COURT OF APPEALS
PRISTINA

Case number: **PAKR 215/14**
Date: **14 May 2015**

Basic Court: **Pristina, PKR 237/13**

Original: **English**

The Court of Appeals, in a Panel composed of EULEX Court of Appeals judge Radostin Petrov, as presiding and reporting judge, Kosovo Court of Appeals judge Driton Muharremi and Kosovo Court of Appeals judge Tonka Berishaj as panel members, assisted by Dr. Bernd Franke, EULEX legal officer, acting in the capacity of a recording officer,

in the case concerning the defendant:

> **Y.J., male, father's name […], born on […] in […], Kosovo Albanian, residing in […], Kosovo, currently in […];**

charged under the Special Prosecution Office of the Republic of Kosovo's (SPRK) indictment PPS 42/2012, filed on 11 April 2013 with:

> five (5) criminal offences of unauthorized purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substances, in violation Article 229, par. 1, 2, 3 and 4 of CCK related to Article 3 CCK;
>
> one (1) criminal offence of unauthorized ownership, control possession or use of weapons in violation of Article 328, par. 2 of CCK,
>
> and the criminal offence of organized crime in violation of Article 274, par. 1, 2 and 3 CCK;

adjudicated in first instance by the Basic Court of Pristina with judgment PKR 237/13, dated 29 November 2013, by which the defendant **Y.J.** was found guilty and pursuant to Article 71 of CCK, sentenced to an aggregate punishment of eleven (11) years of imprisonment and to a fine in the amount of 25,000 Euros;

seized of the appeals filed by defense counsel Besnik Berisha on 3 March 2014 and by defense counsel Zivojin Jokanovic on 10 March 2014, both against judgment PKR 237/13, rendered by the Basic Court of Pristina on 29 November 2013;

and also seized of the appeal filed by the Special Prosecution Office of the Republic of Kosovo (hereinafter SPRK) on 24 March 2014 against order PKR 237/13, rendered by the Basic Court of Pristina on 6 March 2014;

having considered the responses of the SPRK, filed on 11 March and 2 April 2014 and the response of defense counsel Rame Gashi, filed on 26 March 2014;

having considered the motion of the appellate state prosecutor, filed on 15 April 2014,

after having held a public session of the Court of Appeals on 29 April 2015;

having deliberated on 30 April and 14 May 2015 and voted on 14 May 2015;

acting pursuant to Articles 389, 390, 394, 398 and 402 of the Criminal Procedure Code of Kosovo (CPC);

renders the following:

RULING

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1) The appeal of defense counsel Besnik Berisha, filed on 3 March 2014 and the appeal of defense counsel Zivojin Jokanovic, filed on 10 March 2014 are hereby granted and the Judgment of the Basic Court of Pristina rendered on 29 November 2013, PKR. No. 237/2013 is annulled.

2) The appeal of the SPRK prosecutor filed on 24 March 2014 against Order PKR no. 237/13 is granted and Order PKR no. 237/13, dated 6 March 2014 is annulled.

3) The case is returned to the Basic Court of Pristina for Retrial.

4) The defendant remains in detention under the conditions of the law until the Basic Court renders a deviating decision. The Basic Court has to decide on it according to Article 193 CPC.

REASONING

I. PROCEDURAL BACKGROUND

On 11 April 2013, the Special Prosecution Office of the Republic of Kosovo (SPRK) filed indictment (PPS no. 42/2013, dated 9 April 2013) against the defendant **YJ** accusing him for five (5) criminal offences of unauthorized purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substances, in violation of Article 229, par. 1, 2, 3 and 4 of CCK related to Article 23 CCK; one (1) criminal offence of unauthorized ownership, control, possession or use of weapons in violation of Article 328, par. 2 of CCK and the criminal offence of organized crime in violation of Article 274, par. 1, 2 and 3 CCK.

On 29 November 2013, the trial panel of the Basic Court of Pristina found defendant **YJ** guilty for the criminal offence of unauthorized purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substances, in violation of Article 229, par. 1, 2, 3 of the Criminal Code of Kosovo (old Criminal Code) and the criminal offence of organized crime, in violation of Article 274, par. 3 of the CCK, and pursuant to Article 71 of CCK was sentenced to an aggregate punishment of eleven (11) years of imprisonment and to a fine in the amount of 25,000 Euros. The charge of unauthorized ownership, control, possession or use of weapons in violation of Article 328, par. 2 of CCK was rejected in accordance with the Law on amnesty.

