

COURT OF APPEALS

Case number: PAKR 347/13

Date: 18 August 2015

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Roman Raab as Presiding and Reporting Judge, and Kosovo Court of Appeals Judges Fillim Skoro and Abdullah Ahmeti as Panel Members, with the participation of Anne-Gaëlle Denier, EULEX Legal Officer, as the Recording Officer,

in the criminal proceedings against

N.D., father's name [], mother's name [], mother's maiden name [], born on [] in [], residing in [], in detention on remand from 25 May 2011 to 2 June 2011;

A.S., father's name [], mother's name [], mother's maiden name [], born on [] in the village of [], residing in the village of [], in detention on remand from 25 May 2011 to 2 June 2011;

N.P., father's name [], mother's name [], mother's maiden name [], born on [] in the village of [], residing in [], in detention on remand from 25 May 2011 to 2 June 2011;

B.S., nickname [], father's name [], mother's name [], mother's maiden name [], born on [] in [], residing in [], in detention on remand from 25 May 2011 to 2 June 2011;

K.H., nickname [], father's name [], mother's name [], mother's maiden name [], born on [] in [], residing in [], in detention on remand from 25 May 2011 to 2 June 2011;

charged under the Indictment SPRK PPS 70/10 dated 30 November 2011 as amended on 16 February 2012 as follows:

- Count 1: **Abusing Official Position or Authority**, in violation of Article 339(1) of the Provisional Criminal Code of Kosovo (hereinafter "PCCK", in force from 6 April 2004 to 31 December 2012)
- Count 2: **Accepting Bribes**, in violation of Article 343(1) PCCK

and against

H.F., father's name [], mother's name [], mother's maiden name [], born on [] in [], residing in [];

charged under the Indictment SPRK PPS 70/10 dated 30 November 2011 as amended on 16 February 2012 as follows:

- Count 1: **Abusing Official Position or Authority**, in violation of Article 339(1) PCCK

adjudicated in first instance by the Basic Court of Mitrovica with the Judgment P. Nr. 22/12, dated 15 February 2013 as follows:

- Defendants **N.D.**, **B.S.** and **K.H.** acquitted of the criminal offences of *Abusing Official Position or Authority* pursuant to Article 339(1) PCCK and *Accepting Bribes* pursuant to Article 343(1) PCCK;
- Defendant **H.F.** acquitted of the criminal offence of *Abusing Official Position or Authority* pursuant to Article 339(1) PCCK;
- Defendant **N.P.** found guilty of the criminal offences of *Abusing Official Position or Authority* pursuant to Article 339(1) PCCK and *Accepting Bribes* pursuant to Article 343(1) PCCK and sentenced to an aggregate punishment of one year and two months of imprisonment, sentence suspended for a verification period of two years and six months;
- Defendant **A.S.** found guilty of the criminal offence of *Abusing Official Position or Authority* pursuant to Article 339(1) PCCK, sentenced to five months of imprisonment, sentence suspended for a verification period of two years, and acquitted of the criminal offence of *Accepting Bribes* pursuant to Article 343(1) PCCK;

deciding upon the following appeals, filed against the Judgment of the Basic Court of Mitrovica P. Nr. 22/12 dated 15 February 2013

- **appeal of the Special Prosecutor, filed on 26 April 2013**
- **appeal of defence counsel Zeqir Maxhuni on behalf of the defendant N.P., filed on 26 April 2013**
- **appeal of defence counsel Rexhep Kacaniku on behalf of the defendant A.S., filed on 7 May 2013**

having reviewed the motion of the Appellate State Prosecutor filed on 10 September 2013;

after having held a session on 18 August 2015;

having deliberated and voted on 18 August 2015;

pursuant to Articles 389, 390, 394, 398 and 401 of the Criminal Procedure Code of Kosovo (hereinafter “CPC”);

renders the following

JUDGMENT

- I. The appeal of defence counsel Zeqir Maxhuni on behalf of the defendant N.P. is hereby rejected as unfounded.**
- II. The appeal of defence counsel Rexhep Kacaniku on behalf of the defendant A.S. is hereby rejected as unfounded.**
- III. The appeal of the Special Prosecutor is hereby rejected as unfounded.**
- IV. The Judgment of the Basic Court of Mitrovica P. nr. 22/12 dated 15 February 2013 is hereby affirmed.**

