

COURT OF APPEALS

Case number: PAKR 542/14

Date: 20 July 2015

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Hajnalka Veronika Karpati as Presiding and Reporting Judge, and Kosovo Court of Appeals Judges Xhevdet Abazi and Tonka Berishaj as Panel Members, with the participation of Anne-Gaëlle Denier, EULEX Legal Officer, as the Recording Officer,

in the criminal proceedings against

Z.V., father's name [], mother's name [], born on []in and residing in [], Kosovo Serb, arrested on 29 July 2013, on detention on remand from that date until 28 February 2014, on house detention from 28 February 2014 until 20 June 2014, and under the measure of reporting at police station from that date to 10 July 2014;

charged under the Indictment of the Mitrovica Basic Prosecution Office no. PP. 157/2013 filed with the Court on 25 October 2013 as follows: **Attempted Aggravated Murder** under Article 147(10) of the Provisional Criminal Code of Kosovo (hereinafter "PCCK", in force from 6 April 2004 to 31 December 2012), in conjunction with Article 20 PCCK, criminalized under Articles 28 and 179(1.9) of the Criminal Code of the Republic of Kosovo (hereinafter "CCRK");

adjudicated in first instance by the Basic Court of Mitrovica with the Judgment P. no. 933/2013, dated 10 July 2014 as follows:

Z.V. was found guilty of and convicted for the requalified criminal offence of **attempt of Obstructing Official Persons in Performing Official Duties** in violation of Article 316(1), (3), and (4) PCCK and acquitted of committing the criminal offence of Attempted Aggravated Murder pursuant to Article 364(1) CPC because in the Basic Court's assessment it was found that the defendant acted intentionally with the purpose of preventing the truck under police

custody and loaded with oil to be driven to customs terminal South Mitrovica and undergo customs procedure, however, that it was not proven beyond reasonable doubt that he used his vehicle as a lethal weapon with the intent to kill the two police officers or that he saw the possibility that he might hit them and they might be killed as a consequence of his actions. He was sentenced to an aggregate punishment of twelve (12) months of imprisonment with the time spent in detention in remand and in house detention credited in the imposed punishment, and ordered to reimburse the sum of EUR 300 as part of the costs of the criminal proceedings;

deciding upon the following appeals, filed against the Judgment of the Basic Court of Mitrovica PKR no. 933/2013 dated 10 July 2014

- **appeal of Defence Counsel Nebojsa Vlajic on behalf of the defendant Z.V., filed on 10 October 2014,**
- **appeal of the EULEX Prosecutor, filed on 13 October 2014,**

having reviewed the motion of the Appellate Prosecutor filed on 27 November 2014;

after having held a public session of the Appellate Panel on 20 July 2015;

having deliberated and voted on 20 July 2015;

pursuant to Articles 389, 390, 394, 398 and 401 CPC;

renders the following

JUDGMENT

- I. The appeal of defence counsel Nebojsa Vlajic for defendant Z.V. is rejected as unfounded.**
- II. The appeal of the EULEX Prosecutor is rejected as unfounded.**
- III. The Judgment of the Basic Court of Mitrovica no. P 933/2013 dated 10 July 2014 is affirmed.**

REASONING

I. RELEVANT PROCEDURAL BACKGROUND

The events giving rise to this criminal case occurred on 14 August 2010 late afternoon on the road of Rudare between Zvecan and Mitrovica, near Sokolica Monastery junction. The defendant **Z.V.**, ignoring the stop and slow down sign of police officer A.T., kept driving his quad at the same speed in the direction of Police officers A.T. and F.S. who were performing official duties and who could avoid a collision with the incoming vehicle only by swiftly moving aside.

On 29 July 2013 the defendant **Z.V.** was arrested and placed in detention on remand from that date to 28 February 2014. He was placed under the measure of house detention from 28 February to 20 June 2014, and under the measure of reporting at police station from 20 June to 10 July 2014.

On 25 October 2013 the State Prosecutor of the Basic Prosecution Office of Mitrovica filed the Indictment PP. no 157/2013 dated 24 October 2013 charging the defendant **Z.V.** with the criminal offences of Attempted Aggravated Murder in violation of Article 147(10) PCKK in conjunction with Article 20 PCKK and Unauthorized Ownership, Control, Possession or Use of Weapons pursuant to Article 374(1) CCRK.

On 13 November 2013 the initial hearing on the Indictment was held, where **Z.V.** pleaded guilty to the offence of Unauthorized Ownership, Control, Possession or Use of Weapons, and not guilty to the offence of Attempted Aggravated Murder. By a ruling rendered on the same date the charge of Unauthorized Ownership, Control, Possession or Use of Weapons was severed from the current proceedings.