The written judgment was served to the defendant on 20 February 2014 and to defense counsel Besnik Berisha on 14 February 2014, to defense counsel Zivojin Jokanovic on 21 February 2014 and to defense counsel Rame Gashi on 13 February 2014. The judgment was served to SPRK prosecutor on 11 February 2014.

On 6 March 2014, the trial panel of the Basic Court of Pristina issued an order releasing the Audi A 6 vehicle, the jewelry, 15 mobile phones, laptop, Rolex watch and money seized during the search on 2 October 2012 as listed in the indictment in compliance with Article 241, par. 1 subpar. 1.9 of the CPCK.

On behalf of the defendant, defense counsel Berisha filed an appeal against the judgment on 3 March 2014. Defence counsel Zivojin Jokanovic filed an appeal against the judgment on 10 March 2014, reasoned on 24 March 2014. Furthermore on 24 March 2014, the SPRK prosecutor filed an appeal against the order releasing the confiscated items, PKR No. 237/13.

Responses were filed by SPRK prosecutor against the appeals of the defence counsel (filed on 11 March and 2 April 2014) and by defense counsel Rame Gashi against the appeal of the prosecutor (filed on 26 March 2014).

The session of the Court of Appeals Panel was held on 29 April 2015 in the presence of the defendant, his defense counsels Besnik Berisha and Rame Gashi and the appellate state prosecutor.

The Panel deliberated on 30 April and 14 May 2015 and voted on 14 May 2015.

II. SUBMISSIONS OF THE PARTIES

The Appeals against the Judgement

Defense Counsel Besnik Berisha on 3 March 2014 timely filed an appeal dated 2 March 2014 with the Basic Court on the grounds of:

- Essential violation of provisions of criminal procedure;
- Erroneous and incomplete determination of factual situation;
- Violation of the criminal law;
- Decision upon conviction.

He proposes to grant the appeal, to modify the judgement by finding the accused for not guilty and acquit him of the charges pursuant to Article 364 paragraph (1), subparagraph (1) and (3) of CPC or to quash the challenged judgement and remit the herein case for retrial.

He states that the challenged judgement constitutes essential violations of the provisions of criminal proceedings under Article 384 (1) sub 1.8 of CPC, because it is entirely based on inadmissible evidence, among others also the statements of M.G. and M.O. In the criminal proceedings conducted against them in Germany, M.G. and M.O. both mention the name of **Y.J.**, but all this has been done in another procedure, where they have been examined in capacity as accused. Pursuant to Article 128, par. 1, subpar. 1.4 of CPC these witnesses were interrogated in a different way, in different procedures and in contradiction of the provisions of CPC. The first instance court is in full contradiction of Article 370, par. 7 of CPC because the opposed judgement is lacking sufficient decisive facts how the circumstances that **J.** has been the main one in organized criminal group in Germany were considered and entirely only based on the witness's T.A. testimony. The first instance court allowed to this witness to summarize and describe as he thinks testimonies of other persons, the accused in Germany M.G. and M.O. These testimonies he had heard in their trials in Germany. The witness A. is declared also for the identification of the defendant, in spite of the fact that he does not clarify how this identification has been made. The defense also notices that in this procedure it was also violated the principle of equality of arms, because the Basic Court allowed and entirely believed to the statement of the

investigator A., on the other side it refuses the proposal of the defense to hear in the capacity of witness the lawyer who had taken part in the criminal proceedings against M.G. and others.

The defense counsel claims that from the legal point of view the defendant could not be convicted and sentenced for two crimes (Unauthorized purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substances and Organized crime), when a single wrongdoing was committed. He notes that the perpetrator could only commit one criminal offence, no way to offences. He also states that the criminal offence for which **Y.** is found guilty is not sanctioned by imprisonment of at least four years.

The judgment of guilty announced by the Basic Court is made and based on assumptions, in testimonies given in another procedure, without the presence of the accused, and mostly the policeman who prosecuted the case in Germany. The solitary evidence on which the court is attempting to ground the judgement are phone calls and transcripts of interception, which, even after the conducted expertise still remains a great dilemma as far as their accuracy and genuineness goes.

He also points that the drug located in the flat at […] Str. and the drug located in the house in […], utterly destined for personal use containing doze not more than for 3-4 days, could not be considered as drug with aim to be dispersed. No evidence was established that the confiscated drug from him was not for his personal use but for delivery.