REASONING

I. RELEVANT PROCEDURAL BACKGROUND

The defendants are charged with the following events: between the summer 2010 and May 2011, **N.D.**, **A.S.**, **N.P.**, **B.S.**, **K.H.** and **H.F.**, members of the Kosovo Police in the region of Mitrovicë/Mitrovica, acting in their official capacity, and in order to obtain unlawful material benefit, allegedly abused their official positions by providing assistance and/or information to the cooperative witness A.H. so he could smuggle goods at the police check points established between the northern and southern parts of Mitrovicë/Mitrovica, despite lacking a permit or authorisations for trade, and allegedly obtained money in exchange.

On 30 November 2011 the Special Prosecutor of the Republic of Kosovo filed the Indictment SPRK nr. PPS 70/10 against the above-mentioned defendants for the criminal offences of Organised Crime pursuant to Article 274(2) PCCK, Smuggling of Goods pursuant to Article 273(1) PCCK, Abusing Official Position or Authority pursuant to Article 339(1) PCCK and Accepting Bribes pursuant to Article 343(1) PCCK.

The main trial in the case was held on 30 and 31 January, and on 1, 4, 5, 7, 8, 11 and 12 February 2013 and the enacting clause of the Judgment announced on 15 February 2013. The written Judgment was drawn up on 25 March 2013.

On 26 April 2013 and 7 May 2013, defence counsel Zeqir Maxhuni on behalf of **N.P.** and defence counsel Rexhep Kacaniku on behalf of **A.S.** respectively filed an appeal against the impugned Judgment. The Special Prosecutor did not file any response.

On 26 April 2013 the Special Prosecutor also appealed the Judgment.

On 16 May 2013, defence counsel Vehbi Beqiri on behalf of **B.S.**, on 15 May 2013 defence counsel Zeqir Maxhuni on behalf of **N.P.**, on 20 May 2013 defence counsel Bashkim Mehana on behalf of **K.H.**, and on 14 May 2013 defence counsel Faruk Korenica on behalf of **N.D.** respectively filed responses against the appeal of the Special Prosecutor.

The case was transferred to the Court of Appeals for a decision on the appeals on 9 September 2013.

On 10 September 2013 the Appellate State Prosecutor filed a motion.

The session of the Court of Appeals Panel was held on 18 August 2015. Since no imprisonment sentence was imposed in first instance, the parties were not sent a notification of the session, pursuant to Article 390(1) CPC.

The Appellate Panel deliberated and voted on 18 August 2015.

II. SUBMISSIONS OF THE PARTIES

A. Appeal of N.P.

Defence counsel Zeqir Maxhuni on 26 April 2013 filed an appeal with the Basic Court on behalf of the defendant **N.P.** on all grounds. He challenges the Basic Court's ruling on admissibility of evidence dated 6 February 2013 (hereinafter "Ruling on Admissibility of Evidence") arguing a violation of Article 384(1.8) CPC. More particularly, he recalls that the

defence already objected in this regard during the main trial and submits that the evidence was inadmissible given that according to both Article 91(3.1) CPC and Article 256(3) of the provisional criminal procedure code of Kosovo (hereinafter “PCPC”), the covert monitoring of conversations can only be conducted by a duly authorized judicial police officer whose identity is provided, which was not the case.

With regard to the erroneous and incomplete determination of the facts, the defence counsel contends that the Basic Court failed to evaluate properly the evidence of the cooperative witness A.H.. According to him, the evidence demonstrates that the defendant **N.P.** knew the family of A.H. for a long time and that he accepted the 15 euros from the witness as a reimbursement for the fuel since he had used the defendant’s car.

As to the mention in the Judgment that the defendant should have acted as a positive example due to his official position, the defence counsel points to the fact that the Basic Court disregarded relevant evidence establishing that the defendant carried out his duties diligently and professionally, notably a gratitude letter by the police command received by **N.P.** for his achievements.

