

COURT OF APPEALS

PN1 Nr. 2002/17

Case number: PAKR 1/2017

(Pkr no. 218/14 BC Pristina)

Date: 26 October 2017

The Presiding and Reporting Judge in case PAKR 1/2017, Judge Elka Filcheva-Ermenkova, with the assistance of the EULEX Legal Officer Kerry Moyes acting as recording officer;

in the case against the defendant:

E.S, son of xxx, born on xxx in xxx, in detention since his arrest on xxx until xxx, in house detention from xxx until xxx when detention on remand again imposed;

charged by the Indictment of the Special Prosecution Office PPS no. 467/2009 dated 24 April 2014, as amended on 27 April 2016, with

Count 1: **Incitement to Commit Aggravated Murder** in violation of Article 24 and 147 (3) and (9) of the Criminal Code of Kosovo (hereinafter “the CCK”);

Count 2: **Extortion** in violation of Article 267 (1) and (2) the CCK, and;

Count 3: **Rape** in violation of Article 193 (1) and (2) the CCK;

found guilty by the Judgment of the Basic Court of Pristina Pkr no. 218/14 dated 17 May 2016 of Count one: the criminal offence of **Incitement to Commit Aggravated Murder** in violation of Article 24 and 147 (3) and (9) of the CCK; and Count two: the criminal offence of **Extortion** only under paragraph (1) of Article 267 the CCK and sentenced to aggregate punishment of long-term imprisonment of 37 (thirty seven) years and found not guilty for Count three: the criminal offence of **Rape** in violation of Article 193 (1) and (2) the CCK;

acting pursuant to the Order PN1 Nr. 2002/17 issued on 20 October 2017 by the Presiding and Reporting Judge in Case Number PAKR 1/2017 before the Court of Appeals for the defendant **E.S.** to be arrested immediately, for the measure of house detention replaced with the measure of

detention on remand, and for a hearing on the measure of detention on remand to be held on 24 October 2017;

having held a hearing on 24 October 2017 and having considered the application filed by the Special Prosecutor on 20 October 2017, the letter from **A.H.**, the documents presented by the Special Prosecutor during the hearing and the written Motion submitted by defence counsel **K.K.** on 25 October 2017;

pursuant to Articles 183 paragraphs 3, 4 5 and 6 and Article 187 paragraph 1 items 1.2.1, and Article 193 paragraph 2 of the CPC;

issues the following:

RULING

The measure of detention on remand is imposed on the defendant E.S., already arrested following the Order of this Court dated 20 October 2017. The detention on remand to be reviewed in accordance with Article 193 paragraph 2 of the CPC by the first instance Court where the case is being sent back for retrial.

REASONING

I. Procedural history

1. On 24 April 2014 the SPRK Prosecutor filed the Indictment PPS no. 467/2009 wherein the defendant was charged with the criminal offences of Incitement to Commit Aggravated Murder, Extortion and Rape.
2. The initial hearing was held on 30 April 2014. The presiding trial Judge, with a Ruling dated 12 June 2014, rejected as ungrounded the application of the defense counsel on behalf of the defendant **E.S.** to dismiss the Indictment and to declare evidence as inadmissible. This Ruling was appealed by the defense counsel on behalf of **E.S.**, which was rejected as ungrounded by the Court of Appeals Ruling dated 7 August 2014.
3. The main trial sessions were held on 31 October 2014; 5, 6 10, 14, 19, 20, 21 November 2014; 16 December 2014; 10, 13, 14, 22, 27, 28, 29 January 2015; 11 and 12 February 2015; 4 and 31 March 2015; 27 and 30 April 2015; 25, 28 and 29 May

2015; 1, 2, 3, 15, 26 June 2015; 20, 21, 22 and 23 July 2015; 17, 18, 19, 20 and 21 August 2015; 1, 2, 5, 6, 29 and 30 October 2015; 2, 3, 4, 5, 6, 17, 18 and 30 November 2015; 1, 2, 3 and 4 December 2015; 25 January 2016; 2, 3, 7, 8 and 9 March 2016; 12, 13, 14, 19 2016. An Amended Indictment was filed on 27 April 2016 taking into account corrected SMS timings. The main trial continued on 29 April 2016 and 12 May 2016.