The defense notes that with the Judgement not only it was determined completely the factual situation but the same was erroneously determined which resulted in an unlawful judgement. The defense counsel points that there is no single evidence establishing **Y.J.** that he was involved in selling of 22 kg of dangerous drugs. He stresses that without direct examination of other defendants referred to the enacting clause of the judgement that are adjudicated in Germany, and till other persons are examined, which due to the prosecution are involved in the criminal offence as unlawful acts, cannot be considered as completely and fairly established factual situation of the criminal matter. The claims of witness A. that F.Z. collected money initially accepted by B.K. to be further transferred to **Y.J.** are claims with no cover and are not supported by any evidence. It results that the factual situation determined by the testimony of investigator A., is not supported by any facts and the same is based only on his desire as a police officer to see the accused **J.** involved in the sales of drugs, then, by describing him as a part of criminal group, at the end, makes the same as the chief of this criminal group.

The defense counsel points that the voice expert has failed to ascertain beyond any doubt that the voice involved in all interceptions presented in the challenged judgement, belongs to the accused **J.** He claims the psychiatric expertise is not only deficient and partial but is not corroborated on scientific achievements.

The defense opines this court act is unlawful because the accused **J.** is punished with a maximum penalty for the criminal offence he did not commit and moreover he was punished with two serious penalties for one criminal offence. Defense is of opinion that the challenged judgement is

also unlawful because no mitigating circumstance for the accused **J.** was taken into consideration although they existed. Decision on criminal sanction becomes unlawful also by joining the penalties, performed based on Article 71 of CCK.

Defense Counsel Zivojin Jokanovic on 10 March 2014 (sent by post on 6 March 2014) timely filed an appeal dated 6 March 2014 with the Basic Court on the grounds of:

- Essential violation of provisions of criminal procedure of Article 383, paragraph 1, item 1 of CPC;
- Violation of the criminal law, Article 383, paragraph 1, item 2 of CPC;
- Erroneous and incomplete determination of factual situation, Article 383, paragraph 1, item 3 of CPC;
- Decision on sentence and therefore he proposes to modify the judgment in its convicting part, to impose more lenient sentence to the defendant or to annul it and return the case to the first instance court for re-trial.

The Defense Counsel Zivojin Jokanovic notes that he will submit the reasoning of the appeal to the court with separate submission. **On 24 March 2014 he submitted reasoning of the appeal dated 18 February 2014**.

The defense submits that the judgement contains a substantial violation of the criminal procedure, because the enacting clause of the judgement does not have basis in the administrated evidence, and in contradiction with its reasoning, it does not contain the reasons for the decisive facts. The Court based the act of commission on dubious evidence. The evidence itself does not constitute valid and sustainable evidence, because the Court overestimates the voice expertise when it finds that the voice of the defendant is identified in all of the listed transaction, which does not correspond to the findings of the expert. The Court anticipates and does not assess the fact that dozens of phones were found with the defendant but none of them was used for contacting with the alleged co-perpetrators within the country or abroad.

The accusation and especially the enacting clause of the judgement have no basis in the administrated evidence, because it cannot be assumed that the defendant was the coordinator or that he, in any way, played a significant role, even under the assumption that he have known that the matter in question was the traffic in psychotropic substances, or that he could have known. The fact that the defendant himself is addicted to drugs, since he was 13 years old, is disregarded.

The Basic Court does not admit witness statements directly as evidence on which the judgement is based, but it uses them by having them assessed through the examination of witnesses.

Responses to the appeals dated 11 March 2013 (2014) and 31 March 2014

The SPRK prosecutor in his responses to the appeal finds that the grounds stated by the defense are ungrounded and requests that the conviction of **Y.J.** for all counts should be upheld. Contrary to the assertion of the defense, the statements of M.G. and M.O. were ruled inadmissible by the trial panel (page 26). The prosecutor considers that the panel erred in law on this issue by excluding the evidence from consideration. The prosecutor strongly refuses the argument that the testimony of witness T.A. ought to have been excluded for the simple fact that he was police officer involved with investigating the alleged crimes in issue. He opines that the hearsay evidence is admissible where not explicitly prohibited. Evidence obtained through lawful interception is plainly admissible under the Kosovo criminal procedure where a free assessment of evidence applies.

The prosecutor disputes the argument of the defense that Organized crime and Unauthorized purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substances are one and the same offence in the sense that conviction of the defendant for both offences purportedly violates the principle of *ne bis in idem*. The prosecutor contests the arguments of the defense as regards the decision on criminal sanction and considers that the court of first instance properly ordered an aggregate sentence for all the counts.

