

## COURT OF APPEALS

**Case number:** PAKR 441/13

**Date:** 2 April 2014

**THE COURT OF APPEALS OF KOSOVO** in the Panel composed of EULEX Judge Hajnalka Veronika Karpati as Presiding and Reporting Judge, and Kosovo Appellate Judges Vahid Halili and Mejreme Mema as Panel Members, with the participation of Beti Hohler, EULEX Legal Officer,

in the criminal proceedings against

**A.R.**, born on xxx in xxx, Municipality of xxx, father's name **v**, mother's name **Z.** (nee **K.**), currently residing at xxx, Kosovo Albanian, ID no. xxx;

*convicted in first instance* through the Judgment no. P 86/13 of the Basic Court of Peja/Pec dated 14 June 2013 of the criminal offence of *Abuse of Official Position or Authority* pursuant to Articles 3(2), 31 and 422(1) of the Criminal Code of the Republic of Kosovo - Law no. 04/L-082 (CCRK 2013);

**acting upon the following appeals filed against the Judgment no. P 86/13 of the Basic Court of Peja/Pec dated 14.06.2013 (hereinafter: Impugned Judgment):**

- **Appeal of defendant A.R., filed on 26 July 2013,**
- **Appeal of Defence Counsel Bajram Tmava on behalf of the defendant A.R, filed on 26 July 2013;**

*having reviewed* the Opinion of the Appellate State Prosecutor no. PPA/I 404/13 dated 19.11.2013 and filed with the Court of Appeals on 20 November 2013;

*after* having held a public session on 02.04.2014 in the presence of the defendant, his Defence Counsel Bajram Tmava and the Appellate State Prosecutor Xhevdet Bislimi;

*having deliberated and voted* on 02 April 2014;

*pursuant to* Articles 389, 390, 394, 398 of the Criminal Procedure Code - Law no. 04/L-123 (CPC);

*renders the following*

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## JUDGMENT

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The appeal of defendant **A.R.** and the appeal of Defence Counsel Bajram Tmava, both filed on 26 July 2013 against the Judgment of the Basic Court of Peja no. P 86/13 dated 14 June 2013, are hereby partially accepted.

The Judgment of the Basic Court of Peja no. P 86/13 dated 14 June 2013 is modified to read as follows:

“The charge of *Abusing Official Position or Authority* (Indictment of the SPRK no. PPS 07/11 dated 23.07.2012) against **A.R.**, is hereby rejected.

The costs of criminal proceedings under Article 450(2) 2.1 through 2.5) CPC the necessary expenses of the defendant **A.R.** and the remuneration and necessary expenditures of his Defence Counsel shall be paid from budgetary resources”

## REASONING

### **I. Procedural history of the case**

1. The State Prosecutor on 23 July 2012 filed the Indictment no. PPS 07/2011 with the (then) District Court of Peja. The Indictment was filed against defendant **K. P.** and defendant **A.R.**. The Indictment against **A.R.** was filed for the criminal offence of *Abusing Official Position or Authority* pursuant to Article 339 Paragraph (1) in connection with Paragraph (3) of the Criminal Code of Kosovo (CCK),<sup>1</sup> in co-perpetration with the defendant **K. P.** as per Article 23 CCK, in connection with criminal offence of *Breach of Trust* pursuant to Article 269 Paragraph (1) as read with Paragraph (2) CCK.

2. The Confirmation Judge of the District Court of Peja on 20 September 2012 issued the Ruling no. KA 223/12. The Confirmation Judge affirmed the Indictment for both defendants (**K.P.** and **A.R.**) for the criminal offence of *Abusing Official Position or Authority* pursuant to Article 339 Paragraphs (1) and (2) CCK. The Confirmation Judge dismissed the Indictment against both defendants for the criminal offence of *Breach of Trust* pursuant to Article 269 Paragraphs (1) and (2) CCK, because the statutory limitation for the prosecution of the criminal offence had expired.

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<sup>1</sup> Criminal Code in force in Kosovo from 6.04.2004 until 31.12.2012.

3. The main trial against the defendant **A.R.** commenced before the Trial Panel of the Basic Court of Peja on 29 January 2013. Further sessions were held on 30 January 2013, 4 February 2013, 10 April 2013 and 10 June 2013. On 14 June 2013 the Trial Panel announced the Judgment in the case.

4. The Trial Panel found the defendant **A.R.** guilty of the criminal offence of *Abusing Official Position or Authority* pursuant to Article 422 Paragraph (1) CCRK 2013 and sentenced the defendant to an imprisonment term of eighteen (18) months. The Trial Panel further ordered the defendant to pay an amount of money corresponding to the material benefit of 71.257,40 EUR. The Trial Panel also ordered the defendant **A.R.** to reimburse the costs of criminal proceedings in the amount of 700 EUR altogether. The Injured Parties were instructed to pursue their claim for compensation through the civil courts.