4. Pursuant to Article 541 of the CPC, which entered into force on 1 January 2013, the trial was conducted according to the provisions of the new Criminal Procedure Code while in relation to the criminal offences, and the first instance court found the old Criminal Code more favourable to this defendant. The Judgment of the Basic Court of Pristina was announced in public on 17 May 2016. The defence counsel on behalf of the defendant filed an appeal against the Judgment.
5. The public session before the Court of Appeals Panel was held on 6 September 2017. The Panel deliberated and voted on 7 September 2017 and on 19 October 2017. The Judgment of the Court of Appeals is currently in the drafting process.
6. On 2 October 2017 defense counsel K.K. and defence counsel B.P. filed a Motion on behalf of the defendant **E.S.**, proposing that the Court of Appeals terminate the measure of detention on remand.
7. On 19 October 2017 the Panel issued an Order accepting the Motion and terminating the measure of detention on remand and replace it with the measure of house detention. The Panel further instructed the defendant to not leave the place of residence and to refrain from contacting persons with whom he does not live. The Order also stated that the reasoned Ruling of the Court of Appeals setting out the grounds of termination of the measure of detention on remand would be issued in due time and served on all parties. Such Ruling was not issued as it was overtaken by events thus turning obsolete. The defendant violated the measure the very same day and:
8. On 20 October 2017, acting upon the application of the EULEX Special Prosecutor, which included a police report alleging violation of the conditions of the measure of house detention, the Presiding Judge issued an Order that the defendant be immediately arrested, that the measure of house detention ordered on 19 October 2017 is replaced with the measure of detention on remand at the High Security Prison in Gerdovc, and that a hearing on detention on remand shall be held on 24 October 2017. The alleged violation was that 2 persons with whom the defendant did not live; A.H. and L.Rr., had visited the defendant at his home in the evening of 19 October

2017, and that L.Rr. had posted a photograph of the 2 of them with the defendant on Facebook at 21.51. The defendant was arrested and taken to the High Security Prison the following morning.

9. On 21 October 2017 the Presiding Judge received a letter from A.H., explaining the circumstances in which he and L.Rr. E.S..
10. The detention hearing was held on 24 October 2017 at 14.00, when the defendant was brought before the Presiding Judge. During the hearing the Presiding Judge received from the Special Prosecutor 3 anonymous letters which had been posted to the Special Prosecution and which alleged criminal activity by the defendant **E.S.** and others. The Presiding Judge also received from the Special Prosecutor a print out of a report in the xxx dated 19 October 2017 and timed at 23.56, which included 2 photographs of the defendant with another person and which the xxx claimed were taken in his home after being released from prison. The Special Prosecutor also stated that while the hearing had been ongoing that the Prosecution had been collecting an interview from B.H. and which alleged that he had overheard a conversation between the defendant and another man in the High Security prison following the defendant's return on 21 October, and in which the defendant had been discussing his plans to flee but had not had sufficient time. Copies of these documents were provided to defence counsel K.K. immediately following the hearing. Defence counsel was directed by the Presiding Judge that the deadline for her to file any response to these documents was the morning of Thursday 26 October 2017 (12am). A Motion was filed by defence counsel K.K on 25 October 2017, and was served on the Special Prosecutor.

II. Submissions of the parties

11. The Special Prosecutor.

During the hearing the Special Prosecutor reminded the Presiding Judge of the application which he filed on 20 October 2017, in which he submitted that the behavior of the defendant so soon after his release from detention in remand demonstrates the defendant's disrespect for the Panel's Ruling, and suggests that even further violations are to be expected. Further, it leads to the real presumption that the defendant will not refrain from leaving his house or contacting other persons. The Special Prosecutor submitted that the Order releasing him to house detention is written in very simple and clear language that does not leave space for misunderstanding regarding the need for the permission of the Presiding Judge to receive visits. While A.H. is a counsel for the defendant in a different case, his visit is not an exception and he should have been granted permission by the Presiding Judge.

L.Rr. is no family relation to the defendant. Further, the Special Prosecutor now has information that these were not the only visits which the defendant received that night, and that photographs of other people appeared on the website of 'xxx'.