The prosecutor disputes the arguments of the defense concerning the voice comparison expertise as ungrounded. The conclusions of the expert are very clear and leave no reasonable doubt.

The prosecutor requests the CoA to uphold the conviction of the defendant on all counts and to reject the defense appeal as ungrounded.

Appeal against Order PKR. no. 237/13, dated 6 March 2014

The prosecutor motions the Appellate Court to overturn or vary the order, in whole or part, on the following grounds relating to violation of the criminal procedure:

- Error of law in the determination of a material benefit;
- Erroneous or incomplete assessment of the factual situation solely as regards the assets sought for permanent confiscation.

The prosecutor highlights that the applicable law envisages the forfeiture of assets that were obtained not just as a direct result of the acts constituting the criminal offence but also where they were purchased by funds that were indirectly obtained from the criminal offending. Further, the Court ought to have applied Article 277, paragraph 1 of CPC. The mentioned in the judgement monetary amounts are those held to constitute the direct material benefit to **Y.J.** The prosecutor points that it is not clear from the Order of 6 March 2014 what consideration of weight, if any, the panel gave to the financial expertise and to the testimony of the financial investigator **A.O.**

The prosecutor requests the Court of Appeals to overturn the Order dated 6 March 2014 and/or vary the said order in whole or in part to order the forfeiture of the items; or return the issue to the trial panel for reconsideration, with appropriate directions.

Response to the Appeal

The Defense Counsel Rame Gashi proposes the appeal of the SPRK to be dismissed as belated and ungrounded, while the Order for returning of the items dated 6 March 2014 to be confirmed. The appeal about non confiscation of the items could have filed only presenting appeal against the judgment. He points that the Basic Court did not issue a Ruling, but only rendered Order for returning of the items only after it was confirmed that prosecution had not filed appeal against the judgement about the issue of non-confiscation of the items.

It is clearly proved from the presented documents the origin of the taken items, also and a fact who is the true owner of the items. He points that vehicle "Audi", gold ornaments and "Rolex" watch were not property of **Y.J.**, and were not bought by him. All these items are property of J.J.

The Proposal of the Appellate Prosecutor

The Appellate Prosecutor, Claudio Pala in his Proposal dated 15 April 2014 proposes to reject the appeal of the defense counsel Besnik Berisha against the judgement of the BC of Pristina as ungrounded and affirm the impugned decision; to dismiss the appeal of the defense counsel Zivojin Jokanovic against the judgement of the BC of Pristina as belated; to accept the appeal of the special prosecutor against the order of the BC of Pristina.

III. Findings

Competence of the Court of Appeals

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 (Law no. 03/L-199).

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 No. 03/L-053 on Jurisdiction and Competencies of EULEX Judges and Prosecutors in Kosovo.

Admissibility of the Appeals

(1) Appeals against Judgment

The appeals are admissible. The contested judgment was announced on 29 November 2013. The defendant was served with the written judgment on 20 February 2014. The judgment was served

to defense counsel Besnik Berisha on 14 February 2014 and to defense counsel Zivojin Jokanovic on 21 February 2014. The appeals of the defense counsels both were filed within the 15-day deadline pursuant to Article 380 (1) CPC and by the authorized person.

Contrary to the assertion of the prosecution, also the appeal of defense counsel Jokanovic has been timely filed. However, the Basic Court was served with all necessary information pursuant to Article 376 CPC on 24 March 2014 and thus after expiration of the 15-day deadline. Thus, the Panel does not take the reasoning of the appeal into consideration and has to be rejected as belated although the appeal has been timely filed.

In this case, Article 394 (2) CPC applies. The Court of Appeals confines itself to inquiring into violations under paragraph 1 subp. 1.1 through 1.4 of the present Article and to examining the decision on punishment, mandatory rehabilitation treatment and the confiscation of the material benefit acquired by the commission of a criminal offence.

(2) Appeal against Order

The appeal against the order rendered by the Basic Court of Pristina was timely filed by the prosecution on 6 March 2014. Contrary to the allegation of the defense the appeal has not been belated. The order was rendered on 6 March 2015. Thus and pursuant to Article 284 paragraph 1 and 8 of the CPC and the information on legal remedies given by the Basic Court and its order, the prosecutor had a deadline of one week to submit an appeal. The prosecutor submitted the appeal on 24 March and by doing so he met the legal requirements of the above mentioned timeframe. The appeal has been timely filed.

