

IN THE BASIC COURT OF PEJË/PEĆ

Case Number P.nr. 359/12

Date 14/06/ 2013

IN THE NAME OF THE PEOPLE

The Basic Court of Pejë/Peć, in the trial panel composed of Eulex Judge Jonathan Welford-Carroll as Presiding Judge and Eulex Judge Cornelia Peeck and Kosovo Judge Nushe Kuka-Mekaj as panel members and Court Recorder Christine Sengl, in the criminal case against:

KP, son of father X and mother X, maiden name X, born on X, in the village of X, X Municipality, residing in X, lawyer by profession, of average financial situation, married, father of three children, Albanian, citizen of the Republic of Kosovo

Charged jointly with his co-accused, **AR** in the Indictment of the Special Prosecution Office of the Republic of Kosovo (hereinafter "SPRK") PPS.nr. 7/2011 dated 23/07/2012, filed in the District of X on 23/07/2012, and partially confirmed by the ruling of the Eulex confirmation Judge dated 20/09/2012, with the criminal offence of *Abuse of Official Position or Authority committed in co-perpetration* contrary to Articles 23 and 339 paragraphs 1 and 3 of the Criminal Code of Kosovo ("CCK"),

after holding a public trial on 29/01/2013 at which Ali Rexha appeared for SPRK, GB appeared for the defendant, **KP** and the Injured Parties **ZM, BE, XH, XK, NA** and the Insurance Association of Kosovo – Compulsory Insurance Unit were either present or summoned to be present and at which the defendant, **KP** was present, after severing the proceedings against **AR** by ruling dated 31/01/2013 and in accordance with the Minutes on the Achievement of Guilty Plea Agreement of 29/01/2013 after deliberation and voting held on 14/06/ 2013, on 14/06/2013 announces in public the following:

JUDGMENT

The defendant **KP** with the personal details set out above is

GUILTY

Of *Abuse of Official Position or Authority* committed in co-perpetration with **AR** contrary to Articles 3 paragraph 2, 31 and 422 paragraph 1 of the CCRK in that the defendant, **KP** participated in an illegal procedure which resulted in a loss of €71,257.40 to the Insurance Assurance of Kosovo – Compulsory Insurance Unit in Prishtina.

* * *

THEREFORE, by reason of the aforementioned the court imposes the following sentences:

- for the criminal offence of Abuse of Official Position committed in co-perpetration the defendant, **KP** is sentenced to an aggregate term of imprisonment of one (1) year and six months.

Against the defendant, **KP** pursuant to Article 3 paragraph 1 of the CCRK and Article 56 paragraph 2 of the CCK, the **accessory punishment** of *Prohibition on Exercising Public Administration or Public Service Functions* is imposed for an aggregate period of three (3) years after the punishment of imprisonment has been served.

Against the defendant, **KP** pursuant to Article 3 paragraph 1 of the CCRK and Article 57 paragraph 1 of the CCK, the **accessory punishment** of *Prohibition on Exercising the Profession of Lawyer* is also imposed for an aggregate period of three (3) years after the punishment of imprisonment has been served.

Pursuant to Article 3 paragraph 2 of the CCRK and Articles 82 and 83 of the CCK the defendant, **KP** is ordered to pay an amount of money corresponding to the material benefit of €71,257.40. The defendant, **KP** and his co-accused, **AR** are jointly and severally liable for the repayment of this sum.

The defendant, **KP** shall reimburse the costs of the criminal proceedings, assessed in the sum of 100 Euros together with the Scheduled Amount assessed in the sum of 50 Euros.

The Injured Parties may pursue a claim for compensation through the civil courts.

REASONING

1. Procedural Background

i. The indictment

On 23/07/2012 the Special Prosecution Office of Kosovo (hereinafter "SPRK") filed Indictment PP.no.07/2011 against the defendants **KP** and **AR** for the criminal offences of Abuse of Official Position or Authority, contrary to Article 339 paragraphs 1 and 3 of the CCK in conjunction with Article 23 of CCK and in connection with the alleged offence of Issuing Unlawful Court Decisions contrary to Article 346 of CCK, (against **KP**) and Abuse of Official Position or Authority, contrary to Article 339 paragraphs 1 and 3 of the CCK in conjunction with Article 23 of CCK and in connection with the alleged offence of Breach of Trust contrary to Article 269 paragraphs 1 and 2 of CCK, (against **AR**).

