

COURT OF APPEALS

Case number: PAKR 1731/2012

Date: 22 August 2013

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Annemarie Meister, as Presiding and Reporting Judge, and Judges Tore Thomassen (EULEX) and Rasim Rasimi as Members of the Panel, with the participation of Andres Parmas, EULEX Legal Officer, acting as Recording Officer, in the criminal proceedings against

A. A., born on ..., in...;

Who was found guilty and sentenced by Judgment P. No. 130/2009 dated 28 March 2011 of the District Court of Pristina for the criminal offence of Fraud contrary to Art 261 (2) Criminal Code of the Republic of Kosovo (CCK) and equivalent to Art 140 (1) and (2) Criminal Law of the Socialist Autonomous Province of Kosovo;

Acting upon the following Appeals against the Judgment P 130/2009 filed with the District Court of Pristina:

- Appeal of Defence Counsel A.A. filed on behalf of defendant A. A. on 7 December 2012,
- Appeal of Defence Counsel V.G. filed on behalf of defendant A. A. on 7 December 2012,

Having considered the Response of the Appellate State Prosecutor of Kosovo Haxhi Derguti no PPA 139/13 dated 18 June 2013;

After having held a public session on 22 August 2013 in the presence of the Appellate State Prosecutor Sabri Ademi, the Defendant and the Defence Counsel A.A.;

Having deliberated and voted on 22 August 2013,

Pursuant to Art-s 112 (1) and (3); 389 4); 420 and 426 (1) of the Provisional Criminal Procedure Code of Kosovo (CPCCK)

Renders the following

JUDGMENT

The Judgment of the District Court of Pristina dated 28 March 2011 is modified in the following:

- 1) The judgment in finding A. A. guilty of the criminal offence Fraud contrary to Art 261 (2) CCK, sentencing him and obliging A. A. to compensate the damage caused to D. H. is annulled;**
- 2) The charge with above-mentioned criminal offence against the Defendant A. A. is rejected;**
- 3) The Appeals are granted partially;**
- 4) The Injured Party D. H. is hereby instructed that according to Art 112 (3) CPCCK he may pursue the property claim against the Defendant A. A. raising from the activities being the subject matter in the criminal procedure at hand in civil litigation.**

REASONING

I. Procedural history of the case

1. On 1 November 2007 Public Prosecutor filed an indictment no. PPS 385-10/2006 against A. A. charged with the criminal act of Fraud contrary to Art 261 (1) and (2) CCK.
2. The main trial in the criminal case was held between 22 November 2010 and 28 March 2011 before the District Court of Pristina. On 28 March 2011 the Trial Panel announced publicly the judgment No. 130/2009 by which the Defendant A. A. was found guilty for the criminal offence of Fraud under Art 261 (2) CCK, because on 20 January 2003 he deceived D. H. by making him falsely believe that in exchange of 20 000 Euros received from D. H. he will use his influence to obtain an immediate release of N. H., the father of the injured party, from Dubrava prison. He was sentenced to imprisonment of 1 year and 6 months. Pursuant to Art 41 (1) 1); Art-s 42 and 43; Art 44 (1)-(3) and Art 66 2) CCK the sentence was suspended with the condition that A. A. does not commit another criminal offence within a period of 3 years and compensates the damage caused to the injured party. A. A. was obligated within 2 years to compensate the damage caused to D. H. in the amount of 20 000 Euro. The time spent in detention on remand was included in the amount of punishment provided that suspended sentence shall be revoked. A. A. was obligated to pay the costs of the proceedings in the amount of 100 Euro as a lump sum.
3. The Defence Counsels of the Defendant A. A. subsequently appealed the Judgment. The case file was hereafter transmitted to the Supreme Court of Kosovo as the competent court of second instance at the time. Pursuant to Article 39 Paragraph (1) of the Law on Courts, Law no. 03/L-199, the case was on 1 January 2013 transferred to the Court of Appeals as the (new) competent appellate court.

II. Submissions of the Parties

4. On 7 December 2012 the Defence Counsel A.A. filed an appeal against the Judgment, requesting to quash it and send the case back to the court of first instance for retrial or acquit A. A.. The Appellant argues that the enacting clause of the judgment is contrary to its reasoning, because facts stated in the reasoning are unclear and contrary to the

evidence. Both the objective and subjective element of the crime of Fraud are lacking in the actions of the Defendant. The court did not take into consideration the statement of the Defendant that indeed he received money in amount of 20 000 Euro from D. H., but not for the purpose of getting N. H. released from the detention. The money was given to the Defendant with the purpose of creating funds for resistance forces in Macedonia. According to the Defence Counsel it is unbelievable that a person with the position and credibility of the Defendant would indulge himself into such low actions as to deceive someone for gaining material gain.