Substantial violation of the provisions of criminal procedure and Erroneous or Incomplete Determination of the Factual Situation

The factual situation was erroneously determined by the first instance court when it did not take testimony of six witnesses. Therefore, the Court of Appeals does not accept the factual findings and reasoning of the trial panel.

General Remarks

As a general rule the review of the first instance court's decision regarding the determination of the facts is bounded by the allegations of the appellant. This is not a matter that the Court of Appeals can examine *ex officio* (Article 394.1 of the CPC *a contrario sensu*). The party has to give precise motivation for the appeal and explain clearly which evidence would show that a certain fact should have been considered proven or not proven and why. The law does not grant the parties the right to a second judgment of the same evidence as opposite to the review of the

way it was established. As it was affirmed previously by the Court of Appeals[1], the terms "erroneous determination of the factual situation" and "incomplete determination of the factual situation" are referred to errors or omissions related to "material facts" that are critical to the verdict reached[2]. Only if the first instance court committed a fundamental mistake while assessing the evidence and determining the facts the Court of Appeals will overturn the judgment[3].

Generally, the evaluation of evidence should rely on a direct and immediate examination of oral testimonies and statements by a panel of judges. The reading of the record of the evidence examined in the trial, however faithful and accurate it may be, is always a less reliable instrument for its evaluation. Even the examination of documents and other material evidence is in general more accurate in the trial because often that evidence has to be analyzed in relation with other elements and subject to oral explanations by witnesses or parties. Therefore, as affirmed by this court in other occasions[4], "It is a general principle of appellate proceedings that the Court of Appeals must give a margin of deference to the finding of fact reached by the Trial Panel because it is the latter which was best placed to assess the evidence".

The Court of Appeals reviewed the evidence examined by the first instance court and the assessment made by the panel in the judgment. The defendants' and witnesses' statements, both given in the investigative stage and in the main trial, were examined profoundly by the first instance court. The defendant has challenged various aspects of the legal and factual findings and reasoning of the trial panel. The Court of Appeal has carefully reviewed all of these challenges. Particularly, the Court of Appeals states the following with regard to the evaluation of evidence.

a) Testimonies of Witnesses

The Court of Appeals finds that the Basic Court did not consider all testimonies of witnesses proposed by the defense. The Basic Court is obliged to give reasoning in accordance with the law when not approving individual motions of the parties – Article 370, paragraph 7 CPC. The motion of the defense counsel Rame Gashi to hear all people as witness involved in this case was rejected because he did not give precise names of the individuals and did not give any reasonable explanation as to what all those people are going to testify and prove in this trial. The Court of Appeals finds that the names of those persons are known and they are written in the enacting clause of the appealed judgment. They should be summoned to testify for the events described in the first three paragraphs of the enacting clause. Therefore, the Court of Appeals opines that there is a substantial violation of the provisions of criminal procedure – Article 384, paragraph 1. Subparagraph 1.12 in connection with Article 370, paragraph 7 CPC. The Panel finds that a new

[1] PAKR 1121/12, Judgment dated 25 September 2013.
[2] The mentioned Judgment refers to B. Petric, in: Commentaries of the Articles of the Yugoslav Law on Criminal Procedure, 2nd Edition 1986, Article 366, para. 3.
[3] PaKr 1122/12, Judgment dated 25 April 2013.
[4] PAKR 1121/12, Judgment dated 25 September 2013.

main trial before the Basic Court is necessary because of the substantial violation of the provisions of criminal procedure. In the re-trial, the Basic Court therefore should give a reasonable deadline in which the defense submits the address and contact information of the following persons:

a) F.Z.
b) S.A.
c) J.B.
d) S.F.
e) M.D.
f) A.M.

These persons should be summoned to testify as witnesses. After that the Basic Court has to make a new evaluation of all evidence. Summarized, by not testifying the above mentioned witnesses it cannot completely be excluded that the factual situation has been erroneously or incomplete determined by the first instance court.

b) Testimony of Witness A. and the statements of M.G. and M.O.

With regard to the testimony of witness A. the panel finds that the evidence is fully admissible. The prosecutor's motion to admit as read as evidence statements of M.G. and M.O. was rejected by the Basic Court.

The defense asserted that the testimony given by A. is a claim with no cover and are not supported by any evidence. Further, his testimony is based on his desire to see the accused involved in the sales of drugs. Thus, the first instance court wrongfully allowed witness A. to give testimony with regard to the defendant.

