SUPREME COURT

Case number: **PML-KZZ 147/2017**

(P. no. 98/14 Basic Court of Mitrovica)
(PAKR no. 299/16 Court of Appeals)

Date: 20 July 2017

IN THE NAME OF PEOPLE

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Jorge Martins Ribeiro (presiding and reporting), EULEX Judge Elka Filcheva-Ermenkova and Kosovo Supreme Court Judge Nesrin Lushta, as Panel members, assisted by EULEX Legal Adviser Vjollca Kroci-Gerxhaliu, in the criminal case against:

> **O.I.**, son of B. I. and O. K., born on … in …, …, residing in …, since … subject to the restrictive measures set in Articles 177 of the Criminal Procedure Code, hereinafter CPC, (prohibition of approaching specific persons or places) and 178 CPC (attendance at the police station) with his travel documents apprehended by the court, and
>
> **D.D.**, son of D. D. and M. S., born on … in …, residing in …

charged under the Indictment of the Special Prosecution office of the Republic of Kosovo PPS 04/2013, dated 8 August 2014, and filed with the Basic Court on 11 August 2014, and as far this request for protection of legality is concerned, they were accused of

(Count two – 3 charges)

- 1: Incitement to Commit the Offence of Aggravated Murder in Co-perpetration in the form of depriving another person of his or her life because of national motives, in co-perpetration and pursuant to Article 179 (1.10) in conjunction with Articles 31 and 32 of the CCK and criminalized also at the time of the commission of the criminal offence under Article 30 Paragraph (2) of the CLSAPK in conjunction with Articles 22 and 23 of the CCSFRY
- 2: Incitement to Commit the Offence of Attempted Aggravated Murder in Co-perpetration in the form of depriving another person of his or her life because of national motives, resulting in grievous bodily injury in co-perpetration, pursuant to Article 179 (1.10) and Article 189 (2.1) and (5) in conjunction with Articles 28, 31 of the CCK, and criminalized also at the time of the commission of the criminal offence under Article 30 Paragraph (2) and Article 38 Paragraph (2) of the CLSAPK in conjunction with Articles 19, 22 and 23 of the CCSFRY and;
- 3: Incitement to Commit the Offence of Attempted Aggravated Murder in Co-perpetration in the form of depriving another person of his or her life because of national motives in co-perpetration, pursuant to Article 179 (1.10) in conjunction with Articles 28, 31 and 32 of the CCK, and criminalized also at the time of the commission of the criminal offence under Article 30 Paragraph (2) of the CLSAPK in conjunction with Articles 19, 22 and 23 of the CCSFRY; (charged with one co-accused);

acquitted by **Judgment of the Basic Court of Mitrovica** P. no. 98/14, dated 30 March 2016, with regards count 2 all 3 sub-charges above mentioned. By the **Judgment of the Court of Appeals** dated 19 December 2016, adjudicating on the appeals filed by the Prosecution, the Court of Appeals (PAKR 299/16), rejected the appeal with regards count 2 and the Judgment of the Basic Court of Mitrovica was confirmed thereto (count 2 and also count 3).

Acting upon the Request for Protection of Legality KMLP/I no. 147/2017 (hereinafter: Request) concerning the Judgment of the Court of

Appeals PAKR 299/16, dated 19 December 2016, in relation to count two, filed by a State Prosecutor on 28 April 2017 and received at the Supreme Court through the Basic Court of Mitrovica on 3 May 2017, served to the defence councels on 2 May 2017 (N.V.and Lj. P. for O.I.; M.B. and D. V.for D.D.) and, following an order of the undersigned (dated 17 May 2017, granting the motions by Defence Counsels requesting defendants to be served, pursuant Article, 477, paragraphs 2 and 4, CPC.), the defendants and their defence counsels were served (D.D. on 23 June 2017, as per the delivery registry received in the court on 4 July, after several requests by the Supreme Court);

having considered the request and replies of the defense counsel Lj.P. on behalf of defendant O.I., filed on 16 May 2017 with the Basic Court of Mitrovica and individual reply filed by defendant O. I. on 12 June 2017 to the Request for Protection of Legality filed by a State Prosecutor on count two of the Court of Appeals Judgment PAKR 299/16 dated 19 December 2016; neither the defence counsel M.B. nor D.D. himself filed a reply.

having deliberated and voted on 20 July 2017;

pursuant to Articles 418 and Articles 432 to 441 of the Criminal Procedure Code (CPC);

renders, by majority, the following:

JUDGMENT

The Supreme Court finds the request for Protection of Legality against the Judgment of the Court of Appeals in case PAKR no. 299/16, dated 19 December 2016, admissible, pursuant to Articles 418, paragraph 3, and 432, paragraph 1 and sub-paragraph 1.2, CPC, but it is rejected for being ungrounded, pursuant to Article 437 CPC.

