

DISTRICT COURT OF PRIZREN

KP 55/11

03 March 2011

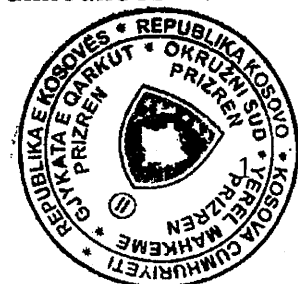
The Three-Judge Panel of the District Court of Prizren comprising Judge Malcolm Simmons Presiding, Judges Vatou Durguti and Kujtim Pasuli as panel members, in the criminal case against

1. **B** **K**, father's name , mother's name , maiden name i, born in village , Municipality of Podujeve/Podujevo, in Prishtine/Pristina, Kosovo Albanian, married, father of two children, Law Faculty graduate, middle economic status, no known previous convictions in Kosovo, currently at liberty, and

2. **Xh** **D**: father's name , mother's name , maiden name born on in Peje/Pec, Prishtine/Pristina, Kosovo-Albanian, widower, father of three children, Law Faculty graduate, middle economic status,

charged pursuant to Indictment PP number 2549-15/08 dated 4 June 2008, with which the defendant **B** **K** (hereinafter the "First Defendant") was previously charged with the criminal offence of Issuing Unlawful Judicial Decisions under Article 346 of the Provisional Criminal Code of Kosovo (hereinafter "the PCCK") and the defendant **Xh** **D** (hereinafter the "Second Defendant") was charged with the criminal offence of Abusing official position or authority under Article 339 par.2, and the criminal offence of Falsifying Official Documents under Article 348 par.2 of the PCCK,

deciding upon the appeal of the Municipal Public Prosecutor of Prizren dated 2 February 2011 against the Judgment of the Municipal Court of Prizren in case number P. 616/10 dated 15 December 2010, following a hearing on 3 March 2011 at which the First Defendant was present and the Second Defendant was represented by Ymer Osaj, pursuant to Article 423 of Criminal Procedure Code of Kosovo, announces the following



JUDGMENT

The appeal is **rejected** as unfounded and the Judgment of the Municipal Court of Prizren in case P. 616/10 dated 15 December 2010 is hereby **confirmed**.

Reasoning

The First Defendant was charged that on 6 September 2007 in the capacity of Confirmation Judge of the District Court of Pristina, in the confirmation session of Indictment PP.no.855-2/07 dated 19 July 2007, in order to inflict damage to the injured parties E. , A. , B. G. and M. D. , in order to deny their subsidiary claimant right, failed to summon the defendant I. B. and the injured parties pursuant to the provisions of Article 313 par. 2 of the Provisional Criminal Procedure Code of Kosovo (hereinafter "the PCPCK"), issuing an unlawful decision by confirming with Ruling KA.no.357/07 dated 6 September 2007 a new indictment submitted by the Second defendant, as if it was delivered to the court on 19 July 2007 which did not include the accused Q. B. and I. B. charged for a criminal offence grievous bodily harm under Article 154 par. 1 item 5 of the PCCK, and failed to inform the injured parties of their right to pursue a criminal charge pursuant to Article 62 par. 1 of the PCPCK.

Wherewith it was averred the First Defendant committed the criminal offence of Issuing an Unlawful Judicial Decision under Article 346 of the PCCK.

The Second Defendant was charged that on 6 September 2007 in the capacity of Confirmation Judge of the District Court of Pristina, in the confirmation session of Indictment PP.no.855-2/07 in the District Public Prosecution in Pristina, and therefore an "official person" within the meaning of the Code, during the confirmation session of the Indictment of District Public Prosecution in Pristina PP.no.855-2/07, abused his official position and exceeded his official authorization in order to inflict damage to the injured parties E. , A. , B. G. and M. D. to deny their right of pursuing criminal charges, in violation of the provisions of Article 313 of the PCPCK, driven by the First Defendant, amended the

mentioned indictment so that it no longer charged the accused Q. B. and I. B. for the criminal offence of grievous bodily harm under Article 154 par. 1 item 5 of the PCCK, for which he was charged in the indictment delivered to the court on 19 July 2007.

Wherewith it was averred the Second Defendant committed the criminal offence of Abusing his Official Position or Authority under Article 339 par.2 of the PCCK.

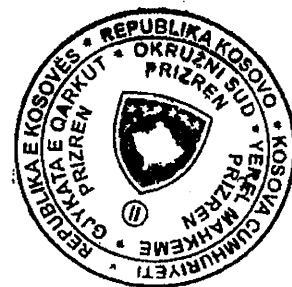
It was further alleged against the Second Defendant that on the same day and while acting in the same capacity used a falsified official document as an original, namely indictment PP.no.855-2/07 wherein it was falsely stated the Indictment had been delivered to the court on 19 July 2007 at 15:20hrs under reference number 617 and thereafter submitted it to the First Defendant who delivered it as an original into the case files of the District Court in Pristina KAQ.no.375/07.

Wherewith it was averred the Second Defendant committed the criminal offence of Falsifying Official Documents under Article 348 par.2 of the PCCK.

As against the First Defendant, applying the principle of *reformationis in peius*, the Court re-qualified the count of Issuing Unlawful Judicial Decision under Article 346 of the PCCK as Abusing official position or authority and not for the offence of Issuing unlawful judicial decisions (Article 346 of the PCCK).