5. The Court of Appeals is seized of two appeals filed by the defendant and the Defence Counsel of the defendant, against the Impugned Judgment.

6. The Court of Appeals held a public session in the case on 2 April 2014 in the presence of the defendant, his Defence Counsel and the Appellate State Prosecutor.

## **II. Submissions of the Parties**

### *(The Appeals)*

7. Defendant **A.R.** submitted an appeal dated and filed 26 July 2013 on the grounds of fundamental violation of the provisions of criminal procedure, violation of the Criminal Code, erroneous establishment of the factual situation. The defendant also challenged the decision on the criminal sanction and application related to the civil claim. He proposed that the Court of Appeals modifies the Impugned Judgment and finds him not guilty.

8. Defense Counsel Bajram Tmava on 26 July 2013 filed an appeal dated 22 July 2013 with the Basic Court on the grounds of violation of the criminal law and the decision on the criminal sanction. He requested the Court of Appeals to modify the Impugned Judgment by finding the defendant not guilty and acquit him of the charges because the act he was charged with does not constitute a criminal offence (Article 364 Paragraph (1) Subparagraph 1.1) CPC).

### *(Response of the Prosecutor)*

9. The Prosecutor in the case did not file a response to the appeals.

### *(Motion of the Appellate State Prosecutor)*

10. The Appellate State Prosecutor in his Motion dated 19 November 2013 proposes to the Court of Appeals to reject as ungrounded the appeals of the defendant and his Defence Counsel and to affirm the Judgment of the Basic Court of Peja.

### III. Findings of the Court of Appeals

11. The Court of Appeals is the competent court to decide on the appeals pursuant to Articles 17 and 18 of the Law on Courts - Law no. 03/L-199.

12. The Panel of the Court of Appeals is constituted in accordance with Article 19 (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. 2014.OPEJ.0128-0001 dated 12 March 2014, 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 Court of Appeals Judges. No objections against the composition of the Panel were raised by the parties.

13. The appeals of the Defence are timely filed and admissible. The appeals of the Defence are partially accepted.

14. The Basic Court found the defendant guilty of committing the criminal offence of *Abusing Official Position or Authority* pursuant to Article 422 Paragraph (1) CCRK 2013. The Basic Court applied the new Criminal Code of Kosovo as the more favorable law for the defendant in accordance with Article 3 Paragraph (2) CCRK.

15. The Court of Appeals affirms the Basic Court's assessment that the new Criminal Code is more favorable for the defendant in this case and is therefore the applicable law.

16. The Court of Appeals concurs with the Defence arguments raised in the appeals and agrees that the Basic Court should not have convicted the defendant, but the defendant, through correct findings on the facts and criminal law, should have been acquitted. The Panel is particularly concerned about the conclusion of the Basic Court that the defendant, although not an official person, can be prosecuted for the criminal offence of *Abusing Official Position or Authority*, because the alleged co-perpetrator (**K. P.**) was an official person. This is a serious error in law that the Defence correctly points out. For a defendant to be prosecuted and convicted of a criminal offence as *perpetrator*<sup>2</sup> all elements of the alleged criminal offence must be established. The defendant, exercising his role of the xxx, was not an official person, thus this element is missing and the defendant as a matter of law cannot be found responsible as a perpetrator of the criminal offence of *Abusing Official Position or Authority* or similar offences, where the status of official person is an element of the crime. The Panel however need not engage in any further

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<sup>2</sup> The conclusion may be different if a defendant is charged with another mode of liability, e.g. assistance or incitement.

detail in the case, because the prosecution for the criminal offence is barred by the statute of limitation.

17. The Court of Appeals concurs with the Defence position on expiry of statutory limitation, raised already during the main trial. This leads to the result that the Basic Court should have rejected the charge against the defendant – i.e. issued a Judgment of rejection pursuant to Article 363 CPC.

18. The prescribed punishment for the criminal offence under Article 422 Paragraph (1) CCRK is an imprisonment term from six months to five years. Pursuant to Article 106 Paragraph (1) Subparagraph 1.4.) CCRK 2013 the statutory limitation for this criminal offence, based on the maximum prescribed punishment, is five years.

19. Article 107 Paragraph (1) CCRK stipulates the period of statutory limitation on criminal prosecution commences on the day when the criminal offence was committed. Pursuant to the Indictment no. PPS 07/2011 dated and filed on 23 July 2012, the defendant had allegedly committed the criminal offence on 14 June 2005.<sup>3</sup> The statutory limitation for initiating the prosecution therefore expired five years from that date, on 14 June 2010.

20. **Z.M.**<sup>4</sup> in the case filed the criminal complaint on 5 January 2011.<sup>5</sup> The Prosecutor issued the Ruling on initiation of investigation against **A.R.** on 16 February 2011.