On 20/09/2012 the confirmation judge of the District Court of Pejë/Peć confirmed the aforementioned Indictment through Ruling KA.nr. 223/12 dated 20th September 2012. However, the confirmation Judge dismissed the Indictment filed against the defendant, **KP** in respect of the criminal offence of Issuing Unlawful court decisions contrary to Article 346 of the CCK.

ii. Competence of the Court and Panel Composition

INTRODUCTION & FORMALITIES

1. Geographical competence

1.1. According to the Indictment the criminal offences were committed within the jurisdiction of the former District Court of Pejë/Peć. No issue was raised by the parties at the commencement of the trial regarding the jurisdiction of this Court.

2. Jurisdiction and Applicable Law

2.1. In accordance with Article 23 (1) of the Kosovo Code of Criminal Procedure ("KCCP"), District Courts have jurisdiction to adjudicate at first-instance criminal offences punishable by imprisonment of at least five years or those offences punishable by Long-Term imprisonment.

2.2. In the present case the defendants, **KP** and **AR** were charged with offences that included Abuse of Official Position contrary to Article 339 paragraph 3 of the CCK, an offence punishable by imprisonment of one (1) to eight (8) years.

2.3. Article 3 (2) of the CCRK provides that in the event of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply.

2.4. In its session on 07/01/2013 the Supreme Court of Kosovo issued a Legal Opinion¹ wherein it stated that in all criminal proceedings in which the main trial commenced prior to the entry into force of the new Code of Criminal Procedure, the old Criminal Procedure Code would apply. This position was confirmed in the Amendment to the Opinion² dated 23/01/2013.

¹ 93/2013

² 56/2013

3. Panel Competence

3.1. This case was prosecuted by the Special Prosecution Office of the Republic of Kosovo (“SPRK”). Pursuant to Article 3.1 of the Law on Jurisdiction, Case Selection and Case Allocation of Eulex Judges and Prosecutors (Law nr. 03/L053), Eulex Judges assigned to criminal proceedings will have jurisdiction and competence over any offence investigated and prosecuted by SPRK. By reason thereof, the Trial Panel of the District Court of Pejë/Peć was correctly composed of a mixed panel of two EULEX Judges and one Kosovo Judge in accordance with Article 4.7 of the Law on Jurisdiction. No issue was raised by the parties at the commencement of the trial regarding the composition of the panel.

iii. Main Trial

1. General

The main trial was held in public on 29/01/2013 in the presence of the Special Prosecutor, **AR**, the accused **KP** and his co-accused, **AR** and their respective defence counsels, **GB** and **BT**. The injured parties were either present or summoned to be present. In accordance with Article 15 of KCCP, international interpreters translated the court proceedings and all court documents relevant to the trial from English into Albanian and vice-versa, as necessary.

2. Guilty plea of KP

2.1 The presiding Judge held a pre-trial conference on 04/12/2012. At the conclusion of the session he instructed both defendants to liaise with their counsels and with the special prosecutor in order to narrow the issues in advance of the opening main trial session and to discuss the possibility of entering a guilty plea.

2.2 On 25/01/2013, the special prosecutor filed an application for issuance of an order declaring the defendant, **KP** a cooperative witness³. The agreement proposed the defendant, **KP** would plead guilty, testify in court and in return would receive a sentence of one year imprisonment. At the opening session the special prosecutor filed a set of “*Minutes on the Achievement of Guilty Plea Agreement*” signed by the head of SPRK, the prosecutor himself, the defendant, **KP** and his counsel **GK**.⁴ Pursuant to this agreement the defendant, **KP** would receive a sentence of one year and six months imprisonment if he pleaded guilty and a sentence of one year imprisonment if he if he pleaded guilty in the capacity of a cooperative witness.