The main trial was scheduled to start on 25 March 2014 but the proceedings were adjourned due to the fact that the defendant's two defence counsels were arrested. On 3 April 2014, they were put under house detention. On 8 April 2014, the presiding Judge appointed *ex officio* Nebojsa Vljajic as defence counsel for **Z.V.**.

The main trial in the case was held on 6 May, 3, 4, 9, 10, 11, 18, and 19 June, and 9 July 2014, with deliberations and vote on 9 July 2014. On 10 July 2014, the verdict was announced.

The written judgment was served to **Z.V.** and his defence counsel on 26 September 2014 and to the EULEX Prosecutor on 29 September 2014. On 10 October 2014, **Z.V.**, through his defence counsel, appealed the Judgment. On 13 October 2014, the EULEX Prosecutor also filed an appeal against the Judgment. On 16 October 2014 the EULEX Prosecutor filed a response to the appeal. On 24 October 2014 the defence counsel of **Z.V.** filed a response to the appeal.

The case was transferred to the Court of Appeals for a decision on the appeal on 31 October 2014. On 27 November 2014 the Appellate State Prosecutor filed a motion.

The session of the Court of Appeals Panel was held on 20 July 2015 in the presence of the two injured parties A.T. and F.S.. The defendant **Z.V.** and his defence counsel Nebojsa Vlajic were duly invited to the session as demonstrated by the delivery slips in the case file but did not attend. The Appellate Prosecutor did not attend either.

The Appellate Panel deliberated and voted on 20 July 2015.

I. SUBMISSIONS OF THE PARTIES

EULEX Prosecutor Pascal Persoons on 13 October 2014 timely filed an appeal dated 13 October 2014 with the Basic Court on the grounds of:

- Erroneous determination of the factual situation.
- The re-qualification of the criminal offence by the trial panel does not reflect the factual situation

The EULEX Prosecutor claims that the evidence administered in the trial proves that the accused committed the criminal offence as charged. He contends that the high speed with which the accused was driving his vehicle is crucial in establishing the correct qualification. The proven fact that the accused did not show any intention to slow down or stop his vehicle in spite of clearly noticing the universally recognized gestures of the police officer and that he was heading towards the two Police officers without changing the direction of his vehicle, show his state of mind and his determination to hit them or at least he disregarded any potential outcome of the impact between his vehicle and the police officers. The other core aspect of the established facts is that without the action of the two injured parties, namely their quick moving aside in order to avoid a collision, they would have been hit by the quad bike. The impact was only avoided by the actions of the police officers and not by the action of the accused. The collected evidence, as well as the findings of the trial panel clearly shows that the accused used his vehicle as a potential lethal weapon with the sole purpose to hit and perhaps kill the two Police officers performing their duties.

The EULEX Prosecutor proposes to modify the judgment and preserve the initial qualification of the criminal offence.

Defence Counsel Nebojsa Vljajic on 10 October 2014 timely filed an appeal dated 10 October 2014 on the grounds of:

- Violation of the criminal law with regards to the decision on punishment

He argues that the Court erroneously applied Article 20(1) PCKK. From the legal definition of attempt it is clear that attempt means taking immediate actions that lead to the commission of a criminal offence. If the court found that the accused “acted with the intent to prevent the truck with its loads to be taken to the customs terminal in southern Mitrovica and undergo customs procedure” then the court would have had to say by what action he tried to prevent it. The fact that he stopped and wanted to inquire about the truck and its load is not an attempt to commit this offence. What he did is simply a matter of traffic offense when the driver refuses to stop or a criminal offence of Endangering Public Traffic.

Defence Counsel elaborates in his appeal on why he thinks the prosecutor charged **Z.V.** with Attempted Aggravated Murder in the current criminal proceedings and brings up other unsuccessful criminal charges against the accused that are unrelated to this one.

He further claims that even if the attempted obstruction of official persons stands, then the punishment is too strict. He argues with the legal practice, that no one in Kosovo who was punished for the same criminal offence was ever sentenced to one year of imprisonment. He argues that the accused got this severe punishment because he is a Serb from the North of Kosovo and he is a brother of a certain person. Furthermore he spent 11 months in detention and therefore he had to be convicted to that much or even more.

The defence counsel argues that the mitigating and aggravating circumstances were wrongfully determined by the trial panel. The panel found that there were no mitigating circumstances, fully neglecting the personal circumstances of the accused, that he is married and have two small children and that he is unemployed. Also, his cooperation and his behavior during the proceedings should be taken as mitigating circumstance. Furthermore, he never and especially not after August 2010, came into conflict with the police.