The Court of Appeals does not follow these arguments. Opposed to the statement given by the defense, the Court of Appeals does not have any legal concerns when the Basic Court permitted A. to give testimony on G. and O.`s statements.

The criminal procedure applicable is one in which evidence can only be declared inadmissible *when the law expressly so prescribes*, (Article 257 paragraph 2 of the CPC). In all other circumstances, the evidence will be admissible but a possible violation of the procedural provisions may impact on the probative value of the evidence.

Although G. and O. rejected to give any testimony for the trial, A. gave testimony on statements given by G. and O. Such "hearsay evidence" is generally admissible and not prohibited by law. It might be evaluated and taken into consideration by the court because the applicable criminal procedure is one involving a free evaluation of evidence. Nevertheless, the Court of Appeals stresses that such a hearsay evidence, although admissible, might have a limited value and should not be given the same weight as the testimonies of witnesses who were closer the incident.

The panel stresses that there are no legal reasons why the testimony of witness A. as evidence should be inadmissible. Insofar there is no legal provision prohibiting the court to take testimony from a police officer; a case of Article 128 paragraph 1.4 is not given. In this context the panel rejects the assertion the police while conducting investigations is playing the role of the charge body. This is wrong. Fact is that the police is less a charging body than more an impartial body to detect criminal offences, to conduct investigations and to collect evidence for the use of criminal procedures. Therefore, the Basic Court did not err in law by permitting the police officer A., to provide opinion evidence as to matters within his knowledge and experience.

c) Medical Documentation from Germany

The Court of Appeals further finds that there is no erroneous or incomplete determination of the factual situation with regard to the medical documentation taken in Germany. The defense had requested to accept the documentation as evidence but the first instance court had rejected that evidence and had waived to request the documentation from Germany.

The panel concurs with the basic court and does not see any violation of the criminal procedures. There is no need to request the medical documentation which was made in Germany. Insofar there are other medical examinations conducted in Kosovo sufficiently describing the mental condition of the defendant as good. The defendant has been in Kosovo the last years, thus it is absolutely sufficient to have the medical documentation made in Kosovo. This documentation reflects the current mental situation of the defendant best. The panel therefore finds that the Basic Court had not to consider the German documentation which was made prior to the medical documentation made in Kosovo. However, if there is the need for a further medical examination, then of course all measures have to be taken to ensure a proper documentation.

d) Interception Evidence

The Court of Appeals does not have any legal concerns with regard to the interception evidence. The defense finds that the voice comparison expertise is ungrounded and challenges the scientific method and conclusion of the expert.

With regard to the voice expert the panel finds that the appointment of the expert as well as the examination of the interceptions were done in a correct and proper way. The voice expert was properly appointed by the court, without challenge by the defense at the time upon notice. Moreover, the expert properly prepared a report on the voice comparison examination complete with a clear and fully comprehensive explanation of the means and the methods used and materials found and extracted. The report entirely complies with the requirements set in Article 138 of the CPCK, specifically it contains (1) the identity of the expert and the proceedings, (2) the question material to the guilt or innocence of the defendant, (3) the expert`s specialized training and experience, and (4) a description of the analysis, including relevant

photographs, drawings, summary charts, images, laboratory results or other relevant scientific or technical information, (5) an explanation that the technical practices are generally accepted within the expert`s field or has a scientific or technical basis, and (6) a conclusion with the expert`s opinion.

Overall, there is no violation of provisions regarding the appointment of a voice expert or his evaluation of the interceptions. Documental and forensic evidence was assessed carefully. In eight cases the expert clearly identified the voice of the accused and explained very well for what reasons the identified voice belongs to the accused. The judgment explains in detail the meaning of that evidence and of the contradictions between them. It does it in a convincing manner that moves the appellate panel to accept that the factual findings in the judgment are in this point a reasonable, logic and possible explanation for the evidence.

Violation of Principle of Fair Trial and Equality of Arms

In light of the above mentioned the Court of Appeals observes a violation of the principle of equality of arms.

According to the ECHR, the principle of equality of arms is part of the wider concept of a fair trial.[5] It is closely connected to the right to adversarial proceedings, which entails that the parties involved in a trial get the opportunity 'to have knowledge of and comment on all evidence adduced or observations filed'. The principle has a broad scope and is applicable during all stages of criminal proceedings, even during preliminary police investigations. In addition, the principle requires 'the arguments of the defence to be heard as far as possible in addition to those of the prosecution', but it does not necessarily require a "quantifiable unfairness flowing from a procedural inequality".

