

COURT OF APPEALS

Case number: PAKR 1123/12

Date: 27 August 2013

THE COURT OF APPEALS OF KOSOVO in a Panel composed of EULEX Judge Hajnalka Veronika Karpati as Presiding and Reporting Judge, and Judges Fillim Skoro and Xhevdet Abazi as members of the Panel, with the participation of Beti Hohler, EULEX Legal Officer, acting as Recording Officer,

in the criminal proceeding against

1. N. H., son of B. and S. B., born on in ..., ..., male, residing in ..., ..., ..., ..., of average financial status, married and father of two children, Kosovar Albanin, ID no. ..., *and*

2. L. R., son of T. and H. S., born ... in ..., ..., male, residing in ..., married and father of two children,, of average financial status, Kosovar Albanian, ID no.;

Accused of having committed the criminal offence of *Abusing Official Position or Authority* in co-perpetration, pursuant to Article 339 Paragraphs (1) to (3) of the Criminal Code of Kosovo (CCK)¹ in conjunction with Article 23 CCK;

acquitted of the above criminal offence through the Judgment of District Court in Pristina/ë no. P 638/2011 dated 17.05.2012;

acting upon the Appeal of the Special Prosecutor filed on 10.08.2012 against the Judgment of District Court in Pristina/ë no. P 638/2011 dated 17.05.2012;

having considered the Response of the Appellate State Prosecutor of Kosovo no PPA-KTZ 465/12 dated 27.12.2012;

after having held a public session on 27.08.2013 in the presence of both Accused, Defence Counsel Linn Slattengren representing **N. H.**, Defence Counsel Destan Rukiqi representing **L. R.** and Appellate State Prosecutor Claudio Pala;

having deliberated and voted on 27.08.2013;

pursuant to Articles 420 and the following of the Kosovo Code of Criminal Procedure (KCCP)

¹ Criminal Code in force from 06.04.2004 until 31.12.2012.

renders the following

JUDGMENT

I. The Appeal of the Special Prosecutor, filed on 10.08.2012 against the Judgment of the (then) District Court of Pristina no. P 638/2011 dated 17.05.2012 concerning N. H. and L. R., is hereby REJECTED AS UNFOUNDED.

II. The enacting clause of the Judgment of the (then) District Court of Pristina no. P 638/2011 dated 17.05.2012 is AMENDED *ex officio*:

The first sentence of the enacting clause that includes reference to Article 390 Paragraph (2) KCCP is amended to read: “Pursuant to Article 390 Paragraph (3) KCCP, [...]”.

In the ruling on the costs, the reference to Article 103 Paragraph (3) KCCP is amended to read “Pursuant to Article 103 Paragraph (1) KCCP [...]”

III. In all remaining parts, the Judgment of the (then) District Court of Pristina no. P 638/2011 dated 17.05.2012 is hereby affirmed.

REASONING

PROCEDURAL HISTORY OF THE CASE, IMPUGNED JUDGMENT, SUBMISSIONS OF THE PARTIES

(Procedural History)

1. The Indictment against both Accused was filed on 08.06.2011 with the District Court of Pristina for the criminal offences of Abusing Official Position or Authority pursuant to Article 339 Paragraphs (1) to (3) CCK and Misuse of Economic Authorizations pursuant to Article 236 Paragraph (1) Subparagraph 3) CCK.

2. The Confirmation Judge on 02.09.2011 issued a Ruling, dismissing the Indictment. The ruling was partially over-turned upon Appeal from the Special Prosecutor by the Three-Judge Panel on 18.10.2011. The Three-Judge Panel confirmed the Indictment for the criminal offence of

Abusing Official Position or Authority pursuant to Article 339 Paragraphs (1) to (3) CCK in relation to both Accused. Thereafter the case proceeded to main trial for this criminal offence only.

3. The Trial Panel held twelve trial sessions from 12.01.2012 until 17.05.2012. The Judgment was announced on 17.05.2012. The Panel acquitted both Accused. The Panel considered the Prosecution failed to prove the Accused have committed the criminal act they were charged with. The Trial Panel also ruled on costs in the case. The Special Prosecutor announced the filing of an Appeal immediately after the announcement of the Judgment.

4. The parties were served with the reasoned written Judgment in late July 2012.

5. The Special Prosecutor was served with the reasoned Judgment on 26.07.2012. He filed an Appeal against the Judgment on 10.08.2012.

6. The Defence filed their Replies to the Appeal on 23.08.2013 and 24.08.2013 respectively.

7. The case was transferred from the District Court of Pristina to the Supreme Court of Kosovo (at the time competent court of second instance) on 26.09.2012. On 01.01.2013, following the entry into force of the Law on Courts (Law no. 03/L-199, hereinafter: Law On Courts) the criminal case was transferred to the Court of Appeals.

8. The Court of Appeals held a public session in the criminal case pursuant to Article 410 KCCP on 27.08.2013. All parties were present at the session, as well as the Defence Counsel of both Accused.