12. The Special Prosecutor stated that the Court would shortly receive a police report regarding a conversation allegedly between the defendant and another man in the High Security Prison on 21 October 2017 in which the defendant had been discussing his plan to leave. The Special Prosecutor submitted that the grounded suspicion continues to exist because, as of this time, his conviction by the Judgment of the District Court still stands. There is therefore a real risk of flight. The Special Prosecutor also reminded the Presiding Judge that the defendant fled the country in the past and an international wanted notice was necessary to convince the defendant to surrender. His behavior shows a complete disrespect for the order of the Presiding Judge and his inability to abide by simple judicial prescriptions. The Special Prosecutor submitted that the defendant is a high profile criminal offender and the leader of a criminal group prone to commit violent actions and intimidations. Further, there is concern that the criminal activity is still ongoing. He concluded that all of these reasons make house detention absolutely unsuitable to protect the public order and why he has petitioned the Judge to reinstate the detention on remand.

13. Defence counsel K.K.

During the hearing defence counsel stated that on 19 October 2017 after 17.00 she received a telephone call from a EULEX Official who advised her that the defendant's measure of detention on remand has been replaced with the measure of house detention, and the Order had already been sent to the prison and that she would receive her copy of the Order the next day. Defence counsel states that she telephoned the defendant's family with the news. During this time, the defendant was unexpectedly informed by the prison staff that his detention on remand was being replaced with house detention, and to get ready to go home. The defendant hurried to gather his personal belongings, which included the notice given to him by his guardians, and the case file. He did not read the Order. By the time he got home his house was already full of people – family, friends and neighbors. Not one of them was aware of the content of the Order. The defendant was helpless to find approximately 100 people in his home when he arrived there. Defence counsel stated that at 08.30 the next morning she received the Order. She contacted the defendant straight away, but it was now already too late. Had she known of the entire content of the Order she would have informed the S. family and given instructions that no one should visit the house. When she did tell the family, they closed their house gates and did not receive anyone else. Defence counsel stated that there is no logic that the

defendant, after years in hiding and in detention on remand, would intentionally violate the Order and lose the opportunity to be in house detention. She stated that the measure of house detention had been imposed to ensure the presence of the defendant, while the additional restriction of not contacting others has the intention to avoid contact between the defendant and potential witnesses or others who might be related to his case. The people who went to his house are not of that capacity. Further, the main measure of his house detention was not violated. She states that if he is given another chance there will be no negligence or even the smallest mistake, and that there was no intention to disrespect the Order.

14. Defence counsel stated that regarding the report made by B.H., he is located on the third floor of the prison, and yet he manages to hear the conversation of the defendant on the ground floor. Neither does he inform the staff of the prison but personally telephoned Sergeant M. K. who happens to be a witness in this trial. Defence counsel submits that the report of B.H. is a fabrication. Regarding the 3 anonymous letters, defence counsel states that while she is not a graphologist they have the same writing and they know exactly who to address. Finally, defence counsel reiterated the apology on behalf of the defendant, and stated that if another opportunity is given that she is ready to specify the xxx members of his family with whom he lives and that no one else besides them will meet the defendant without the permission of the Court. Further, he does not have a valid travel document or an ID card, and his last one expired in 2012 while he was in detention on remand.
15. The Presiding Judge asked the defendant if he had been served with the Order, and reminded him that he did not have to respond. The defendant stated that he was given the Order and told he was under house arrest, but nothing more. He stated that he placed the document with the other documents so as not to lose it. He did not read it, and he did not have time to read it. There were a lot of guests when he arrived home, but even if there had not been he would not have read it and would have waited for his defence counsel to explain it to him.
16. The Special Prosecutor asked how the defendant was in possession of a passport as an Order had been issued by the Court which confiscated all travel documents. The defence counsel responded that the passport was in the possession of the Prosecutor Andrew Carney, who returned it to her and it has been in her case file ever since.

Defence counsel's written Motion

17. In her written Motion, defence counsel K.K. objects to the report of xxx M.K.. She submits that this police officer was a prosecution witness in the first instance trial of the defendant, and that he is continuing with his investigative actions. It is suspicious that this witness happened to overhear the conversation of the defendant, and also happened to be in possession of the personal telephone number of police officer M.K.. It is transparent to the defence that this is false testimony. B.H. is convicted of very serious criminal offences and sentenced to xxx of imprisonment, and is the same witness who also falsely denounced a xxx and 2 defence lawyers, and deceived a xxx. B.H. has nothing to lose, and is the same person who tried to kill the defendant in a xxx incident which killed 2 persons and wounded 11 others. It is ridiculous to believe that he heard a conversation from a half opened window from the third floor which was taking place in the defendant's cell. It is also ridiculous that the defendant would have been discussing his plan to flee, with a stranger, loudly enough to be heard at such a distance. Further, in the interview B.H. states that he made a complaint to the on call xxx F. H. about the noise, but not about what he had overheard. Instead, he made a report to xxx M.K. the next day. The defence counsel also points out that xxx M.K. did not interview the man said to have been in conversation with the defendant about his plan to flee, or interview xxx F. H., or investigate if anyone else had overheard the conversation. Regarding the 3 anonymous letters, they have absolutely identical content and the writing is the same, and all 3 were sent to the same Appellate Prosecutor on the same day 7 September 2017. Further, one was in English and then translated into Albanian 2 days later. This means that it was in English before he wrote it with his own hand in his native Albanian language. Defence counsel proposes that the Court issues a Ruling replacing the defendant's detention on remand with house detention.

