COURT OF APPEALS
PRISTINA

Case number: **PAKR 157/15**
Date: **28 May 2015**

Basic Court: **Pristina, PKR 282/14**

Original: **English**

The Court of Appeals, in a Panel composed of EULEX Court of Appeals judge Radostin Petrov, as presiding and reporting judge, EULEX Court of Appeals judge Roman Raab and Kosovo Court of Appeals judge Fillim Skoro 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:

> **B.D., male, father's name S., born on […] in A., Municipality of D., Kosovo Albanian, residing in […];**
>
> **H.T., male, father`s name B., born on […] in B., Municipality of S., Kosovo Albanian, residing in […];**

both charged under the Public Prosecutor`s indictment PPS 45/2012, dated 19 May 2014 and filed with the Registry of the Basic Court of Pristina on 21 May 2014 with:

> *Trading in Influence*, by requesting, receiving or accepting an offer or promise of any undue advantage for himself, herself or another person in consideration of the exertion of an improper influence by the perpetrator over the decision-making of an official person, whether or not the influence is exerted, or whether or not the supposed influence leads to the intended result, in violation of Article 345, paragraph 1 of the Provisional Criminal Code of Kosovo (hereinafter "PCCK", in force from 6 April 2004 to 31 December 2012);

adjudicated in first instance by the Basic Court of Pristina with judgment P. Kr. Nr. 282/14, dated 4 February 2015, by which the defendants **B.D.** and **H.T.** were found guilty and both sentenced to the punishment of one year and three months of imprisonment. They were also ordered to pay jointly and severally the sum of EUR 200 000 as compensation for the

confiscation of the corresponding amount acquired through the commission of the criminal offence. **B.D.** and **H.T.** were ordered to reimburse the sum of EUR 150 each as part of the costs of the criminal proceedings and were relieved to pay the rest of the costs;

seized of the appeals filed by defence counsel M.H. on behalf of defendant **B.D.** on 10 March 2015, by defence counsel B.T. on behalf of the defendant **H.T.** on 9 March 2015, by the defendant **H.T.** on 10 March 2015, and also seized of the appeal filed by the Special Prosecution Office of the Republic of Kosovo (hereinafter SPRK) on 25 February 2015;

having considered the response of the SPRK, filed on 20 March 2015;

having considered the motion of the appellate state prosecutor, filed on 31 March 2015;

after having held a public session of the Court of Appeals on 25 May 2015;

having deliberated and voted on 25 May 2015 and on 28 May 2015;

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

renders the following:

JUDGMENT

Judgment rendered by the Basic Court of Pristina on 4 February 2015, PKR. No. 282/2014 is modified and indictment PPS no.45/2012 dated 19 May 2014 and filed on 21 May 2014 against the defendants B.D. and H.T. is rejected.

REASONING

I. PROCEDURAL BACKGROUND

On 1 August 2011, SPRK Prosecutor Ali Rexha issued a ruling initiating the investigation against five (5) defendants, suspected of committing the criminal offences of Organized Crime, Money Laundering, Giving Bribes, and Accepting Bribes. On 31 January 2012, the Pre-Trial Judge extended the investigation for these charges for a further six (6) months, until 1 August 2012, under case number PPS 48/2011.

On 21 May 2012, SPRK Prosecutor Ali Rexha issued a ruling on the initiation of investigation in relation to seven additional defendants, including the two defendants herein **B.D.**, **H.T.**, and five (5) others, suspected of committing the criminal offences of Accepting Bribes, Giving Bribes, trading in influence and Abuse of official position or authority.

On 23 May 2012, SPRK Prosecutor issued a ruling consolidating both cases under PPS number 45/12, and on 18 December 2012, the Pre-Trial Judge extended the investigation until 21 May 2013.

On 4 April 2013, the EULEX SPRK Prosecutor Andrew Carney issued a ruling expanding the charges of the investigation against the defendants, and further on 20 May 2013, issued a further ruling expanding the investigation in relation to weapons charges against five (5) defendants.