(Impugned Judgment)

9. The Trial Panel found that the following two material facts have not been proven in the proceedings against the Accused:

- that decisions taken by **L. R.** to grant further importation of tobacco were based on political influence and as such contrary to any sound legal reasoning and
- that **N. H.** in a practically unusual procedure in Kosovo Customs decided to replace **B. C.** because he was afraid the latter would insist in his opinions on legality of the action or because he wanted to follow the instructions he was given by the Minister.

10. The Trial Panel reasoned that Mr. **L. R.**'s interpretation on banning transportation in the given circumstances was made known much before the meeting with then A. Sh. There is no evidence that **L. R.** adopted the legal interpretation because of political influence. It has also not been proven beyond reasonable doubt that **L. R.**'s interpretation is "without any sound legal basis". Insofar the manner of appointment of **L. R.** by **N. H.** is concerned, the explanation provided by **N. H.** is reasonable. The Trial Panel emphasized that any doubts it had with regard

to facts in the case, they had to be resolved in favor of the Accused (*in dubio pro reo*) in accordance with the law.

(Submissions of the Parties)

11. The Special Prosecutor invokes the following appeal grounds: (i) substantial violation of the provisions of criminal procedure, specifically Articles 236, 237 Paragraph(1), 360 Paragraph (1), 360 Paragraph (5) and 363 Paragrapha (1) KCCP, (ii) erroneous and incomplete determination of the factual situation, (iii) violation of the criminal law. He proposes to modify the Impugned Judgment by finding both Accused guilty pursuant to the confirmed Indictment or, alternatively, to annul the Impugned Judgment and return the case for re-trial to the Court of First Instance.

12. The Defence in their Responses opposes the arguments raised by the Special Prosecutor and move the Court to reject the Appeal and affirm the Impugned Judgment.

13. The Appellate State Prosecutor supports the Appeal of the Special Prosecutor and moves the Court of Appeals to annul the Impugned Judgment and to return the case for re-trial to the Court of First Instance. The Appellate State Prosecutor presents a detailed Opinion discussing the grounds of Appeal and the Defence Responses.

FINDINGS OF THE COURT OF APPEALS

I. Competence of the Court of Appeals

14. The Court of Appeals is the competent court to decide on the Appeal pursuant to Article 17 and Article 18 of the Law on Courts.

15. The Panel of the Court of Appeals is constituted in accordance with Article 19 Paragraph (1) of the Law on Courts and Article 3 of the Law on the jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo (Law no 03/L-053). Pursuant to the decision of the President of the Assembly of EULEX Judges no. 2013.OPEJ.00359-0001 dated 09.08.2013, taken in accordance with Article 3.7. of the Law on the jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo, the Panel was composed of one EULEX Judge and two Kosovo appellate judges.

II. Applicable procedural law – the KCCP

16. The Court of Appeals finds it appropriate to restate that the procedural law applicable in the respective criminal case is the (old) Kosovo Code of Criminal Procedure that remained in force until 31.12.2012.² In criminal proceedings initiated prior to the entry into force of the new Criminal Procedure Code on 01.01.2013, for which the trial already commenced but was not

² Kosovo Code of Criminal Procedure, in force since 06.04.2004 until 31.12.2012.

completed with a final decision, provisions of the KCCP apply until the decision becomes final. Reference is made to the Legal opinion no. 56/2013 of the Supreme Court of Kosovo, adopted in its general session on 23.01.2013.

III. Admissibility of the Appeal

17. The Special Prosecutor announced the filing of the Appeal in accordance with Article 400(1) KCCP on 17.05.2012, following the announcement of the Judgment.³

18. The Special Prosecutor was served with the reasoned Judgment on 26.07.2012. He filed an Appeal against the Judgment on 10.08.2012.

19. The Appeal is admissible pursuant to Articles 398 Paragraph (1) KCCP, 399 Paragraph (1) KCCP and 401 Paragraph (1) KCCP.

IV. Findings on the merits of the Appeal

IV. A. Alleged substantial violations of procedural law

20. The Special Prosecutor alleges substantial violations of criminal procedure pursuant to Article 403(2) KCCP. He submits that violations of Articles 236, 237, 360 and 363 KCCP influenced or might have influenced the rendering of a lawful and proper judgment.

Alleged violation of Articles 236 and 237 KCCP and alleged violation of Article 363 Paragraph (1) KCCP

21. The Special Prosecutor argues that the legal analysis submitted by H. S. should have been treated as an expert opinion and not merely as documentary evidence, particularly because Mr. H. S. testified during main trial in the capacity of an expert. On alleged violation of Article 363(1) KCCP, the Special Prosecutor submits that his right to effectively question the expert witness orally during main trial was violated, because the Trial Panel only allowed questions which from its perspective were unclear.