Concerning the aggravating circumstances one factor that the panel took into consideration is scandalous, namely that “the criminal offence happened in the north of Kosovo, where the rule of law is still not present”. An aggravating circumstance can only be something that is within the scope of the perpetrator’s intent or for which he might be responsible of. Otherwise it would lead to discrimination which is prohibited not only by international treaties but also by the Kosovo Constitution.

The defence counsel proposes to amend the judgment of the basic court and acquit the accused as he did not commit any criminal offence.

Responses to the Appeal

EULEX Prosecutor Neeta Amin filed a reply to the appeal of defence counsel Nebojsa Vlajic on 16 October 2014. She emphasizes that the Prosecution has a different view of the case than that of the defence counsel and she repeats the main arguments in the Prosecutor's appeal.

Defence Counsel of the accused lawyer Nebojsa Vlajic also filed a response to the appeal of the Prosecutor on 24 October 2014. He considers the appeal of the Prosecutor as ungrounded and proposes to reject it. He argues that the appeal of the Prosecutor only repeats reasons that have been presented by the prosecutor at all stages of the procedure and that were assessed by the court in the judgment. What the Prosecutor asserts was not supported by witnesses, not even by the injured parties.

Proposal of the Appellate Prosecutor

The Appellate Prosecutor, Claudio Pala in his Proposal dated 27 November 2014 concurs with the findings of the trial panel, namely that it was not proven beyond reasonable doubt that the defendant intended to kill the injured parties having in mind the behavior of the defendant during and after the carrying out of the criminal conduct he was found guilty of. Instead, the facts as proven during the trial lead to the conclusion that the accused intentionally attempted to obstruct the police officers from performing their duties.

Concerning the calculation of punishment, the Appellate Prosecutor leaves to the Appellate Panel the assessment of whether the trial panel correctly considered the absence of mitigating circumstances and whether it correctly considered as aggravating circumstance a situation that cannot be imputed to the accused. He observes that the imposed punishment in a similar case is immaterial in the present case given the different circumstances.

The Appellate Prosecutor moves the Court of Appeals to reject the appeals as unfounded and to affirm the contested judgment.

II. FINDINGS OF THE APPELLATE PANEL

A. Competence of the Panel

Pursuant to Article 472(1) CPC the Panel has reviewed its competence and since no objections were raised by the parties the Panel will suffice with the following. In accordance with the Law on Courts and the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273 and clarified through the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, the Panel concludes that EULEX has jurisdiction over the case and

that the Panel is competent to decide the respective case in the composition of one EULEX judge and two Kosovo appellate judges.

B. Admissibility of the appeals

The impugned Judgment was announced on 10 July 2014 and finalized on 10 September 2014. The written Judgment was served to **Z.V.** and to his defence counsel on 26 September 2014, and to the EULEX Prosecutor on 29 September 2014. All appeals were filed within the 15-day deadline pursuant to Article 380(1) CPC. The two appeals were filed by the authorized persons and contain all other information pursuant to Article 376 *et seq* CPC. They are therefore admissible.

C. Findings on the merits

The Appellate Panel will discuss all grounds of appeal raised under relevant headings below. Firstly, the Panel will address the appeal of the EULEX Prosecutor challenging the requalification of the criminal offence for which the defendant has been convicted. Secondly, the Panel will discuss the challenges raised by the appeal of defence counsel Nebojsa Vlajic on behalf of the defendant concerning violation of criminal law with regard to the decision on punishment.

Appeal of the EULEX Prosecutor

The Court of Appeals concurs with the requalification of the criminal offence adopted by the Basic Court and decides to reject the appeal of the EULEX Prosecutor as unfounded.

Contrary to the contention of the EULEX Prosecutor, the Appellate Panel does not find that the evidence suffices to establish that **Z.V.** committed attempted aggravated murder and used the vehicle as a lethal weapon against the two Police officers. The Court of Appeals concurs with the Basic Court's assessment that the defendant's intention to kill the injured parties has not been proven beyond reasonable doubt, as it shows through his behavior during and immediately after the carrying out of the criminal offence for which he has been convicted.

In the view of the Panel, the fact that the defendant, while he did not slow down, yet did not increase his speed while approaching the two Kosovo Police officers,¹ and that he made a U-turn and came back in order to enquire about the truck demonstrates that his intent was focused on approaching the truck and its load, rather than on depriving the injured parties of their lives.