On 16 July 2013, the EULEX SPRK Prosecutor filed an application to extend the consolidated and expanded investigation which had commenced on 1 August 2011.

On 26 April 2013 and 11 February 2014, the investigation was terminated against a number of defendants, and, in the latter ruling, against defendant **H.T.** regarding the weapons allegations.

On 21 May 2014, the SPRK Prosecutor Andrew Carney filed an indictment in case PKr 282/14 against the defendants herein dated 19 May 2014.

After eleven (11) sessions, the first instance court rendered the impugned judgement on 4 February 2015. Defence counsel M.H. on behalf of defendant **B.D.**, defence counsel B.T. on behalf of the defendant **H.T.** the defendant **H.T.,** and the prosecution filed an appeal.

II. SUBMISSIONS OF THE PARTIES

The Appeals

Defense Counsel B.T. on 9 March 2015 (sent by post on 6 March 2015) filed an appeal dated 6 March 2015 with the Basic Court on behalf of the defendant **H.T.** on the grounds of:

- Substantial violation of the provisions of criminal procedure;
- Violation of the criminal law;
- Erroneous or incomplete determination of the factual situation;
- Error in the decision on criminal sanction.

Concerning **violations of the provisions of criminal procedure**, the defense counsel submits that the judgment was not drafted in accordance with Article 370 of the Criminal Procedure Code (hereinafter "CPC") in violation of Article 384 (1.12) 1.12 of CPC. In particular, he

contends that the Basic Court, in finding that the criminal offence was committed between April and June 2009, exceeded and substantially changed the content of the Indictment that expressly referred to the date of 16 April 2009. He contends that the Basic Court failed to describe the individual actions of each defendant and the causal link in order to convict them of the criminal offence. The defense counsel further asserts that the judgment cannot be based on testimonies of witnesses S.Z., A.J, I.M., and Z.B. who were examined in the capacity of defendants as this would amount to a violation of Article 262 (2) of CPC. He also claims that the Basic Court based its judgment on evidence that was provided in an unlawful manner.

According to the defense counsel, the judgment is contradictory between its enacting clause and its reasoning in stating that it could not be proven what kind of influence was exerted by the defendants while this constitutes an element of the criminal offence. In his opinion, the judgment is further contradictory concerning the amount of money received by the defendants. He also contends that the Basic Court erred in relying on SMS as they cannot constitute evidence to establish the guilt of the defendants given that they did not have any communication with the exchangers of these SMS.

With respect to **violations of the criminal law**, the defense counsel asserts that, on the basis of the evidence administered, there is not sufficient confirmation to establish the criminal offence beyond the reasonable threshold of grounded suspicion. According to him, the Basic Court failed to address the defence motion presented at trial on the breach of the relative statutory limitation for the offence. He also submits that the Basic Court erred in finding both defendants guilty as co-perpetrators pursuant to Article 23 of PCCK given that none of the requirements for the co-execution to exist are met, namely, that the actions of each co-perpetrator should be separate, should constitute elements of a criminal offence, and should be specified in an agreement to which the co-perpetrator should have agreed to.

With regard to the **erroneous and incomplete determination of the facts**, the defense counsel avers that none of the witnesses indicated that the defendants had any influence concerning the winning of the tender. In addition, he contends none of the witnesses, save for S.Z., knew and identified them in court. According to him, the principle of "*in dubio pro reo*" should apply and the doubt should go in the favor of the accused.

Finally, as to the **decision on criminal sanctions**, the defense counsel argues that the Basic Court erred in ordering the seizure as compensation given that there is no injured party in this case.

Defendant H.T. on 10 March 2015 (sent by post on 6 March 2015) filed an appeal dated 4 March 2015 with the Basic Court on the grounds of:

- Substantial violation of the provisions of criminal procedure;
- Violation of the criminal law;
- Erroneous or incomplete determination of the factual situation;
- Error in the decision on criminal sanction.