REASONING

Relevant Procedural Background

1 – The above mentioned charge was initially adjudicated in the criminal case P. no. 98/2014 of the Basic Court of Mitrovica. By the Judgment rendered on 30 March 2016 the Defendants were found not guilty of the said criminal offenses.

2 – During the appellate proceedings, on 19 December 2016, the Court of Appeals rendered Judgment PAKR 299/16 and confirmed the acquittal of both defendants O.I. and D.D.. In relation to count 1 the case was returned for retrial to the Basic Court of Mitrovica.

3 – On 28 April 2017, a State Prosecutor filed this Request for Protection of Legality against the said Judgment of the Court of Appeals in relation to the adjudication on count two with regards, in sum, the violation of the provision of Article 384, paragraph, 1.12 as read in conjunction with Article 370, paragraphs, 6 and 7, of the CPC, because the Court of Appeals failed to provide any grounds for each individual point of the judgment and to state clearly and exhaustively the reasons by which it was guided in setting the above mentioned points of law and also because it should have deemed the first instance judgment raised considerable doubt as to the accuracy of the factual determination and therefore annulled the verdict also in count two and a new main trial should have been ordered as well.

4 – The Basic Court of Mitrovica served the Request to the Defence Councels on 2 May 2017 and the defence counsels filed their motions asking the defendants be served, which was granted on dated 17 May 2017.

5 – The Request for Protection of Legality was transferred to the Supreme Court on 3 May 2017. The copy of delivery slip with regards the service to the defendant D.D. with Request on 23 June 2017, was received by the Supreme Court only on 4 July 2017.

6 – In this case, following the entry into force of Law 05/L-103, it is not necessary to ask again KJC, based on Article 3, paragraph 5, of the said

Law, for permission to have the panel composed of a majority of EULEX Judges with a EULEX Judge Presiding because the previous request (on 22/8/2016 PEJ (0107-0001) for such throughout the entire course of the proceedings was granted on 27 September 2016 (KGJK 1123/2016). With regards the mentioned KJC decision, it is worth noting that no reference is made to the protection of legality. However, it starts by approving the request of EULEX (and it comprised also the requests for protection of legality) and in the reasoning of the decision there is nothing in the sense that the requests for protection of legality are excluded).

7- Following the judgment of the Court of Appeals dated 19 December 2017, the Basic Court of Mitrovica is holding a new main trial in relation to count 1.

Submissions of the Parties

State Prosecutor's submission

Request for Protection of Legality against the Judgment of the Court of Appeals with regards count 2

The State Prosecutor opposes the findings and reasoning of the Court of Appeals in its Judgment. According to the Prosecution, the said judgment "violated the provision of Article 384, paragraph 1.12, as read in conjunction with Article 370, paragraphs 6 and 7, CPC, because if failed to provide any grounds for each individual point of the judgment and to state clearly and exhaustively the reasons by which it was guided in setting the abovementioned points of law" and to be considered by the Supreme Court there are doubts as to the accuracy of the factual determination and therefore the judgment is annulled and a new main trial is ordered to be held before the Basic Court of Mitrovica.

The Prosecution claims Article 439 CPC enables the Supreme Court to following doubts on the accuracy of the factual situation to annul the judgment and order a new main trial, even if it is to the disadvantage of the defendant, because such norm (Article 439 CPC) enshrines an exception to Articles 432, paragraph 2, 437 and 438, paragraph 2, CPC.