¹ This fact has been confirmed by A.T. during his testimony, while F.S. clarified in court that he could not be positive as to whether the driver increased or decreased the speed of the vehicle. *See* Minutes of main trial, 3 June 2014.

The Appellate Panel considers that the legal qualification for the criminal offence of “Attempted Aggravated Murder” is not established, and that the Basic Court did not err in requalifying the criminal offence as “Obstructing Official Persons in Performing Official Duties”.

Appeal of defence counsel Nebojsa Vlajic on behalf of Z.V.

With regard to the defendant’s contention that the Basic Court erred in finding that an attempt was constituted, the Panel finds on the contrary that the specific actions taken by **Z.V.** toward the commission of the criminal offence, namely the fact that he kept driving his quad at the same speed in direction of the Police officers A.T. and F.S. and managed to break through the perimeter established by the Police despite the fact that they had ordered him to slow down and stop, in an attempt to prevent the truck and its load from being taken to the customs terminal, are clearly laid out in the judgment and arise out of the evidence. Contrary to the defence’s assertion, besides the intent, the *actus reus* of the criminal offence as well is clearly constituted. The Court of Appeals is satisfied that the immediate action intentionally taken toward the commission of the offence pursuant to Article 20(1) PCCK has been established.

In addition, the defence counsel’s submission that the offence rather constitutes a mere traffic offence is rejected as groundless given that the evidence adduced at trial clearly demonstrates that the defendant, by his actions, intended to hinder the Kosovo Police from moving the truck. In the view of the Court of Appeals, this is further confirmed by the established links between **Z.V.** and the truck as well as its load, and the defendant’s awareness that the Police officers were acting in their official capacity.

The attempt of the criminal offence of “Obstructing Official Persons in Performing Official Duties” under Article 316(1) PCCK is characterized by the use of force made by the defendant in order to break through the perimeter established by Police forces so to obstruct the Police officers from taking the truck to the customs terminal.

Now turning to the decision on the punishment, the Panel first finds that the defence’s reference to other allegedly similar cases is immaterial since the circumstances of each case necessarily differ. Thus, any comparison would be irrelevant.

The Appellate Panel carefully reviewed the aggravating and mitigating circumstances established by the Basic Court and the challenges raised by the defendant’s appeal in this regard. The Panel accepts the argument of the defence that the Basic Court, in finding that there was no mitigating circumstances in the case, failed to consider the family situation of the defendant.

The Appellate Panel finds no reason not to believe that the family situation of the defendant laid out by the defence counsel is accurate. The Appellate Panel therefore considers as a mitigating circumstance for the defendant **Z.V.** that he is married and has two underage children. Additionally, the Court of Appeals is of the view that the fact that the defendant cooperated during the proceedings should also be taken into account as a mitigating circumstance.

Insofar the defence counsel submits that the fact that the criminal offence occurred in the North of Kosovo – where the rule of law is still no present – cannot constitute an aggravating circumstance as it is not within the scope of the perpetrator’s intent, the Appellate Panel disagrees. This characteristic typically falls within what Article 64(1) PCKK describes as “circumstances in which the act was committed” which have to be taken into account when establishing the mitigation or aggravation of the punishment. While the absence of rule of law in the North of Kosovo cannot be attributed to the defendant, he was aware of the situation in the North and still made use of such an environment when committing the criminal offence. The Appellate Panel finds that the Basic Court correctly considered this as an aggravating circumstance and strongly rejects as unsubstantiated the allegation on discrimination on behalf of the Basic Court because of the fact that the defendant is a Kosovo Serb from the North of Kosovo.

In light of the aggravating circumstances correctly established by the Basic Court and giving due regard to the additional mitigating circumstances of the family status of the defendant and his cooperation during the proceedings, and considering that the maximum punishment foreseen for attempt of Obstructing Official Persons in Performing Official Duties is 3 years and 9 months of imprisonment pursuant to Articles 20(3), 65(2) and 316(3) PCKK taken in combination, the Panel finds that the sentence of one year of imprisonment imposed by the Basic Court is not disproportionate and reflects an appropriate punishment in view of the circumstances of the case.

III. CONCLUSION

The Court of Appeals, for the reasons elaborated above, rejects the EULEX Prosecutor’s and the defence’s appeals and affirms the impugned judgment.

Done in English, an authorized language. Reasoned Judgment completed on 27 July 2015.

Presiding Judge

Hajnalka Veronika Karpati
EULEX Judge

Panel member

Panel member

Xhevdet Abazi
Kosovo Court of Appeals Judge

Tonka Berishaj
Kosovo Court of Appeals Judge

Recording Officer

Anne-Gaëlle Denier
EULEX Legal Officer

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