provide concrete evidence for the criminal liability of the defendants.¹⁰

⁹ Record of the main trial of the Basic Court of Gjilan (PKR 529/13) of the session held on 8 October 2013, MT Binder I/15, p. 4 (English version).

¹⁰ Record of the main trial of the Basic Court of Gjilan (PKR 529/13) of the session held on 8 October 2013, MT Binder I/15, p. 6 (English version).

i. Evaluation of evidence and defendants' testimonies

The SPRK argues that the Basic Court took into consideration all the exculpatory evidence, but the Basic Court failed to analyze and take into account the incriminating evidence and failed to reason why it did so. It is further submitted that the Basic Court did not ascertain which other evidence administered by the court corroborates the statements of the defendants, which the Basic Court found credible despite the fact, the defendants never say the truth. Their testimonies contradicted numerous evidence in writing, but the Basic Court did not take this evidence into consideration at all.

The Panel does not agree with the assertion of the prosecution that the Basic Court did not properly evaluate all the evidence. The Panel carefully reviewed and assessed the evidence presented by the prosecution and finds that the Basic Court sufficiently addressed and evaluated the raised issues and circumstances by the prosecution. The Panel fully concurs with the analysis of the Basic Court. The prosecutor's position disqualifying the statements of the defendants, who "never say the truth" is unacceptable. The Basic Court described its evaluation of documentary evidence in p.64 of the judgment, mentioning particular pieces of evidence in previous points. The State Prosecutor on the contrary does not mention any concrete piece of evidence, that was not taken into consideration, effecting in erroneous conclusions of the Court.

j. Aid

The SPRK argues that points 61 and 77 of the impugned judgment show that the judgment contradicts itself. Point 61 specifies that the names of the poor were not mentioned in the decisions, while point 77 specifies that it would not be reasonable to believe that the defendant B.S. would have offered aid without any request for it. Furthermore, if aid was indeed offered it was only offered in an attempt to influence the elections, as 90% of the aid provided was allocated over the last four months of 2009 and none was delivered in 2008.

As noted under paragraph b 'Citizens in need' of this judgment, the prosecution failed to present evidence that the money was not given to the poor people. Furthermore the defendant B.S. as mayor of the Kamenica Municipality did not go beyond his mandate when providing aid to the poor people, regardless whether or not this aid was offered during the last period of his office. Also there was not proof, the aid addressees weren't poor people, neither they were influenced concerning their votes in municipality elections. The submission of the prosecution again does not proof the criminal liability of the defendants.

k. Restaurant meals

The SPRK submits that the Basic Court erroneously determined that the Kosovo Police were served their meals at a restaurant, when in fact they were served on their respective posts and not at the restaurant. Furthermore the expenses incurred by the Police on Election Day were too high to be related to the meals, even if they would have gone to the claimed restaurant.

The Panel notes that the Basic Court did not establish that the police officers were served their meal in the restaurant, the Basic Court merely ascertained that the police officers were served by the restaurant. Furthermore the prosecution did not provide any concrete evidence indicating that the police officers were not served their meals, but the prosecution solely relies on a vague statement that it is well known what is served to the police officers on election day. On the contrary the witness L.P., Police Commander in Kamenica, stated, the police officers were served the meal and that it was him, who asked the mayor of the municipality to bear the costs of this supply.¹¹ Once more, the submission of the prosecution does not proof the criminal liability of the defendants.

l. Election campaign, posters

The SPRK submits that the fact that during the elections, the photos of the defendant B.S. and those of other candidates from his party were advertised using municipal budget was verified by the testimony of witness V.K.; however he changed it at the court. Such a fact was also verified in the statement given on 14 November 2013 by the competent authorities of Kamenica Municipality, proving that in the first four months of 2009 no municipal projects were advertised. The fact why the court did not review this evidence is unknown.

The Panel notes that there is no concrete connection between the advertisements for the elections and the spending of the Kamenica Municipality budget by the defendants. None of the posters mention or show the defendants or any other information linking the defendants. Sufficient evidence for the defendants' intent to obtain an unlawful material benefit for themselves or another person or a business organization or the intent to cause any damage to another person or business organization is therefore lacking.

m. Independent financial expert

The SPRK submits that the Basic Court made an error when it did not approve the proposal for assigning an independent financial expert, since an independent financial expertise would verify the real situation of this matter.

As noted previously, the Basic Court discussed the defence's proposal of the assignment of an independent financial expert during the main trial, but it was the prosecution themselves who opposed such an assignment. The submission of the prosecution is therefore ungrounded.

¹¹ Record of the main trial of the Basic Court of Gjilan (PKR 529/13) of the session held on 9 October 2013, MT Binder I/11, p. 3,5 (English version).

n. Conclusion

The Panel reiterates that the Basic Court in the impugned judgment in detail discusses the alleged charges. The Panel furthermore accepts the factual findings and reasoning of the trial panel, as elaborated on above. The Panel moreover concurs with the conclusion of the Basic Court that the prosecution failed to present concrete evidence for the criminal liability of the defendants regarding the intent to obtain an unlawful material benefit for themselves or another person or a business organization or the intent to cause any damage to another person or business organization is therefore lacking. The acts with which the defendants B.S. and H.K. are charged with therefore do not constitute a criminal offence and the Basic Court correctly and justly rendered the judgment of acquittal.

Even though the Basic Court in its enacting clause erroneously mentioned that the committed acts have not been proven, it is clear from the reasoning, in particular paragraph 90, that the defendants were acquitted pursuant to Article 364 §1.1 CPC because the acts with which they are charged do not constitute a criminal offence .

E. Violation of the criminal law under Article 385 CPC

The SPRK submits that if the witness testimonies and material evidence was properly assessed by the Basic Court, there would be no doubt that the defendants committed the criminal offence of Abusing Official Position or Authority. Thus the criminal law was violated.

The Panel notes that the prosecution in the appeal did not further elaborate which violations of Article 385 CPC have occurred. No specific paragraph of Article 385 CPC is mentioned. The Panel therefore finds no grounds in this submission.

F. Closing remarks

The Court of Appeals - for reasons elaborated above - rejects the appeal and affirms the impugned judgment.

Reasoned written judgment completed on 31 July 2015.

Presiding Judge

Xhevdet Abazi
Kosovo Judge

Panel member

Panel member

Tonka Berishaj
Kosovo Judge

Roman Raab
EULEX Judge

Recording Officer

Alan Vasak
EULEX Legal Officer

Court of Appeals
Pristina

PAKR 234/14
25 June 2015