³ Main trial file Volume I at tab 23

⁴ Main trial file Volume I at tab 22

2.3 However, at the beginning of the opening main trial session on 29/01/2013 counsel for the defendant, **KP** informed the presiding Judge his client now wished to enter a plea of not guilty⁵. Counsel stated this was because of his interpretation of the limitation period that applied to the prosecution of the offence alleged against his client. The special prosecutor stated he did not believe the manner in which the offence before the court was prosecuted contravened the statute of limitations. The trial panel retired and deliberated before rendering a ruling. The trial panel determined the manner in which the charge before the court was prosecuted did not offend the statute of limitations.⁶

2.4 The presiding Judge asked the defendant, **KP** if he wished to waive his right to have the indictment read over to him and he stated he did. The presiding Judge stated he proposed taking the defendants' personal details. At this point the defendant, **KP** asked to consult his counsel again. His counsel then informed the presiding Judge his client wished to plead guilty in accordance with the "*Minutes on the Achievement of Guilty Plea Agreement*". In particular he wished to do in accordance with the term which provided if he pleaded guilty in the capacity of a cooperative witness a sentence of one year of imprisonment would be imposed.

2.5 Counsel for the co-accused, **AR**, the lawyer, **BT** raised an objection. He stated it was now too late in the criminal proceedings for the defendant, **KP** to be declared a cooperative witness. The special prosecutor made submissions. The trial panel deliberated and agreed that, as the indictment had effectively been read, it was now too late for the defendant, **KP** to be declared a cooperative witness. The presiding Judge then severed the case against the defendant, **KP** and adjourned it to a future date for sentence. The presiding Judge subsequently issued a ruling in these terms dated 31/01/2013⁷. The defendant, **KP** was brought before the court for sentence on 14/06/2013.

3. Factual Situation

3.2. Based upon the above evidence the Panel concludes as follows;

3.3. That **BE** together with others suffered injury in a road traffic accident in August 2003. As a result of that accident a claim was made against the Association of Insurers/ Guarantee Fund for Kosovo for compensation. The case was given the number C nr 916/2004. **KP** was the judge. **KP** arranged for **ZM** to act as authorised lawyer on behalf of **BE** and **AR** was authorised to act for the Guarantee Fund by whom he was then employed as a lawyer.

⁵ Page 3 of the minutes of 29/01/2013

⁶ Page 5-6 of the minutes of 29/01/2013

⁷ Main trial file Volume I at tab 20

- 3.4. On 15/10/2004, a hearing was held at which **ZM** proposed obtaining financial expert evidence (i.e. of an actuary). No one appeared at that hearing for the Respondent. **ZM**'s signature on the Minutes of Hearing is genuine.
- 3.5. At some stage, additional claimants were added to the claim namely: **XK, XH** and **NA**. **ZM** had no knowledge of these additional claimants.
- 3.6. On 07/06/2005, a hearing occurred in the case. **ZM** attended for the Claimant. **BE** and **AR** attended for the Respondent. Two sets of minutes exist for that hearing. One of those sets of minutes is false. One set of minutes was produced to the main trial panel by **ZM** from his office copy of the case file. Those minutes adjourned the case to an unspecified date to obtain further evidence. Both **ZM** and **AR** signed those minutes. Both signatures are genuine. The second set of minutes from the same day purport to adjourn the case until 14/06/2005. **AR**'s signature on that document is also genuine. However, **ZM**'s signature on that document is false. The Panel concludes that the second set of minutes is a fictitious creation designed to allow a criminal offence to be committed and that **KP** and **AR** were fully aware of that fact and knowingly played an active part in that conduct.
- 3.7. On 14/06/2005 a further hearing was held. Two sets of minutes for the case on the same day exist. **KP** was the judge. **AR** attended on behalf of the Respondent. Though the minutes record that **ZM** was present, the handwriting evidence in this case establishes that **ZM**'s signature on both sets of minutes is false. The court concludes that he was not present at the session. **AR**'s signature on the minutes which award a total of Euros 71,257.45 to the claimants **BE, XK, XH** and **NA** through an in court settlement is genuine. **AR**'s signature on the minutes which award Euros 13,421.30 to **BE** through an in court settlement 'could' be genuine. In the light of the other findings about **AR**'s active and knowing participation in illegal conduct, the Panel concludes that there is no doubt that this signature is also **AR**'s. These minutes are false because due to the absence of any representative for the claimant(s), no in court settlement could have been reached. **KP** used his position as a judge to make up these false minutes. By co-signing these minutes **AR** contributed substantially to the actions of **KP**.
- 3.8. As a result of this conduct, **KP** and **AR** in co-perpetration succeeded in obtaining at least Euros 71,257.45 to which they were not lawfully entitled. That money was paid into a bank account in **ZM**'s name on 06/09/2005⁸. **ZM** had effectively given over control of this account for the use of **KP**. Though **ZM**'s conduct in giving **KP** uncontrolled access to this account was at best naïve, he is not on trial in this case. **KP** withdrew Euros 50,000 from that account on 07/09/2005. The evidence does not establish what happened to the remaining Euros 21,257.35. There is no evidence to establish that any money was ever paid either directly or indirectly to **AR** from this criminal act.
- 3.9. These facts establish that **KP** and **AR** are both guilty of the offence of Abuse of Official Position committed in co-perpetration. In case of co-perpetration there is no need for each perpetrator to fulfill all elements of the criminal offence. It is sufficient when the perpetrators all together fulfill these elements. The Panel concludes that though **AR** himself was not an official person as