With respect to **substantial violations of the criminal procedure**, **H.T.** points out that the judgment was not drafted pursuant to the requirements of Article 370(7) of CPC since the Basic Court did not clearly and exhaustively stated which facts it considered proven or not proven and the grounds for this and failed to make an evaluation of the conflicting evidence. In particular, he contends that in order to establish the existence of the criminal offence and the criminal liability of the defendants pursuant to Article 345 (1) of PCCK, it had to be established that the defendants received an illegal benefit in order to exert influence on the decision-making of a public official, but the Basic Court failed to do so and mostly relied on assumptions rather than on established facts.

H.T. also contends that the video recording provided by the witness A.J. constitutes inadmissible evidence and that A.J. committed the criminal offence of "unauthorized interception" pursuant to Article 204 of the Criminal Code of the Republic of Kosovo (hereinafter "CCRK"). More specifically, he asserts that pursuant to Article 256 of PCCK covert photographic or video surveillance can only be obtained through a "duly authorized judicial police officer" and that pursuant to Articles 258 and 259 of PCCK only the state Special Prosecutor and the pre-trial judge can issue an order for this kind of surveillance.

He argues that the Basic Court erred in stating that the rights provided in Article 123 of CPC for cross-examination are also applicable during redirect examination given that Article 335 of CPC does not provide the right to make a cross-examination of the witness during redirect examination. Finally, **H.T.** submits that the judgment is contradictory as the Basic Court, on the one hand states that there is a lack of concrete knowledge of the circumstances of the exertion of influence and that this element is immaterial, and on the other hand states that it has been proven beyond reasonable doubt that a type of influence had been exerted.[1]

Concerning **violations of the criminal law**, **H.T.** first contends that the Basic Court erred in making a wrong interpretation of the criminal offence and in erroneously applying the substantial law. More specifically, he claims that the elements of the criminal offence have not been fulfilled and that the Basic Court did not establish beyond a reasonable doubt against whom the influence had been exerted or was promised to be exerted given that it failed to determine whether the benefit was unlawful and the identity of the PAK official(s) involved. He also argues that the Basic Court did not analyze the nature of this influence as a fundamental element in establishing the criminal liability of the defendants. In this regard he submits that trading in influence can only exist if the accused through his position can objectively and formally exert influence, which is not the case of the defendant in the present instance.

Furthermore, **H.T.** argues that the relative and absolute statutory limitations have expired. With regard to the relative statutory limitation, and given the criminal offence was committed between 14 April and 20 May 2009, he contends that it expired given that the Prosecution rendered its ruling on the initiation of the proceedings on 21 May 2012, therefore after the time limit

[1] T. Appeal, paras. 16, 17, *referring to* Basic Court Judgment, paras. 76, 77.

prescribed under Article 90 (1.6) PCCK. As for the absolute statutory limitation, he asserts that that the Basic Court erred in its ruling of 10 September 2014 in deciding to favor the English version over the Albanian version of the PCCK. According to him, the Albanian version should prevail on the ground that in case of uncertainty, the Basic Court had the obligation to interpret the clause in favor of the defendant pursuant to Article 1 (3) PCCK and on the ground that English is not among the official languages in the Republic according to the Constitution. Therefore, he claims that the absolute statutory limitation pursuant to Article 91 (6) PCCK is of a period of twice two years and expired.

H.T. further submits that the Basic Court **erroneously and incompletely determined the factual situation** of the case in contravention with Articles 3 and 7 CPC. In particular, he avers that, because these elements are not supported by the evidence, the Basic Court erred in finding that: (i) the group could not legally win the tender; (ii) the defendants' partnership in the project as stakeholders without having to contribute financially was a compensation for earlier exerting of influence while at same time finding that the kind of influence exerted by the defendants could not be established; (iii) the defendants had official contacts with the PAK. In addition, **H.T.** submits that neither the evidence administered by the Court nor the witnesses' statements could determine the factual situation beyond any grounded suspicion and confirm the elements of the criminal offence of trading in influence.