22. The Defence submits that no violation of Article 363(1) KCCP occurred, because the Prosecutor was able to question the witness as an expert witness during main trial. The Defence further maintains its position adopted during main trial that the evidence given by witness H. S. was irrelevant and the witness not qualified.

23. The Court of Appeals finds the approach of the Trial Panel regarding the testimony and written report of H. S., who at the time was a Legal Advisor to Eulex customs, confusing and contradictory.

³ Record of main trial session, 17.05.2012, p. 2 (English version).

24. In the course of the investigation the Special Prosecutor, requested the Pre-Trial Judge to appoint H. S. as an expert and perform an expert legal analysis. The Pre-Trial Judge rejected the request with a Ruling dated 10.02.2011. The Pre-Trial Judge reasoned that no court order is necessary for the appointment of the respective type of expert during the investigative stage and the Special Prosecutor should himself appoint the expert. No appeal was filed against this Ruling of the Pre-Trial Judge and the Special Prosecutor on 14.02.2011 issued an Order, appointing H. S. as an expert witness and ordering him to conduct an analysis of questions specified in the Order. H. S. produced such a report and submitted it to the Special Prosecutor on 13.05.2011. The report was made part of the case-file, duly disclosed to the Defence and proposed as evidence in the Indictment.

25. The Trial Panel in the session on 07.03.2012 decided to hear H. S. in the capacity of an expert witness.⁴ The Trial Panel allowed for the expert witness to be questioned about legal issues, reasoning that the procedural code does not include a limit of what kind of expertise can be sought from an expert witness.⁵ The Special Prosecutor also requested that the Legal Analysis of H. S. dated 13.05.2011 be admitted into evidence as an expert report. The Trial Panel discussed the status of the document during the session on 10.02.2012. In the session on 07.03.2012 the Trial Panel decided not to take any position on the status of H. S.'s legal analysis 'until the final deliberation'. The Trial Panel, noting it had the written analysis before it, only allowed questions to be put to the witness that would clarify his findings in the written analysis.

26. In the Impugned Judgment the Trial Panel elaborated that the analysis of H. S. pursuant to the KCCP cannot be treated as expert evidence. The analysis was thus considered by the Trial Panel as ordinary documentary evidence, submitted by a party.

27. The Court of Appeals as a preliminary matter finds that the Trial Panel should have decided how to treat H. S.'s Legal Analysis dated 13.05.2011 (either as expert evidence or mere documentary evidence) immediately when the issue was raised during main trial. The Trial Panel has the obligation to rule on motions of the parties pursuant to Article 333 Paragraphs (3) to (5) KCCP. The Panel had no legal basis to postpone the decision until the final deliberation, as this would clearly defeat the purpose of Article 333 Paragraphs (5) KCCP. The Trial Panel must decide on contentious procedural issues when they arise and in any case before the closing of the main trial. The Prosecution in the case at hand had an interest to know whether the analysis will be considered as an expert report or as mere documentary evidence, in order to plan their strategy accordingly. Noting the omission of the Trial Panel, the Court of Appeals however remarks that the Prosecutor was aware that no decision on the status of the report will be reached until the final deliberation and did not raise an objection during the proceeding. Similarly, the

⁴ Upon first motion of the Prosecutor, the presiding Judge rejected to hear the witness in the capacity of an expert witness. The Prosecutor appealed to the Trial panel and the Trial Panel changed the Presiding judges's decision, now allowing H. S. to testify as an expert in the case.

⁵ Record of Main trial, Session 07.03.2012, p. 7 (English version).

Prosecutor does not allege any such violation in his Appeal. Consequently, the Court of Appeals does not need to address this matter any further.

28. The Panel limited the questioning of expert witness H. S. to clarifying questions to the analysis he produced. His answers were thus limited to clarifying issues from the report and only those answers had the effect of “expert testimony”. However, subsequently the Trial Panel only treated the report as documentary evidence. The Prosecutor’s argument appears to suggest that had the Prosecution been able to fully question the witness, it would have arguably sought further answers from the witness. It is noted that by doing so the Prosecutor could then by the replication of his analysis in the testimony, secure the expert status of this evidence.

29. While this in itself would be a relevant argument, it is not decisive in the current proceeding, because, as it will be discussed below, the Court cannot seek guidance on *legal* questions from expert witnesses. It is equally relevant that the Prosecutor does not specify in his Appeal what concrete line of questioning the Prosecutor was prevented from pursuing in relation to this witness. As a general remark, the Court of Appeals emphasizes that when a party alleges it has been unlawfully prevented from pursuing a line of questioning during the trial, they must clarify what that line of questioning was and how the Panel’s refusal of questions impacted or could have impacted on the final decision (i.e. establishing the two-prong criteria of Article 403 Paragraph (2) KCCP).