On 15 December 2010 the Municipal Court of Prizren issued a Judgment wherein the First Defendant was acquitted of the offence of Abusing his Official Position or Authority under Article 339 (2) of the CCK and the Second Defendant was acquitted of the offence of Abusing his Official Position or Authority under Article 339 (2) of the CCK but convicted of Falsifying Official Documents under Article 348 (2) of the CCK and sentenced to a term of imprisonment of three months, suspended for 1 year.

The Prosecutor filed an appeal dated 2 February 2011 against the first-instance Judgment wherein it was averred the first-instance court partially and erroneously determined the evidence.



Counsel for the First and Second Defendants filed responses to the Prosecutors appeal. The Second Defendant did not appeal his conviction under Article 348 (2) of the CCK.

We do not propose reciting herein all of the factual findings of the first-instance court.

The First Defendant was charged with one count of Abusing Official Position or Authority under Article 339 (2) of the CCK.

The Second Defendant was charged under two counts: Firstly, Abusing Official Position or Authority under Article 339 (2) of the CCK and, Secondly, Falsifying Official Documents under Article 348 (2) of the CCK.

i. Abusing Official Position or Authority under Article 339 of the CCK

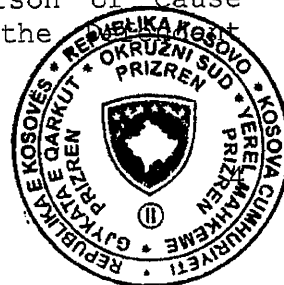
Article 339 (1) provides

*An official person who, **with the intent** to obtain an unlawful material benefit for himself, herself or another person or a business organization or to cause any damage to another person or business organization, abuses his or her official position, exceeds the limits of his or her authorisations or does not execute his or her official duties shall be punished by imprisonment of up to one year.*

Article 339 (2) provides

When the offence provided for in paragraph 1 of the present article results in a damage exceeding 2.500 EUR or a grave violation of the rights of another person, the perpetrator shall be punished by imprisonment of up to three years.

There are two limbs to an offence under Article 339. Firstly, did the Defendant intend to obtain an unlawful material benefit for himself or another person or cause damage to another person? Secondly, did the



abuse his official position, exceed the limits of his authority or fail to execute his official duties?

There is a clear distinction between basic and specific intent. An offence under Article 339 requires specific intent. Therefore, the Prosecution must prove the Defendant specifically intended to obtain an unlawful material benefit for himself or another person or cause damage to another person. Secondly, if the Prosecution successfully proves the first limb of the test it must then prove that the Defendant abused his official position, and/or exceeded the limits of his authority and/or failed to execute his official duties.

A person *intends* a consequence when he or she foresees that it will happen if a given series of acts or omissions continue and desires it to happen.

There exists a distinction between basic and specific intent.

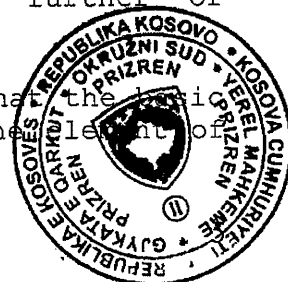
Offences requiring basic intent specify a mens rea element that is no more than the intentional or reckless commission of the *actus reus*. The actor knew or deliberately closed his mind to the risk that his action would result in the harm suffered by the victim.

Therefore, in determining whether a person has committed an offence, a court shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of it being a natural consequence of those actions but shall decide whether he intended or foresaw the result by reference to all the evidence, drawing such inferences as appear proper in the circumstances.

However, a limited number of offences are defined to require a further element in addition to basic intent - specific intent.

Particular offences may be so serious that the mens rea requirement must be drafted to demonstrate more precisely where the fault lies. Thus, in addition to the conventional mens rea of intention or recklessness, a further or additional element is required.

The rule in cases involving such offences is that the basic element can be proved in the usual way, but the further element of



specific intent must be shown using a test that is more subjective than objective thereby ensuring the legislature's express requirement is satisfied.

Article 339 requires proof of specific intent.

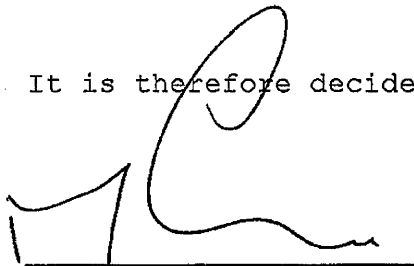
Therefore, the Prosecution must prove the Defendant specifically intended the harm caused. That is a subjective test under Article 339.

There is insufficient evidence to find the First and/or Second Defendant specifically intended to obtain an unlawful material benefit for himself or another person or that he intended to cause damage to another person or business organization.

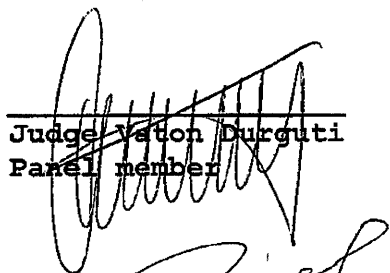
ii. Falsifying Official Documents under Article 348 (2) of the CCK

The Second Defendant was convicted on one count of Falsifying Official Documents under Article 348 (2) of the CCK. He did not appeal his conviction.

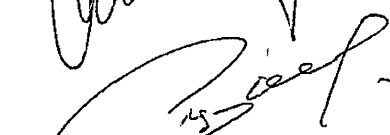
It is therefore decided as in the enacting clause.



Judge Malcolm Simmons
Presiding Judge



Judge Veton Durguti
Panel member



Judge Kujtim Pasuli
Panel Member