After, the Prosecution elaborates on the merits related to points 2 to 5 of its motion, as it addresses the accuracy of the factual situation, legally reasoned (ex vi Article 382, paragraph 1.2, CPC) upon articles 384, paragraph 12, and 370, paragraphs 6 and 7, 361, paragraph 2, and Article 382, paragraph 2, CPC. The State Prosecutor also claims there has been a violation of Article 361, paragraph 2, CPC as the Court of Appeals allegedly failed to provide grounds for its decision or assess the evidence conscientiously or to address all the arguments presented in the appellant's appeal with regards the understanding on the evidence presented in the trial.

In short, the Court of Appeals failed to failed to state clearly the reasons by which it was guided in setting the abovementioned points of law, in presenting the assessment of the evidence as to why facts were established or not or the reasons as to why agreed with the first instance in that regards.

Reply of both the defense counsel and defendant on count two to the Prosecutor's request

Though separately, both the defence counsel and the defendant have submitted motions with the same contents.

They move the Supreme Court of Kosovo to dismiss the Request for Protection of Legality filed by the State Prosecutor as inadmissible pursuant to Article 435 (2) of CPC on 2 grounds:

a) It is prohibited pursuant Article 433, paragraph 1, CPC as it was not filed by the authorised person since the Request for protection of Legality can be filed only by the Chief State Prosecutor of the Republic of Kosovo and not by the, or a, Special Prosecutor of Kosovo;

b) Article 432 of the CPCK provides in paragraph 1 the types of judicial decisions against which requests for protection of legality may be filed, and in which cases it is allowed to file a request for protection of legality. Cases when it is allowed to file this

extraordinary legal remedy are: violation of criminal law, substantial violation of the provisions of criminal procedure, and other violations of the provisions of criminal procedure, if such violations affected the lawfulness of a judicial decision. Filing of a request for protection of legality on grounds of erroneously and incompletely determined factual situation is not allowed, pursuant Article 432, paragraph 2, CPC.

Or, in case it is considered as admissible, they move the Supreme Court to reject it as ungrounded because, in sum, the defendants A.L., N. V. and I. V.), who allegedly would have been incited by O. I. and D.D. were acquitted in a final form in count 3.

Competence and the composition of the panel

The Supreme Court of Kosovo is competent court to adjudicate upon the extraordinary legal remedies, as per Articles 418 *et seq.* CPC.

In accordance with 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 05/L-103, the case is considered as an 'on going case' and consequently falls under the jurisdiction and competence of EULEX judges, in accordance with Articles 1, paragraphs 1 and 2, and 3, paragraph 5, Law 05/L-103 with its current amended wording.
The composition of the panel with a majority of EULEX judges, presided by a EULEX Judge in this case is based upon the KJC Decision No. KGJK 1123/2016, dated 27 September 2016, as mentioned above.

Admissibility of the request

The request in this ongoing EULEX case was filed by a Prosecutor of the Office of the State Prosecutor (as written in the blue stamp "Prokurori Shtetit") and, in sum, the Chief State Prosecutor as mentioned in Article 433 CPC is not the entity competent to file it in this case, pursuant to

Article 12 of the Law on State Prosecutor 05/L-034, dated 28 May 2015, which added Article 32A to the previous law, 03/L-225 from September 2010; according to paragraph 1 of the said Article 32A, "[f]or the duration of the EULEX Kosovo mandate, the Chief State Prosecutor may not assume jurisdiction over cases assigned to a EULEX Prosecutor, without the consent of the Chief EULEX Prosecutor".

It was said "in sum" as much could be said, namely, that the new criminal procedure code is in force since 1/1/2013…and it changed significantly the *locus standi* related to filing protections of legality, as in the Provisional Procedure Code any public prosecutor could do it (pursuant to Article 452, read together with Article 46 *et seq*, on the competencies, and Article 151 on definitions), but in the new Criminal Procedure Code only the Chief State Prosecutor is mentioned (Article 443, and Article 46 on competence, make reference to the Law on State Prosecutor Chapter IV).

Permissibility of the request

It is now the time to assess if the request is permissible at the present moment, as the main trial is being repeated in the Basic Court of Mitrovica.

A Request for Protection of Legality can be filed only against the final judicial decision, or due to a violation of judicial proceedings which preceded the rendering of that decision, after the proceedings have been completed in a final form.

Pursuant to Article 418, paragraph 3, CPC, a party may request protection of legality within three months of the final judgment or final ruling against which protection of legality is sought.