30. The Prosecutor formulated the following questions in his Order appointing H. S. as an expert witness: (1) *Were the approvals of the appeals by the tobacco companies Gekos, Bucaj, Tabakos and Kosovo tobacco, which were drafted by Mr. L. R. in December 2008, compliant with Article 241 of the Kosovo Customs and Excise Code?* (2) *If the conclusion is reached that Article 241 of the Kosovo Customs and Excise Code was breached: are there indicators leading to the result that Mr. L. R. knew of his wrongful application of Article 241 of the Kosovo Customs and Excise Code?* (3) *Does the Director General bear legal responsibility for the decisions which were undertaken by L. R. with regards to the granting of the appeals in December 2008?*

31. It follows that H. S. was requested by the Prosecution to, under question (1) give a legal opinion on whether the decisions of **L. R.** complied with the Kosovo Customs and Excise Code and, under (2) and (3) to discuss elements of (criminal) responsibility of **L. R.** and **N. H.**

32. Pursuant to Article 236 KCCP experts are engaged in order to clarify certain technical or other expert issues. The Code does not define what is considered as technical or expert issue. It is however implicit in the Code, that the Court cannot defer legal questions to an expert witness, but only *factual* questions. It is namely inherent in the Court’s function that it knows the law. This is not limited only to the field of criminal law, but other areas as well.

33. In the case at hand, H. S. was asked to analyze whether **L. R.**’s decisions were in accordance with the law or not. This is not a factual determination but a purely legal determination, one which must and can only be made by the Trial Panel.

34. Furthermore, H. S. was effectively asked to determine criminal responsibility of the Accused. Only the Trial Panel can assess “indicators” of whether **L. R.** knew of the wrongful application of the Kosovo Customs and Excise Code and whether the Director General bears legal responsibility for decisions issued in 2008. Indeed, these issues lie at the heart of this criminal proceeding, and no expert can be engaged to pronounce or offer guidance to the Trial Panel on them. They are to be determined by the Trial Panel after careful analysis of all evidence.

35. The Court of Appeals accordingly finds that the legal analysis produced by H. S. was rightfully not afforded the status of expert evidence.⁶ Questioning the witness as an expert witness on these questions was or would be equally inappropriate. The witness could arguably testify as to his own experience in similar cases, practice and the usually adopted procedure in the handling of such cases, but nothing more.

36. In conclusion, the Court of Appeals considers that no expert report or testimony can be given on legal interpretations of the Kosovo Customs and Excise Code, as sought by the Prosecutor in this case. Any such interpretation can only be made by the Trial Panel with the view to determine whether the interpretation adopted by the Accused was such to amount to abuse of official position or authority. The issue concerns a legal interpretation not a factual determination of a technical nature that would require and indeed allow for the assistance of an expert pursuant to Article 236 KCCP.

37. There has thus been no violation of Articles 236 and 237 KCCP.

38. Insofar the alleged violation of Article 363 Paragraph (1) KCCP is concerned, the Court of Appeals observes that the Special Prosecutor did not specify what line of questioning he was prevented from pursuing had the Trial Panel not limited the questions to clarifying questioning. In any event, the Court finds that the testimony of H. S. cannot be considered expert testimony on legal interpretation, as discussed above. The Court of Appeals underlines there are no grounds to believe that the alleged violation of Article 363 Paragraph (1) KCCP would or could have had any impact on rendering a lawful and proper judgment in the case. Essentially, while the Trial Panel’s treatment of the evidence during the proceedings was confusing and contradictory, the Panel’s ultimate decision not to give weight to this evidence is in the view of the Court the correct one. The Court of Appeals however reiterates that it was still the Trial Panel’s obligation to discuss why it did not take this evidence into account and duly explain its position instead of leaving the Parties guessing. The Trial Panel’s reasoning in this regard is highly unsatisfactory.

Alleged violation of Article 360 Paragraph (1) KCCP

39. The Special Prosecutor submits that the Trial Panel’s rejection to hear B. S. as a witness resulted in a violation of the Prosecution’s right to submit evidence, important for a correct and

⁶ The Court of Appeals notes that the report is named “Expert Report” in the listing of evidence administered at trial on page 5 of the Impugned Judgment (English version). However, it is clear from the reasoning, in particular pp. 9 to 12 that the Trial Panel accepted the legal analysis only as documentary evidence and not expert evidence.

fair adjudication pursuant to Article 360 Paragraph (1) KCCP. The Prosecutor argues that hearing witness B. S. was material for the case, since the witness had stated in an internal audit report that the decisions taken by **L. R.** blatantly violated the law and his interpretations of the law were biased. Furthermore his testimony could have corroborated H. S.'s findings.

40. The Trial Panel rejected the motion of the Special Prosecutor to call B. S. as a witness with a written ruling dated 18.04.2012. The Trial Panel stated that conducting a professional analysis on the rightfulness of the decisions taken by one of the Accused turns him into a possible expert witness rather than a witness and that witnesses are called to explain facts and not reports from other expert witnesses. The Panel also considered that the issue is strictly legal. The Court of Appeals concurs with the finding of the Trial Panel that examining witness B. S. was not relevant for a fair and complete determination of the case.