5. On 7 December 2012 also A. A.'s other Defence Counsel V.G. submitted an appeal against the Judgment. He requested the Judgment to be annulled and the Defendant to be acquitted. The Appellant argues that the enacting clause of the judgment is incomprehensible, contrary to its reasoning and has no legal order of appearance. The Defence Counsel notes that the judgement first contains the criminal offence whereof A. A. was found guilty, only then it contains enacting clause and the punishment. The right order would be to initially ascertain the enacting clause of the criminal offence whereof the Defendant is found guilty, after that the legal formulation of the criminal offence and then to determine the sentence. The Appellant finds that arguments in defence of the Defendant have been left unanswered in the judgment. There is evidence that the case has a political nature and has only been pursued with the aim to damage the reputation of the political party to which the Defendant is affiliated to. The Court has admitted that the Defendant could not have had any influence on the release of N. H. from detention on remand in a criminal proceeding and therefore the Court should not have based its arguments on the statements of N. H. and D. H. The explanations of the Court for not believing the arguments in defence of A. A. are illogical. The Defence Counsel also draws attention to the fact that the Defendant has had no opportunity during the criminal proceedings to contradict D. H. – the main witness against him.
6. On 19 June 2013 the Appellate State Prosecutor filed a response to the Appeals with the proposal to reject the Appeals as unfounded. The Prosecutor finds that the appealed judgment does not contain any substantial violation of provisions of the KCCP; its

enacting clause is clear and comprehensive. The factual situation of the case has been established correctly by the Court and the judgment is well reasoned. The judgment does not contain any violation of the criminal law, as argued by the defence. Decision on the punishment is correct and sufficiently grounded. The Court has also acted appropriately by obligating the Defendant to compensate 20 000 Euro to the injured party.

7. On the Session of the Court of Appeals on 22 August 2013 the Defence Counsel A. A. requested the Panel to reject the charge against the Defendant on the ground that the crime he has been indicted for, has expired.

III. Competence of the Court of Appeals

8. The Appeals were originally addressed to the Supreme Court of Kosovo as the competent court of second instance at the time. However, pursuant to Art 39 (1) of the Law on Courts, Law no. 03/L-199, the case was on 21 January 2013 forwarded to the Court of Appeals as the (new) competent appellate court.
9. The Panel of the Court of Appeals is constituted in accordance with Art 19 (1) of the Law on Courts and Art 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 dated 18 March 2013, taken in accordance with Art 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 two EULEX Judges and one Kosovo appellate judge.

IV. Applicable procedural law

10. The criminal procedural law applicable in the respective criminal case is the Kosovo Code of Criminal Procedure that remained in force until 31 December 2012.¹ The proper interpretation of the transitory provisions of the Criminal Procedure Code (CPC), in force

¹Provisional Criminal Procedure Code of Kosovo, in force since 6 April 2004 until 31 December 2012.

since 1 January 2013, stipulates that in criminal proceedings initiated prior to the entering into force of the new Code, for which the trial already commenced but was not completed with a final decision, provisions of the CPCR will apply *mutatis mutandis* until the decision becomes final. Reference in this regard is made to the Legal opinion no. 56/2013 of the Supreme Court of Kosovo, adopted in its general session on 23 January 2013.

V. Admissibility of the Appeal

11. The contested Judgment was announced on 28 March 2011. The written Judgment was served on the accused on 27 November 2012. The Appeals of both Defence Counsels were filed on 7 December 2012. The Court of Appeals finds that the Appeals were filed by an authorized person and on time in accordance with Art 398 (1) and Art 399 (1) CPCR.

VI. Findings of the Court of Appeals on merits

12. In the case at hand A. A. has been indicted for having allegedly committed a criminal offence of fraud under Art 261 (2) CCK, which is punishable by an imprisonment up to five years. The Court of Appeals notes that under Art 90 (1) 4) CCK criminal prosecution may not be commenced after five years from the commission of a criminal offence punishable by imprisonment of more than 3 years but not more than 5 years. According to Art 91 (1) the period of statutory limitation on criminal prosecution commences on the day when the criminal offence was committed. Although pursuant to para (3) of the same article the period of statutory limitation is interrupted by every act undertaken for the purpose of criminal prosecution of the criminal offence committed, however, pursuant to para (6) of the same article criminal prosecution shall be prohibited in every case when twice the period of statutory limitation has elapsed. As the criminal offence, A. A. is indicted with, was committed more than 10 years and 7 months ago, there is an absolute bar on criminal prosecution because of the lapse of time set in Art 90 (6) CCK. Therefore, according to Art 389 1) CPCR and Art 426 (1) CPCR the charge against the Defendant A. A. has to be rejected.

13. With the Contested Judgment the Defendant A. A. was obliged to compensate the damage caused to the Injured Party D. H. in the amount of 20 000 Euro. Pursuant to Art 112 (3) CPCK, if rejecting the charge, the Court shall instruct the injured party that he or she may pursue the property claim in civil litigation. Hence the Judgment of the District Court has to be annulled concerning the decision taken in regard of the property claim.
14. For the reasons in para 12 the arguments on the merits are not discussed hereunder and it is decided as in the enacting clause.

Prepared in English, an authorized language.

Presiding Judge

Annemarie Meister
EULEX Judge

Panel member

Tore Thomassen
EULEX Judge

Panel member

Rasim Rasimi
Judge

Recording Officer

Andres Parmas
EULEX Legal Officer

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