Concerning **the decision on criminal sanction**, **H.T.** submits that the Basic Court failed to consider whether the criminal offence under Article 345 (1) PCCK was committed with the purpose of achieving an illegal result and in failing to take into consideration the rules concerning mitigation of the punishment.

In addition, he contends that the Basic Court could not determine that the material benefit was acquired through the criminal offence of trading in influence and that there was a direct connection between the offence and the benefit in order to approve the confiscation. **H.T.** claims that the burden of proof in this respect remains within the Prosecution pursuant to Article 275 CPCK. In any event, he argues that the Basic Court could not conclude to the unlawfulness of this benefit.

Defense Counsel M.H. on 10 March 2015 (sent by post on 6 March 2015) filed an appeal dated 5 March 2015 with the Basic Court on behalf of the defendant **B.D.** on the grounds of:

- Substantial violation of the provisions of criminal procedure;
- Violation of the criminal law;
- Erroneous or incomplete determination of the factual situation;
- Error in the decision on criminal sanction.

Concerning **substantial violations of the criminal procedure**, the defense counsel submits that the enacting clause of the judgment, in violation of Articles 384 (1.12), 370 (4) and 365 (1.1) of CPC, is not clear regarding the concrete acts of the defendant, the identification of the official(s)

involved, and the concrete influence exerted given that all these elements are necessary in order to establish the criminal offence. He further contends that the Basic Court violated the rights of the defence under Article 384 (2.1) and (2.2) of CPC and more particularly the principle of equality among parties on the ground that it ignored the defense's objections concerning the way the Special Prosecutor examined his witnesses in contravention with Articles 333 to 335 of CPC and on the ground that the defence was deprived of the opportunity to conduct effective cross-examination.

With respect to the **erroneous or incomplete determination of the factual situation**, the defense counsel asserts that the defendant was "victimized by being used as a pretext to cover dishonest business amongst the group". In particular, he points to S.Z.'s who attempted to allege that the two defendants threatened the group in order to extort EUR 200,000 while this allegation was dismissed by the Prosecution. He alleges that the Basic Court erred in not substantiating its judgment on the basis of the evidence administered during trial and in relying instead on witnesses' statements given during the pretrial procedure, in violation of Article 123 (2) and Article 361 (1) of CPC. The defense counsel contends that the testimony of S.Z. should not be deemed credible given the contradicting evidence provided notably witnesses Z.B., I.M., A.J., and H.K. Therefore, he argues that the evidence presented at trial does not establish beyond reasonable doubt that the defendant was implicated in committing the criminal offence he has been charged with.

Concerning **violations of the criminal law**, according to the defense counsel, given that the criminal offence of trading in influence is listed under the chapter on criminal offences against official duty, there should have been established that the accused had an official status and made use of his or her official duty in order to exert influence. However, he contends that **B.D.** does not hold any official position and therefore could not have exerted influence over PAK officials. He also argues that it has not been established beyond reasonable doubt that the defendant received any amount on behalf of the alleged benefit, as the majority of the witnesses save for S.Z. excluded this possibility.

Finally, as to the **decision on criminal sanctions**, the defense counsel argues that the fact that **B.D.** has never been convicted before, that he correctly behaved during the proceedings, that he has a family with children and that he has a poor economic situation constitute sufficient grounds for more lenient punishment. He further contends that the decision to redress the amount of EUR 100,000 is legally unsubstantiated since the benefit was never realized and since such compensation can only be claimed by the injured party which is presumed to have given this amount.