41. The Trial Panel correctly pointed out in the Impugned Judgment that regardless of whether **L. R.**'s decisions were considered lawful or not by his peers and/or auditors, this does not mean in itself that they were motivated or influenced by political reasons.

42. The Prosecution has showed in the case that **L. R.**'s interpretation of Articles 237 and 241 of the Kosovo Customs and Excise Code was disputed by his colleagues and other experts. The issue in this criminal proceeding however is not whether **L. R.**'s interpretation of the Code was ultimately correct or not; the issue is whether there is evidence proving **L. R.** adopted a wrongful interpretation knowingly because of some sort of political motivation and, importantly, has done so to cause material benefit or damage. These are the key elements of the *criminal* charge against him.

43. The Special Prosecutor never alleged that witness B. S. would have any knowledge or would have witnessed any political motivation exercised over **L. R.** Instead, witness B. S. was proposed to testify 'on the rightfulness of decisions of **L. R.**'. The Court of Appeals therefore concludes that witness B. S.'s testimony could not have had any impact on the outcome of the proceedings and that the Trial Panel rightfully rejected the request to hear this witness.

44. Accordingly, there has been no violation of Article 360 Paragraph (1) KCCP and consequently no violation of Article 403 Paragraph (2) KCCP.

Alleged violation of Article 360 Paragraph (5) KCCP

45. The Special Prosecutor under the appellate ground of erroneous or incomplete determination of factual situation submits the Trial Panel had violated Article 360 Paragraph (5) KCCP by not calling A. Sh. as a witness, using its ex officio powers. Although asserted under a different appeal ground, the submission alleges violation of criminal procedure and will be addressed within this heading.

46. Witness A. Sh. was first proposed as a witness by the Defence but the motion was later withdrawn in open court. The Prosecutor did not propose A. Sh. to be called as a witness, not even after the motion had been withdrawn by the Defence.

47. The Trial Panel under Article 360 Paragraph (5) KCCP has the authority to collect evidence that it considers *necessary for the fair and complete determination of the case*.⁷ In the case at hand, where A. Sh. was a relevant witness that could testify as to the alleged political interference, it would have been preferred for the Trial panel to call him as a witness. He was namely the person that was alleged to have exerted political pressure on the accused. That said, not calling the witness, however does not amount to a violation of Article 360 Paragraph (5) KCCP.

48. The Prosecutor represents the Indictment before the Court and is tasked with presenting and proposing evidence he/she finds relevant for the criminal proceeding. The Prosecutor cannot dispense with his own obligation to propose evidence by relying on the Trial Panel to make use of its *ex officio* powers under Article 360 Paragraph (5) KCCP. Or indeed if the Prosecutor does so, he cannot then successfully assert upon appeal that certain evidence, evidence he never proposed, had not been collected.

49. Also the claim that because the witness was not heard, the determination of factual situation is erroneous or incomplete, is ungrounded. The Prosecutor does not submit any meaningful arguments that would support the conclusion that the witness would have testified in a manner leading to a different determination of material facts. To the contrary, the Prosecutor himself acknowledges that in his testimony presumably “A. Sh. would have claimed not to have inserted political influence in the decision making process”.⁸

50. There has been no violation of Article 360 Paragraph (5) KCCP and subsequently no erroneous or incomplete determination of factual situation.

IV. B. Alleged violation of criminal law under article 404 KCCP

51. The Special Prosecutor alleges that the Impugned Judgment violates criminal law because it misinterprets the preliminary questions in administrative law and customs law and consequently adopts a wrongful interpretation of the Kosovo Customs and Excise Code.

52. The arguments invoked fall within the appellate ground of erroneous or incomplete determination of factual situation, and not violation of criminal law. Determination of whether the Accused blatantly and in full knowledge violated the Kosovo Customs and Excise Code is part of the factual determination, and not determination of criminal law. Challenging the Impugned Judgment on the basis of a violation of criminal law is limited to the misapplication or omission to apply *norms of criminal law*, as defined in Article 404 KCCP.

⁷ See also Article 7 Paragraph (1) KCCP.

⁸ Appeal, p. 14 (English version).

53. In the case at hand the issue of whether the decision taken by **L. R.** to grant further importation of tobacco was contrary to any sound legal reasoning, is a question of fact in the criminal proceeding against him. Although the determination of the issue in effect amounts to legal interpretation relating to the customs laws and administrative law, it remains, for the purposes of the respective criminal proceeding, a factual determination.

54. The Court of Appeals will therefore address the Prosecution arguments in the following subsection under the heading of alleged erroneous or incomplete determination of factual situation.