At this point two interpretations would be possible:

A) The extraordinary legal remedies are to be used once there is a final judicial decision of the proceedings, regardless the number of counts and whether any or some of those are not subject to an appeal any longer for having become final. Even in the case where the request for protection of legality is against judicial proceedings which preceded the rendering of that decision (the final judicial decision) only after the proceedings have

been completed in a final form the request can be filed – as set in the final part of paragraph 1 of Article 432 CPC.
Exception to this understanding would be the case set in paragraph 4 of the same article: a request for protection of legality can be filed during criminal proceedings which have not been completed in a final form only against final decisions ordering or extending detention on remand.

B) A final judicial decision exists in relation to a particular juridical issue, including a count when in the proceedings more than one exist, as long as it becomes *res judicata*.

This latter understanding is the one followed by the Panel.

Having come to this part, it is now established the admissibility of the request and the defence claims above under **a)** and **b)** about inadmissibility are accordingly considered without merits, also because in the case of **b)** it is worth mentioning that the Prosecution makes its request also based on an alleged substantial violation of criminal procedure provided for in article 384, paragraph 1.12, CPC.

The Prosecution elaborates on different arguments,
The grounds to file a request for protection of legality are set in Article 432, paragraphs 1 and 4, and in Article 433, paragraph 4, CPC.
Pursuant to Article 432, paragraph 2, CPC, it is clear that a request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, as Article 437 CPC clearly states that in such case the Supreme Court shall reject it, by a judgment.

On its turn, Article 438 CPC, paragraph 2, states that if the Supreme Court finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it shall only determine that the law was violated.

Nevertheless, the Prosecution claims that Article 439 CPC – where it reads "if in proceedings on a request for protection of legality considerable doubt arises as to the accuracy of the factual determination in a decision challenged by the request (…) the Supreme Court shall in

its judgment (…) annul that decision and order a new main trial" – constitutes an exemption to Article 437 CPC (and logically to Article 432, paragraph 2, CPC) and to Article 438, paragraph 2, CPC, or, as the Prosecution puts it, Article 439 CPC is an "exception to the entire set of norms regulating the process of consideration of protection of legality", enabling the Supreme Court to adjudicate on a request for protection of legality and send the case back for retrial if "protection of legality is requested based on an erroneous or incomplete determination of the factual situation or if protection of legality was requested only to the disadvantage of the defendant.

The Supreme Court, in this case, similar to others where the same issue was discussed (eg. Pml. Kzz 216/2016) sees no reason to deviate from its previous understanding.

The panel is "of the view that, in pursuance of Article 439, the Supreme Court can nullify a verdict and return the case for a retrial only if there is a possibility of a more favourable verdict for the accused to be returned in the new proceedings. Article 439 must be read subject to Article 440, which foresees at paragraph 4 that where a final Judgment is annulled and the case returned for retrial, 'In rendering a new decision, the court shall be bound by the prohibition under Article 395 of the present Code.' Article 395 of the CPC provides for the restriction *Reformatio in Peius* and, while this Article is applicable only to the legal classification of the offence and the criminal sanction imposed, Article 438 (2) is broader in scope and refers to 'the disadvantage of the defendant'. There is no possibility of a more favourable verdict in a retrial of the defendants in this case as all defendants have been acquitted of all criminal offences. There is therefore no purpose in annulling the impugned Judgment and returning the case to the Basic Court for retrial" – see the decision referred to.

The Prosecution's interpretation does not explain how its interpretation would be in compliance with the provisions set in Articles 440, paragraph 3, and 436, paragraph 3, CPC and even to Article 432, paragraph 2, CPC, all to the detriment of the defendant.

Apart from this, "Paragraph 2 of Article 4 states that 'a final decision of a court may be reversed through extraordinary legal remedies only in favor of the convicted person, except when otherwise provided by the present Code'. The Panel is not of the view that an exception to Article 4 (2) is provided by Article 439, as Article 438 (2) would then have no meaning. Such exception as foreseen in Article 4 (2) can only be found in Articles 418 and 419 of the CPC regarding the reopening of criminal proceedings" – idem.