Special Prosecutor Andrew CARNEY on 25 February 2015 filed an appeal dated 25 February 2015 with the Basic Court on the grounds of:

- Error in the decision on criminal sanctions and other decisions

More specifically, the Special Prosecutor argues that the imposition of one year and three months of imprisonment was incorrectly determined pursuant to Article 83 (1), Article 383 (1.4) and Article 387 (1) CPC and that the defendants should have been sentenced to near to the maximum sentence foreseen for the criminal offence in order to mark its seriousness. He contends that the Basic Court should have taken into consideration that under the new criminal code the sentence of the offence of trading in influence has been significantly raised to a maximum of eight years of imprisonment, demonstrating that the original tariff for this offence was considered to be too low.

The Special Prosecutor further points out that a number of aggravating factors were present, namely, the offending was of high monetary value, was carried out over a period of time, required premeditation, and involved multiple parties. In addition, none of the defendants pleaded guilty, expressed remorse or assisted the Prosecution. According to the Special Prosecutor, apart from the absence of previous convictions, there are no mitigating factors.

In addition, the Special Prosecutor contends that pursuant to Article 54 of PCCK the Court of Appeal should order an accessory punishment by way of a significant fine to both defendants in order to reflect the gravity of the offence committed.

The Special Prosecutor therefore motions the Court of Appeal to reverse the judgment in part in order to impose a sentence near to the maximum and an accessory punishment. The Special Prosecutor does not appeal the factual findings made by the Basic Court but only the level of sentences imposed.

Response to the Appeals

Special Prosecutor Andrew Carney, on 20 March 2015, filed a response dated 19 March 2015 in which he requests the Court of Appeal to reject the appeals of the defendants in their entirety as ungrounded. Contrary to the assertion of the defence that the evidence was heard in contravention to the CPC, the Special Prosecutor submits that there was no violation of the procedural rules such as to jeopardize the convictions.

The Special Prosecutor also disputes the arguments of the defence concerning the period of statutory limitation and adopts the reasoning contained within the Ruling issued by the Presiding Judge and dated 10 September 2014. The Special Prosecutor further contends that the Basic Court rightly found that the offence for which both defendants were convicted occurred between April and June 2009, therefore beyond the date of the bid tender on 20 May 2009.

Defense Counsel M.H. for B.D. responded to the Special Prosecutor's appeal in his appeal filed on 10 March 2015. He submits that the Special Prosecutor's appeal should be rejected as ungrounded given that the Special Prosecutor refers to the punishment of the criminal offence under the new criminal code, which does not apply, and given that the prosecutor cannot

consider as aggravating circumstances factors that already form part of the constitutive elements of the criminal offence.

The Proposal of the Appellate Prosecutor

Appellate Prosecutor Claudio Pala in his Proposal dated 30 March 2015, filed on 31 May 2015, submits that the Basic Court thoroughly and accurately assessed the evidence, provided reasons why it did or did not attach weight to the witnesses' testimonies, and correctly considered the video recording as admissible. He highlights that the enacting clause of a judgment only has to express the charges and the verdict in a synthetic way because the facts are stated clearly and exhaustively in the reasoning section of the judgment. The Appellate Prosecutor, referring to Article 12 of the Convention on the Criminal Law on the Corruption of the Council of Europe, fully endorses the Basic Court's reasoning that it is immaterial to the existence of the criminal offence of trading in influence under Article 345 (1) PCCK whether or not the influence is exerted.

As to the statutory limitation, he observes that the pertinent provision to be applied is Article 90 (1.5) PCCK, and not Article 90 (1.6) as asserted by the defence. While the Appellate Prosecutor concedes that since the Constitution entered into force Albanian and Serbian are the official languages in the Republic of Kosovo, he observes that the Albanian version of the code contains an obvious mistake and that the Serbian authentic version matches the English version.

The Appellate Prosecutor submits that the period of statutory limitation was interrupted as per Article 91 PCCK on 20 April 2012 when the Special Anti-Corruption Department of the Kosovo Police submitted the file against the defendants to the Special Prosecutor.

Based on the above, the Appellate Prosecutor moves the Court of Appeals to reject the grounds of appeal put forward by the two defendants and to accept the appeal of the Special Prosecutor against the judgment of the Basic Court.