IV. C. Alleged erroneous or incomplete determination of factual situation

55. The Special Prosecutor submits that the oral reasoning given after the announcement of Judgment and written Judgment differ on whether political influence was exerted over **L. R.**

56. The Court of Appeals takes note of the ambiguous wording of the oral reasoning given by the Presiding Judge on 17.05.2012, when the Presiding Judge appears to have stated that the decision was “triggered by purpose other than law”.⁹ However, reading the oral reasoning in totality and as a whole, it corresponds to the findings elaborated in the written Judgment. The Presiding Trial Judge has explained that the Trial Panel had doubts whether **L. R.** knew that the decision was legally wrong. The Presiding Judge specifically mentioned as relevant for this conclusion that **L. R.** subscribed to the same (now disputed) interpretation of the Customs and Excise Code *before* any meeting took place between **N. H.** and A. Sh. Reading the reasoning as a whole, it follows that the Panel concluded that the Prosecution failed to prove beyond reasonable doubt that political influence was exercised over **L. R.** The Panel noted it had doubts regarding the factual situation and that it had resolved those doubts, in accordance with the law, to the benefit of the Accused. The oral reasoning as a whole thus corresponds to the findings in the reasoned Judgment. In the latter the Trial Panel elaborated on what elements of the criminal offence it did not consider proven. The Panel reasoned that insufficient evidence was presented to conclude beyond reasonable doubt that **L. R.**’s interpretation was without any sound legal reasoning and there was any subjective connection between the alleged action of abuse of position or authority and causing unlawful benefit or damage.

57. The Appellate State Prosecutor in her Opinion points to a perceived inconsistency in the reasoned Judgment. She submits that Trial Panel on one hand writes how some facts may indicate a strong suspicion that decisions of Mr. **L. R.** were subject to political influence where elsewhere the Panel finds there is no evidence the decisions were based on political interference. The Court of Appeals does not find these findings contradictory or mutually exclusive. The Trial Panel namely did consider there is enough evidence to demonstrate suspicion of political influence but at the same time found the evidence fell short of concluding beyond reasonable doubt that such influence was exerted.

⁹ Record of Main Trial, Session 17.05.2012, p. 2 (English version).

58. The Special Prosecutor argues the factual findings of the Trial Panel are based on incomplete evaluation of evidence. He submits the Panel omitted to take into account the following decisive evidence: the statements of witnesses J. H., Xh. P. and Sh. B., the expert testimony of H. S., internal audit report of B. S., email correspondence between **N. H.** and **L. R.** and **L. R.** and B. C. on 26.12.2008, circumstantial evidence proposed by the Prosecution. The Special Prosecutor also argues the Trial Panel failed to obtain a counter expert report in case the expert opinion of H. S. was considered unreliable.

59. The Court of Appeal concurs with the Special Prosecutor that the Trial Panel failed to address some of the relevant evidence in the case. Whilst the Trial Panel was not obliged to discuss every single piece of evidence, it should have in more detail addressed the relevance and probative value of witness testimonies and documentary evidence presented during main trial in order to more clearly and exhaustively reason its findings.

60. Although the reasoning of the Trial Panel is imperfect, the Court of Appeals notes that the scarce reasoning is not of such nature to amount to a violation of Article 403 Paragraph (1) Item 12) KCCP. The Trial Panel namely did exhaustively state what facts it considered proven and what not and there is no inconsistency within the reasoning of the Panel.

61. The Court of Appeals concurs with the findings of the Trial Panel on material facts, as will be discussed in detail below. Having carefully evaluated the evidence referenced in the Prosecution Appeal individually and as a whole, this evidence does not undermine or contradict the findings of the Trial Panel.

62. J. H. testified that **L. R.** asked to meet with him in the period of June - August 2010. The witness testified that **L. R.** told him there are allegations being made against him and this had to do with him competing for the post of Director of Customs. He – **L. R.** – thus wanted to hear J. H.'s professional opinion about the interpretation he had adopted.¹⁰

63. The Prosecutor's submission is that the actions of **L. R.** are indicative of "a guilty mind" of a perpetrator taking precautionary measures not to get caught. The Court of Appeals rejects such argument as unfounded.

64. The alleged criminal offence was committed in 2008, whereas **L. R.** approached J. H. more than 2 years later, in summer 2010. The witness elaborated that **L. R.** sought his professional opinion because he was running for a post and the decisions he made were being used against him. The explanation appears reasonable and credible. **L. R.** approached J. H. for a professional assessment and did not know what that assessment would be. Had he really tried to take precautionary measures not to get caught, as the Prosecution submits, **L. R.** would have surely sought the opinion of a person for whom he knew in advance would agree with his interpretation. Instead, he sought the views of a Eulex international expert, unaware of what that would opinion

¹⁰ Record of main trial, session 18.04.2012, pp. 3-5 (English version)

would be. **L. R.** seeking the opinion of J. H. therefore in the view of the Court does not reveal anything about the alleged *mens rea* of the Accused.