Accordingly, the ICTY considers this principle to require that both parties will have a reasonable opportunity to present their case under conditions that will not place one of them in an unfavourable position vis-à-vis the other.[6] Rights of defence and equality of arms are features of the wider concept of a fair trial. It requires a "fair balance between the parties". It demands that each party to the proceedings is given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.

The principle of equality of arms has been adopted in Articles 328-356 of CPC. During the main trial, the prosecutor, the injured party and defendant have equal rights to make an opening statement, to call and confront witnesses, to introduce evidence and to make a closing statement.

The defense claimed a violation of the principle of equality of arms, because while the first instance court allowed and entirely believed to the statement of investigator A., on the other side

[5] See ECHR, Delcourt v. Belgium (Appl. no. 2689/65), 17 January 1970, § 28. The court also held here that 'a trial would not be fair if it took place in such conditions as to put the accused unfairly at a disadvantage.' See ibid., § 34. Cf. also ECHR, Borgers v. Belgium (Appl. No. 12005/86), 30 October 1991, (procureur general), §§ 24 and 26.
[6] See, for instance, ICTY: Decision on Prosecutor's Appeal, Aleksovski, supra note 1, § 24.

refused the proposal of the defense to hear in the capacity of witness the lawyer who had taken part in the criminal procedure against G. and O.

The Court of Appeals does not consider a violation of the principle of fair trial and equality of arms when the trial panel refused to testified the lawyer as witness. In a trial the lawyer is not party to the criminal procedures. However, he is representative of the defendant`s interest and his testimony has no or very limited value. Thus, in that connection it cannot be accused that the trial panel did not testify him.

Nevertheless, the Panel stressed that when not testifying the six above mentioned witnesses (F.Z.; S.A.; J.B.; S.F.; M.D.; A.M.) as proposed by the defense the Basic Court simultaneously violated the principle of fair trial and equality of arms as the defendant`s rights have not been considered in a proper extension.

Alleged Violations of the Criminal Code

The Court of Appeals finds that the first instance court wrongfully used the criminal code when founding the defendant guilty. The enacting clause therefore has to be modified. It has to be clarified that the defendant committed one criminal offence, instead of two separate criminal offences.

The Basic Court found the defendant guilty for the criminal offence of Unauthorized purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substances in violation of Article 229, par. 1, 2, 3 of CCK and he was sentenced to the punishment of six (6) years imprisonment. Furthermore, he was found guilty for the criminal offence of Organized Crime pursuant to Article 274, par. 3 of CCK, punished to eight (8) years imprisonment and a fine in the amount of 25,000 EUR. Pursuant to Article 71 of CCK, the Basic Court imposed an aggregate punishment of eleven (11) years of imprisonment and a fine in the amount of 25,000 EUR.

The Court of Appeals stresses that the defendant cannot be convicted for two different criminal offences. Insofar the Panel refers to previous decisions rendered by the Supreme Court/Court of Appeals confirming that "organized crime" is a qualifying act and therefore never can be taken as separate criminal offence. The courts have held continuously that the defendant cannot *for the same criminal act* be convicted of both (i) Organized Crime under Article 274 (1) of CCK **and** (ii) the underlying serious crime required as element of the criminal offence. If taking a different approach the defendant would be punished twice for the same act. Supreme Court of Kosovo has in a previous judgment stressed that the offence of organized crime requires the commission of an 'underlying' offence, in addition to the offence of organized crime under Article 274 of CCK. The formulation used throughout Art 274 of CCK clearly stipulates that the commission of a basic offence is a constitutive element to this offence. Otherwise, an individual could be found guilty for the same act, forming part of both criminal offences, of organized crime and of the underlying offence. This situation might amount a breach of the prohibition to impose a double

punishment for one single offence.[7] The Court of Appeals concurs with the above interpretation by the Supreme Court and finds that it necessitates the modification of the contested judgment. In the case at hand the criminal offence of organized crime subsumes the criminal offence of Unauthorized purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substances as the 'underlying' criminal offence to it.

As a matter of fact, the defendant could be found guilty for the criminal offence of organized crime in connection with Unauthorized purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substances done in continuity.

Decision on Punishment

The Court of Appeals finds that the mitigating and aggravating circumstances were not sufficiently described and evaluated in the reasoning of the judgment. The calculation of the punishment has been done wrongly as aggravating and mitigating circumstances have not been taken into consideration in a sufficient extension.