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 4 February 2015. The defendants were served with the written judgment on 20 February 2015. The judgment was served to defense counsel M.H. on 27 February 2015 and to defense counsel B.T. on 20 February 2015. The judgment was served to the prosecutor on 18 February 2015. The appeals were filed within the 15-day deadline pursuant to Article 380 (1) of CPC and by the authorized person.

Expiration of Statutory limitation

The statutory limitation has been expired.

Due to the time of the commission of the criminal offence the old criminal code has to be used. The statutory limitation for this criminal case is lied down in Article 90 (1.6) PCCK, where it is stated that the criminal prosecution may not be commenced after two (2) years from the commission of a criminal offence punishable by imprisonment of more than one (1) year or by fine. This argument may be valid in the Albanian version of PCCK.

In the English/Serbian version Article 90 (1.6) of PCCK says that the statutory limitation accounts to two (2) years from the commission of a criminal offence punishable by imprisonment for up to one (1) year or punishment of a fine whereas Article 90 (1.5) of PCCK states that it is three (3) years after the commission of a criminal offence punishable by imprisonment of more than one (1) year.

According to the Albanian version, the absolute bar has expired as the four (4) years are completed – twice the period of two (2) years has elapsed (Article 91, paragraph 6 of PCCK). The Basic Court found the two defendants guilty that in the time period between April 2009 and June 2009 they requested and received the amount of 200,000 Euro from a group of five individuals. The Special Prosecutor does not appeal the factual findings made by the Basic Court but only the level of sentence imposed. Therefore the Court of Appeals cannot go beyond June 2009 and if the panel considers the Albanian version applicable then the absolute statutory limitation have expired the latest 30 June 2013.

According to the English/Serbian version, the absolute bar has not been expired yet, as there is twice the period of three (3) years valid.

According to Article 356 of PCCK, the English, Albanian and Serbian language versions of the code are equally authentic. In case of conflict, the English language version shall prevail. This means that due to the language discrepancies we have to use the English/Serbian language version. This argument is valid until 14 June 2008.

However, the Court of Appeals considers the Constitution of the Republic of Kosovo which has been into force and effect since 15 June 2008. According to Article 5 of the Constitution the

official languages in Kosovo are Albanian and Serbian. English is not among the official languages in Kosovo anymore. Pursuant to Article 3 of the Law No. 03/L-053 on Jurisdiction and Competencies of EULEX Judges and Prosecutors in Kosovo, the official language in proceedings in which EULEX judges and prosecutors are involved, is also English. After 15 June 2008 the official languages for the legislation are Albanian and Serbian and none of them prevails. The Court of Appeals finds that the language versions of Article 90 (1.6) of PCCK are substantially different.

The answer to the question, which version of the law should be applied in this case of language discrepancies is given in Article 3 (2) of CPC[2]. According to this article doubts regarding the implementation of a certain criminal law provision shall be interpreted in favor of the defendant and his or her rights under the Procedural Code and the Constitution of the Republic of Kosovo. Accordingly, the Court of Appeals finds that the Albanian version is more favorable to the defendants and should be applied. Therefore, the statutory limitation pursuant to Article 91 (1.6) of PCCK is of a period of two (2) years. Thus, there is an expiration of the absolute statutory limitation the latest in June 2013.

In light of the above the Court of Appeals amends the first instance judgement and rejects the indictment of the prosecution.

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

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Reasoned written judgement completed on 11 June 2015.

Presiding Judge

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Radostin Petrov
EULEX Judge

Panel Member Panel Member

[2] Ruling of the CoA, PN1 2486/14, dated 19 December 2014.

Roman Raab EULEX Judge	Fillim Skoro Kosovo Judge

Recording Officer

Dr. Bernd Franke
EULEX Legal Officer

Court of Appeals
Pristina

PAKR 157/15

28 May 2015