65. Insofar the testimony of Xh. P. is concerned, the witness testified about what *he had heard* **N. H.** and **B. C.** say about **L. R.**, essentially how **L. R.** is not prone to acting in accordance with the law. The witness therefore did not testify out of his own knowledge about **L. R.**'s actions or behavior, but what he was told by third persons, one of them being the co-Accused in the case. Moreover, witness Xh. P. did not state that any such comments about Accused **L. R.** were even made in relation to the decisions giving rise to this criminal proceeding, but were in fact made in general terms. It is also noteworthy that **N. H.** in his testimony stated he has never been dissatisfied with **L. R.** either on professional or ethical grounds and that if it were not so he would not have kept him on.¹¹ The evidence of Xh. P. thus amounts to nothing more than the witness testifying on rumors. Such evidence is without probative value in the respective criminal proceeding and was correctly not given weight by the Trial Panel.

66. The Prosecutor in his Appeal also refers to evidence given by witness Sh. B. The Special Prosecutor in the Appeal for unknown reasons refers to the statement of the witness during pre-trial proceedings, instead of his testimony during main trial. More importantly, the Court of Appeals fails to see how the testimony of this witness benefits the Prosecution's case.

67. Firstly, it is noted that witness Sh. B.'s testimony in the investigation and before the Trial Panel was consistent. The witness testified that ...A. Sh. to his knowledge requested to find a legal way, a legal solution, if one existed. His testimony does not support the Prosecution's case of political interference. The witness did not testify that the Minister requested a specific decision to be made. On the contrary, according to witness Sh. B., the Minister only urged **N. H.** to find a legal solution.

68. The testimony of witness **H. S.** and his legal analysis is not addressed in the Impugned Judgment, although it arguably formed a center piece of the Prosecution case. The confusion the Trial Panel created with its treatment of the status of the evidence was addressed above.

69. The Trial Panel did not discuss the actual content of the documentary evidence. Irrespective of such omission, the Court of Appeals notes that the Trial Panel's treatment of this evidence can be inferred from its position regarding the legal interpretation of the Customs and Excise Code adopted by **L. R.** The Trial Panel in the Impugned Judgment discusses the two conflicting interpretations and comes to the conclusion that **L. R.**'s restrictive interpretation of Article 237 of the Code cannot be considered as one "without any sound legal basis". It is also clear from the Impugned Judgment that the Trial Panel, quite correctly, took it upon itself to review the reasonableness of the legal interpretation. The Panel writes that "it is not the role of this Panel to create jurisprudence upon administrative legal provisions or to certify rightful or wrongful interpretations. The role of the panel is to verify whether the decisions at stake have been taken

¹¹ Record of Main trial, session 24.04.2012, p. 7.

without any sound legal reasoning as alleged in the Indictment and, if positive, it occurred beyond reasonable doubt. However, [...] this court cannot define **L. R.**'s interpretation as *without any sound legal reasoning and beyond reasonable doubt*".¹²

70. The Court of Appeals finds that insofar the Trial Panel did not give any weight to this evidence, the decision was correct. The Trial Panel correctly adopted the view that it is its own task to evaluate whether **L. R.** knowingly pursued a blatantly wrongful interpretation of the law.

71. Nonetheless, as emphasized above, the Trial Panel should have discussed *why* the evidence was not considered. The Trial Panel considered that there is insufficient evidence to suggest that **L. R.**'s interpretation is "*without any sound legal reasoning and beyond reasonable doubt*". The Trial Panel also concluded that there is insufficient evidence to suggest that **L. R.** adopted a wrongful interpretation of the law knowing that the interpretation is unlawful. The Trial Panel placed specific importance on the fact that **L. R.** advocated for the same interpretation before making any concrete decisions and has publically pronounced such opinion. **L. R.**'s interpretation may be perceived as not being in accordance with the law by his colleagues, however as long as this is an interpretation he genuinely believed to be correct, there is no criminal offence. It is inherent in the law that it is more often than not interpreted differently. Sometimes decisions may be deemed unlawful on further proceedings, but this does not in itself mean that a criminal offence has been committed.

72. The perceived unlawfulness of the decisions cannot stand on its own as evidence of criminal behavior. Any such finding must be made upon conclusive evidence demonstrating the knowledge of unlawfulness on the side of the Accused. Such conclusive evidence is missing in the case at hand.

73. The Special Prosecutor in the Appeal also refers to the Internal Audit Report of B. S., which proclaimed **L. R.**'s interpretations as "biased".

74. Again, the Court of Appeals notes that the discrepancy in interpretations is evident. It is also evident that the vast majority of **L. R.**'s colleagues and fellow-experts did not support his interpretation of the law and they considered it incorrect.

75. The Prosecutor further places much relevance on the email exchange on 26.12.2008 between **N. H.** and **L. R.** and B. C. and **L. R.** The Prosecutor states that the emails show a pre-planned behavior of **L. R.**, demonstrating the required *mens rea*.¹³ The Court of Appeals rejects the Prosecutor's argument and finds that no such conclusion can be reached upon the text and timings of these emails alone. It is also noted that **N. H.** testified he had first given oral authorization to **L. R.** and then also sent the email.¹⁴

¹² Impugned Judgment. Pp. 17-18 (English version).