With regards the argument Article 438, paragraphs 1 and 2, comprise only requests (respectively) filed to the disadvantage and to the advantage of the defendant where Article 439 comprises both, it not only has no correspondence with the actual text of the law, but also goes against the systematic and teleological interpretation of the set of norms regulating the request for protection of legality but also, would it be necessary, the core principle enshrined in Article 3, paragraph 2, CPC (which does not distinguish between substantive or procedural criminal law), where it reads "doubts regarding the implementation of a certain criminal law provision shall be interpreted in favour of the defendant (…)".

Finally, in relation to the Prosecution's argument that the wording used in Article 439 CPC (considerable doubt arises as to the accuracy of the factual determination) is different in comparison with the one used in provisions as, for instance, Article 432, paragraph 2, and Article 437 (erroneous or incomplete determination of the factual situation), the Supreme Court finds no possible case where doubts as to the accuracy of the factual determination are not related to the right or erroneous or complete or incomplete determination of the factual situation. What would then the accuracy of the factual determination be related to?

With regards the arguments submitted by the State Prosecutor on the merits related to points 2 to 5 of its motion, Article 370, paragraphs 6 and 7 (*ex vi* Article 384, paragraph 1.12) CPC, again the panel is of the opinion that the request is ungrounded.

Nothing in the law prohibits a higher court of adhering to the reasoning of a lower court by endorsing it (which is different from the absence of grounds) if it is deemed that there is no need of adding reasoning to a particular decision, on law or on facts. Contrary to the Prosecution's claims, in the statement of the grounds the latter are present for each individual point of the judgment and stated clearly the facts considered proven or not proven as well as the grounds for such, together with the assessment of the credibility of conflicting evidence.

The level of accuracy or detail is subject to some discretion, as long as the margin is still within the limits required by law to make the decision understandable (namely, the requirements at hand, set in paragraphs 6 and 7).

Of course it is always possible to be more detailed. Though not really needed at this point to engage in a thorough elaboration, it is worth noting, and as an example, that when the prosecution claims the statements of witnesses B.R., G. R., E. B. and Sh.H. were not properly addressed, it is not true. The Court of Appeals addressed them but found not need of repeating the thorough elaborations made on it by the first instance. It is true the Court of Appeals on page 42 made reference to paragraphs 18 and 347 to 355 with regards these witnesses, when could also have made others (for instance, B.R. paragraph 16 but also 355, 462; G.R. paragraph 46 but also 350, 447, 473 and 534; E.B. paragraph 40 but also 464 and Sh.H. paragraph 33 but also 458, 462 and 464.

With regards the concept of "main witnesses" without stating which, it is apparent that with regards (mostly count two) it is all those analysed in detail from paragraphs 358 up to 480 of the first instance judgment (and with regards witnesses X and Y, for example, from paragraphs 482 to 498), starting by Sh.A. and then his wife, V.A., etc., as witness by witness the court addressed them all. Considering this, and in the light of what said above, that there is margin of discretion when it comes to reasoning, as long as the requirements are met, which is the case, this Court considers that the said grounds are without merits as indeed it is clear that underlying the claims is the Prosecution's disagreement with the assessment of the evidence, as the Court of Appeals also pointed out.

And the same applies to the alleged violation by the Court of Appeals of Article 361 CPC.

Finally, as it is considered relevant to the case at hand, about thoroughness of reasoning, the Panel quotes here the Article on the Right to a Fair Trial by the European Court of Human Rights (Art. 6 E.C.H.R.) " 'Reasoning of judicial decisions' – According to established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based (Papon v. France). Reasoned decisions serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. **However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case** (Ruiz Torija v. Spain, § 29). **While courts are not obliged to give a detailed answer to every argument raised** (Van de Hurk v. the Netherlands, § 61), **it must be clear from the decision that the essential issues of the case have been addressed** (see Boldea v. Romania, § 30). National courts should indicate with **sufficient** clarity the grounds on which they base their decision so as to allow a litigant usefully to exercise any available right of appeal (Hadjianastassiou v. Greece; and Boldea v. Romania) [**emphasis added**]".

Conclusion

For the stated above it has been decided as in the enacting clause.

Presiding Judge **Recording Officer**

EULEX Judge Jorge Martins Ribeiro **Vjollca Kroci-Gerxhaliu**

Panel members

EULEX Judge
Elka Filcheva-Ermenkova

Supreme Court Judge
Nesrin Lushta