III. Findings of the Court of Appeals

18. The Presiding Judge notes that defence counsel K.K. was served with a copy of the Order which released the defendant from detention on remand to house detention on the morning of Friday 20 October 2017. It is accepted that on the evening of 19 October 2017 she was notified verbally by means of telephone call by a member of the Court staff that the defendant had been placed into house detention by the Order.

19. The issue is whether or not, and when, the defendant was given a copy of the Order. As noted by the Special Prosecutor, a police officer of the North P. Station filed an 'Officer's report' dated 19 October 2017 and timed at 19.15. This report states that upon receipt of the Order at approximately 17.00 the instruction was received to go to the High Security Prison and escort the defendant **E.S.** from there to his house. As a

result, 3 officers drove to the prison, collected the defendant and then took him to his house. The report further states that the police officers delivered the Court's decision to him and also verbally told him how to comply with it. During the hearing, defence counsel stated that the defendant was served with the Order in the High Security Prison. The defendant himself stated that he was given a copy of the Order, but that he did not read it.

20. The Order releasing the defendant was a short document. The restrictions which accompanied the measure of house detention, those of refraining from contacting persons with whom he does not live and not to leave the place of residence, are written in simple and clear language such that they can be easily understood by a lay person. The violation of the restrictions of the house detention cannot be excused by the failure of the defendant to read the Order, which was obviously an extremely important document. The Order also informs the defendant, again in simple language, the consequences of non-compliance in accordance with Article 183 paragraph 5. The restrictions which accompanied the measure of house detention were imposed for reasons of the utmost seriousness, such that their violation cannot be followed by a second opportunity to comply. Therefore the Court finds that it is appropriate to again impose detention on remand on the defendant.
21. In accordance with Article 187, paragraph 1 item 1.1 of the CPC, the Court may order detention on remand only after it explicitly finds that there is a grounded suspicion that the defendant has committed a criminal offence. The outcome of the appeal filed by the defendant against the Judgment of the Basic Court Pkr no. 218/14 dated 17 May 2016 is that the case against the defendant is returned for re-trial. The reasoning for this decision is fully laid out in the Court of Appeals Judgment. However, the Court finds that the grounded suspicion continues to exist regarding the association of the defendant with the murder of the late T.R. and that the procedural violation which the Court of Appeals has found in the Judgment of the Basic Court does not mean otherwise.
22. Regarding the condition or conditions foreseen in Article 187 paragraph 1 item 1.2 of the CPC which must also be met to order detention on remand, the Court finds that there is a danger of flight. It is recalled that the defendant left the jurisdiction and was in hiding for some time, and an international arrest warrant was issued. The defendant continues to face the most serious criminal offence, for which he is likely to be punished with a significant prison sentence if convicted. These circumstances represent a substantial motivation for the defendant to flee. Therefore the Court finds that the condition in Article 187 paragraph 1 item 1.2 is met, and that no other lesser measure is sufficient to meet the risk. In finding so, the Court gives no weight to the

witness statement given by B.H. to the police. The witness was not heard by the Court so that his statement could be properly assessed, and otherwise it is a hurried document lacking in detail. The Court finds that it is not necessary to assess the statement further, as the condition foreseen in Article 187 paragraph 1 item 1.2 is already met by other existing circumstances, as detailed above.

23. As the case was been sent back for retrial, the detention measure will be revised in accordance with Article 193 (2) CPCK.

Done in English, an authorized language, on 26 October 2017

Recording Officer

Presiding Judge

Kerry Moyes
Legal Officer

Elka Filcheva-Ermenkova
EULEX Judge