⁸ Evidence Binder I, divider 13

mentioned in Art 339, **KP** was. As they both played active parts and the criminal offence itself could not have been completed without the activity of both, both share criminal liability for the offence under the principle of co-perpetration.

Having considered the Prosecution evidence the trial panel accepts the guilty plea of the defendant, **KP**.

3. Final Speech

During the final session on 14/06/2013 the prosecutor stood by the indictment and considering the guilty plea of the defendant, **KP** requested that he be convicted in accordance with law. Counsel for the defendant, **KP**, the lawyer, **GB** did not make any further submissions.

4. Determination of the Punishment

- 4.1 The trial panel, considering all the mitigating and aggravating circumstances, considers that the punishment as in the enacting clause of this judgment is appropriate.
- 4.2 The defendant, **KP** has a number of previous convictions for similar offences. On 19/10/2012 he was convicted by the then District Court of Prishtinë/Priština of Issuing an Unlawful Judicial Decision, Abusing Official Position or Authority, Money Laundering and Fraud. He received sentences of two (2) four (4), three (3) and four (4) years imprisonment respectively. An aggregate sentence of ten (10) years imprisonment was imposed. The defendant, **KP** was also prohibited from exercising public administration or public service functions, and prohibited from exercising the profession of attorney at law, for a period of three (3) years.
- 4.3 On 24/05/2012 he was also convicted of the offence of Abuse of Official Position or Authority by the then District Court of Pejë/Peć. He received a sentence of five (5) years imprisonment. The defendant, **KP** was also prohibited from exercising public administration or public service functions for a period of three (3) years.
- 4.4 The court takes a very serious view of Offences relating to Abuse of Official Position. These are essentially corruption offences and corruption is widely acknowledged as a widespread problem in Kosovo. Corruption among the ranks of the judiciary is particularly serious as it undermines public confidence in one of the pillars of democracy and in the rule of law generally.
- 4.5 The court notes the defendant entered a guilty plea thereby saving the prosecution the burden of proving its case against him. However, the defendant's plea of guilty came at a relatively late stage of the proceedings.

4.6 In any event, the above factors are rendered somewhat moot as they are superseded by the *“Minutes on the Achievement of Guilty Plea Agreement”* between the defendant and the SPRK dated 29/01/2013. The court considers itself bound by this agreement. However, as the court ruled the defendant, **KP** could not be declared a cooperative witness he is not entitled to the sentence of one year of imprisonment agreed with the SPRK.

4.7 However, in light of the defendant’s previous convictions the court considers itself bound to arrive at an aggregate sentence. However, it is not clear if the court can impose this sentence at this stage as none of the defendant’s previous convictions have been rendered final yet. In the event this court is empowered to impose a final sentence it considers the term of eleven (11) years and (six) months of imprisonment is appropriate. In the event this court is not empowered to impose an aggregate sentence it considers it will be for the Appeals Court to discharge this function.

5. Costs

Pursuant to Article 102 paragraph (1) in conjunction with Article 99 paragraph (1) and (2) subparagraphs 6) of KCCP, the defendant shall pay the costs of the criminal proceedings in the sum of 100 Euros together with the Scheduled Amount in the sum of 50 Euros.

BASIC COURT OF PEJË/PEĆ

P.nr.359/12

Dated this 14th day of June 2013

Court Recorder

Presiding Judge

Christine Sengl

Jonathan Welford-Carroll

Panel Member

Panel Member

Cornelie Peeck

Nushe Kuka-Mekaj

Legal Remedy:

Authorized persons may file an appeal in written form against this verdict through the Basic Court of Pejë/Peć to the Court of Appeals within fifteen days from the date the copy of the judgment has been served, pursuant to Article 398 paragraph 1 of the KCCP.