¹³ Appeal, p. 10-11 (English Version)

¹⁴ Record of Main Trial, Session 24.04.2012, p. 10 (English version).

76. The Special Prosecutor concedes that the majority of the evidence against both Accused is circumstantial evidence.

77. The Court of Appeals acknowledges that the Trial Panel failed to elaborate on the circumstantial evidence relied on by the Prosecutor and failed to comment on it in a meaningful way. However, the probative value of the evidence the Prosecutor mentioned in his closing statement and now summarily repeated in the Appeal is low and does not amount to the standard required for conviction, even when taken as a whole.

78. A conviction based predominantly on circumstantial evidence is not disallowed under the law, as long as the court is able to conclude, upon the collectivity of all circumstantial evidence presented, that a fact is proved beyond reasonable doubt. It is inherent of circumstantial evidence that more than one explanation is possible, and the court, to convict upon circumstantial evidence, must be convinced that a particular inference prevails over all others. The collectivity of circumstantial evidence in the case at hand does not enable the Court to doubt the decision of the Trial Panel.

79. The Prosecutor also submits that the Impugned Judgment wrongfully interpreted the preliminary legal questions in customs law and administrative law.

80. The Court of Appeals has already proclaimed the approach of the Trial Panel to itself interpret the Customs and Excise Code as correct. The Court of Appeals has also affirmed the finding of the Panel that there is insufficient evidence to conclude that **L. R.** adopted the interpretation he did knowing it was unlawful. The Appeal also elaborates on perceived wrongful delegation of administrative powers by **N. H.** and non-consideration of administrative principles.

81. The delegation of authority from **N. H.** to **L. R.** was disputed by the Prosecution and alleged to be indicative of the intent of the Accused to act unlawfully. The Court does not agree with such finding. Leaving aside the question of whether the appointment via email was in line with the administrative procedure or not, **N. H.** gave a reasonable explanation on why the delegation occurred in this form – because he was on holiday in Switzerland at the time. It is noteworthy the respective email was not sent only to **L. R.** but a copy also to **B. R.** No attempt was thus made to conceal the appointment, and it was done transparently. While delegation not in accordance with administrative law could have implications for the validity of the issued administrative decisions and the latter may for this reason be challenged in appropriate proceedings, it has no impact on this criminal proceeding.

82. The Court of Appeals does not need to assess the allegations of violations of administrative laws. This is not an administrative proceeding reviewing the administrative decisions issued. This is a criminal proceeding alleging criminal responsibility of the Accused for the issued decisions pursuant to Article 339 Paragraphs (1) to (3) CCK.

83. In conclusion, insofar the Prosecutor alleges the erroneous or incomplete determination of factual situation, there is no such violation. The Trial Panel correctly established the material facts and found insufficient evidence was presented to conclude that those material facts were proven beyond reasonable doubt.

84. The Court of Appeals observes that whilst the Appeal focuses on the finding of the Trial Panel that it has not been proven that the Accused knowingly violated the law, there is no meaningful argument refuting the conclusion of the Panel that it has also not been proven that the Accused acted with the intent to cause material damage or benefit.

V. Ex officio review

85. The Trial Panel in the first sentence of the enacting clause erroneously referred to Article 390 Paragraph (2) KCCP instead of Article 390 Paragraph (3) KCCP. It is evident from reading the Impugned Judgment as a whole, most notably the reasoning part, that the Trial Panel acquitted the Accused because of lack of evidence in the case. The Panel at no point discussed grounds of exclusion of criminal liability of the Accused, which is what Article 390(2) KCCP refers to. The question of excluding criminal liability would only arise if the Accused would have been found guilty of the commission of criminal offence, as set out in Article 10 CCK. The Court of Appeals considers the reference to the wrong paragraph in the enacting clause of the Impugned Judgment to be a typing error. For completeness purposes, the typing error is corrected through the amendment of the enacting clause.

86. The Panel has ordered the costs of criminal proceedings to be paid from the budgetary resources. The Trial Panel however as the legal basis erroneously referenced Article 103 Paragraph (3) KCCP, instead of Article 103 Paragraph (1) KCCP. Paragraph (3) namely refers to the obligation of private prosecutor and subsidiary prosecutor to pay costs in case of acquittal, whereas Paragraph (1) corresponds to the actual decision made by the Trial Panel. The Court of Appeals has amended the reference accordingly.

87. The Court of Appeals finds no violation pursuant to Article 415(1) KCCP.

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

Prepared in English, an authorized language.

Reasoned Judgment completed on 16.09.2013.

Presiding Judge

Hajnalka Veronika Karpati

EULEX Judge

Panel member

Xhevdet Abazi

Judge

Panel member

Fillim Skoro

Judge

Recording Officer

Beti Hohler

EULEX Legal Officer

COURT OF APPEALS OF KOSOVO

Pakr 1123/12

27 August 2013