When deciding on punishment and its calculation the trial panel has the obligation according to Article 74 of CCK, to take and justify separately and in whole all mitigating and aggravated circumstances which have impact on the type and seriousness of the punishment.

Defense counsel Berisha remarks in his appeal that the punishment is very severe and as such is unlawful because the seriousness of the penalty is not in compliance with the public risk of the criminal offence and in particular with criminal liability of the accused and his personal circumstances nor with the punishments policies in the juridical system of Kosovo. He is of the opinion that the challenged judgment is unlawful because no mitigating circumstances for the accused were taken into consideration although they existed. Insofar the courts of Kosovo regularly take the following circumstances in favor of the accused into consideration: the age of the accused, personal circumstances, his behavior during and after commission of the criminal offence, the economic and family situation or the fact that he was not punished before. As the court in particular ignored the facts that a previous conviction was not established in Kosovo and the defendant himself has been addicted to drugs since he was 13 years old, the punishment is unlawful by disregarding mitigating circumstances.

The Basic Court when calculating the punishment based the decision mainly on the motives of the defendant which has been, while committing the criminal offences, entirely profiteering. Furthermore, the court argues that the defendant for almost two years continued his criminal activities, knowing the addictive and poisoning effect of narcotics on his own body. He deliberately distributed the narcotics, and by doing this caused serious health, social and economic problems.

[7] See Judgment of the Supreme Court of Kosovo in case no. Ap-Kz 61/2012 dated 2 October 2012, para 48.

The Court of Appeal does not concur with the defense that the drug addiction of the defendant has to be seen as a mitigating fact. The defendant, and in this point the panel agrees with the Basic Court, was aware of the addictive and poisoning effect of the drugs but notwithstanding and with this awareness in his mind he trafficked over a long time. His motivation was predominantly led by the intention to make profit in order to maintain his very opulent lifestyle.

However, the Court of Appeals finds that the Trial Panel has not sufficiently considered the issues raised in Article 74 of CCK and therefore does not fully concur with its findings of the aggravating and mitigating circumstances. The imposed punishment is not sufficiently reasonable and proportionate; a punishment like this does not fully corresponds to the degree of the criminal liability and intensity of danger. As such the punishment imposed by the court of first instance is not proportionate to the criminal offence making it thus not acceptable for the Court of Appeals.

In light of the above mentioned the Basic Court should therefore give sufficient reason for all mitigating and aggravating circumstances.

Order of the Basic Court with regard to confiscated items

The appeal filed by the prosecution is well grounded.

The panel is not satisfied with the findings of the first instance court. With regard to the Audi A6 vehicle and the other confiscated items the trial panel has to appoint an expert that accurately assesses and determines the legal income of the defendant, his family and his parents. Furthermore, the expert has to assess how much legal money the defendant had in order to buy the car and the other seized items.

The panel stresses that the defendant furthermore has to provide evidence that the car as well as the confiscated items belong to his parents/family. Thus, the trial panel has to impose the obligation to the defendant to offer appropriate documentation as evidence.

The panel remarks that also the ownership of the house, the apartment should be clarified in order to get a clear picture of the defendant`s and his family`s property. After having gotten that clear picture it can be determined whether the vehicle Audi A6, the jewellery, 15 mobile phones, laptop, Rolex watch and money seized during the search on 2 December 2012 as listed in the indictment, were bought from legal or illegal income.

Final Remarks

The Panel concludes that a new main trial before the Basic Court is necessary because of the Substantial Violation of the Provisions of Criminal Procedure and Erroneous or Incomplete Determination of the Factual Situation. Therefore, the Court of Appeals cannot proceed under

Article 403 of the CPC. The judgment and the order have to be quashed and the case returned to the Basic Court for the re-trial.

The defendant has to remain in detention until the basic court makes a deviating decision. In a retrial, the Basic Court has to decide about the detention according to Article 193 CPC.

From what has been mentioned above, it was decided as in enacting clause of the present Ruling.

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Reasoned written ruling completed on 24 June 2015.

Presiding Judge

_____

Radostin Petrov
EULEX Judge

Panel Member

_____

Driton Muharremi
Kosovo Judge

Panel Member

_____

Tonka Berishaj
Kosovo Judge

Recording Officer

_____

Dr. Bernd Franke
EULEX Legal Officer

Court of Appeals
Pristina

PAKR 215/14
14 May 2015