21. The Panel notes that already on 4 February 2011 the Prosecutor conducted an interview with witness **Z.M.** relating to the criminal complaint he had filed against defendants **P.** and **R.**<sup>6</sup> Pursuant to Article 107 Paragraph (5) CCRK 2013 the period of statutory limitation is interrupted by every act undertaken for the purpose of criminal prosecution of the criminal offence committed. The Panel considers that questioning the person who brought forward the criminal complaint was an act undertaken for the purpose of criminal prosecution and this was therefore the act that interrupted the statutory limitation and not the issuance of the Ruling on initiation of investigation. The relevant date to be considered as a start of any prosecutorial action is therefore 4 February 2011.

22. The Court of Appeals finds that the first prosecutorial action was undertaken more than six months after the statutory limitation had expired. The statutory limitation namely ran out, as elaborated above, on 14 June 2010.

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<sup>3</sup> See charging part of the Indictment no. PPS 07/2011 dated and filed on 23 July 2012, p. 5.

<sup>4</sup> The Panel remarks that the Trial Panel throughout the proceeding erroneously considered **Z.M.** as an Injured Party. The latter does not satisfy the criteria for an Injured Party in this criminal proceeding and thus not have this status.

<sup>5</sup> The Panel notes that the criminal report is dated 28.12.2010 and stamped with a receipt stamp filled in manually in handwriting with the dated 05.01.2010. The Panel notes that considering the document is dated 28.12.2010, the stamp should read 05.01.2011. The reference to year 2010 is in the view of the Panel a typing error.

<sup>6</sup> See Minutes of the Hearing of Injured Party, PPS 07/2011, 4.02.2011, Court Case File, Binder no. I, Tab 31-1

23. The Panel notes that at the time of the initiation of criminal investigation, the criminal offence with which the defendant was initially charged carried the punishment of eight years and the period of statutory limitation was longer – it amounted to ten years. At the time when the prosecution was initiated, the period of statutory limitation had thus not elapsed and was lawfully interrupted.

24. However, with the change in the substantive criminal law, the period of statutory limitation is shorter. The legality of the prosecution must be assessed according to the now applicable substantive criminal law as a whole.

25. The Basic Court, taking note of the said change in the period of statutory limitation, considered the issue during main trial. The Basic Court rejected the challenge of the Defence with the following argumentation: *“The important question [...] is whether or not during the course of this case the Prosecutor took a step which lawfully brought to a conclusion or interrupted the passage of time for the purpose of statutory limitation. [...] The Prosecutor issued a ruling on the initiation of investigation on 16<sup>th</sup> February 2011 that was also within the statutory limitation period which applied at the relevant time. Once the Prosecutor has lawfully initiated the prosecution the only relevant limitation period which applies to the Main Trial Panel is the absolute time bar that exists in Article 107 Paragraph 8.”*<sup>7</sup>

26. The Court of Appeals disagrees with the reasoning of the Basic Court.

27. The Court of Appeals finds that when there is a change in substantive law, as in this case, the Court is obliged to assess whether the criminal prosecution commenced lawfully pursuant to the *now applicable law*. If this means that the prosecution did not commence timely, the charge must be rejected.

28. The period of statutory limitation is based on the length of the maximum prescribed punishment. The decrease of the prescribed punishment may, as in this case, result in a shorter period of statutory limitation. The law in totality must be applied for the defendant, meaning also the change in statutory limitation.<sup>8</sup>

29. The Court of Appeals therefore finds that the statutory limitation for criminal prosecution against the defendant had elapsed and the charge against the defendant should have been rejected by the Basic Court with a Rejection Judgment pursuant to Article 363 Paragraph (1.3.) CPC.

30. The Court of Appeals pursuant to Article 398 Paragraph (1) Subparagraph 1.4.) CPC therefore amends the Impugned Judgment and rejects the charge against **A.R.**

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<sup>7</sup> Ruling of the Trial Panel rendered in main trial, in session on 29 January 2013. See Record of Main Hearing, 29.01.2013, pp. 5-6.

<sup>8</sup> The same conclusion has been reached also in comparative jurisprudence. See e.g. the decision of the Federal Supreme Court of Germany, Case no. BGH 2 StR 122/05, dated 07.06.2005.

31. Having amended the Impugned Judgment and rejected the charge against the defendant, the Panel pursuant to Article 454 Paragraph (1) CPC also amends the ruling on costs so that the costs of this criminal proceeding are borne by the budgetary resources.

32. The Panel further clarifies that the entirety of the enacting clause of the Impugned Judgment is repelled through the amendment, including the decision on paying 71.257,40 EUR.

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

*Done in English, an authorized language.*

*Reasoned Judgment completed on 28.04.2014.*

Presiding Judge

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Hajnalka Veronika Karpati

EULEX Judge

Panel member

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Mejreme Mema

Judge

Panel member

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Vahid Halili

Judge

Recording Officer

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Beti Hohler  
EULEX Legal Officer

**COURT OF APPEALS OF KOSOVO**

**Pakr 441/13**

**02.04.2014**