For all these reasons, the defence counsel requests the Court of Appeals to amend the Judgment by acquitting **N.P.** or to annul the Judgment and to return the case to the Basic Court for retrial.

B. Appeal of A.S.

Defence counsel Rexhep Kacaniku on 7 May 2013 filed an appeal with the Basic Court on behalf of the defendant **A.S.** 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 sanctions

Concerning **violations of the provisions of criminal procedure**, the defence counsel submits that the Basic Court did not fully adjudicate the substance of the charge, in violation of Article 384(1.7) CPC, and failed to provide a description of the facts that led to his conviction for Abusing Official Position or Authority.

With respect to **violations of the criminal law**, the defence counsel contends that the defendant **A.S.** was not in a position to perform any specific duty concerning the unlawful smuggling of goods operated by A.H. given that he was not assigned to the patrol unit of the Kosovo Police in charge of checking vehicles for unlawful transport of goods. As such, the defendant could not have stopped the cooperative witness and search his vehicle. Therefore, his actions cannot characterize the criminal offence of Abusing Official Position or Authority under Article 339(1) PCKK.

With regard to the **erroneous and incomplete determination of the facts**, the defence counsel contends that the Basic Court erred in interpreting the testimony of cooperative witness A.H. and in finding it reliable. He also points to alleged inconsistencies in the testimony of witness S.E. concerning the equipment.

Finally, as to the **decision on criminal sanctions**, the defence counsel argues that the sentence of suspended imprisonment cannot stand.

For these reasons, the defence counsel moves the Court of Appeals to quash the impugned Judgment and to return the case for retrial.

C. Appeal of the Special Prosecutor

Special Prosecutor Besim Kelmendi on 26 April 2013 filed an appeal with the Basic Court on the ground of:

- Error in the decision on criminal sanctions against the sentencing part of the verdict

And, against the acquitting part of the verdict and the decision on the admissibility of the evidence, on the grounds of:

- Essential violation of the provisions of criminal procedure
- Erroneous or incomplete determination of the factual situation
- Violation of the criminal law

More specifically, the Special Prosecutor argues that the Basic Court erred since the enacting clause of the Judgment is unclear and contradicts itself as it does not specify which sentence is suspended and as it does not specify the conditions for the revocation of the suspended sentence pursuant to Article 45 PCCK. He further contends that the sentence imposed is too low and that the Basic Court failed to properly assess the aggravating and mitigating circumstances. In particular, the Special Prosecutor submits that in the presence of all these aggravating circumstances and in the absence of any relevant mitigating circumstances, it was not reasonable for the Basic Court to impose suspended sentences to the defendants **A.S.** and **N.P.**

For these reasons, the Special Prosecutor proposes that the Court of Appeals amend the sentencing part of the Judgment, and impose to the defendants a higher punishment by effective imprisonment sentences.

Turning to the acquitting part of the Judgment, the Special Prosecutor argues that the Basic Court erred in not providing any explanation as to why the statements of **N.D.**, **B.S.**, **K.H.** and **H.F.**, the defendants that were acquitted, were not considered as evidence pursuant to Article 231(2)(5) PCPC. In his opinion, the Basic Court did not fully and fairly establish the facts of the case and disregarded these statements at the pre-trial and trial stage. The Special Prosecutor claims that

these statements, combined with the statement of the cooperative witness, constitute two pieces of corroborative evidence that would have been sufficient to incriminate the acquitted defendants.

With regard to the Ruling on Admissibility of Evidence, the Special Prosecutor contends that the Basic Court erred in finding the video and audio materials inadmissible as at the moment the recordings took place, the orders for such covert measure were already in place against the other defendants. While the Special Prosecutor acknowledges that there was no order for the acquitted defendants, he stresses that they were nevertheless caught committing the criminal offences they were charged with in the Indictment and that this should have been taken as evidence.

D. Responses to the appeal of the Special Prosecutor

On 14 May 2013 **defence counsel Faruk Korenica** on behalf of **N.D.**, on 15 May 2013 **defence counsel Zeqir Maxhuni** on behalf of **N.P.**, on 16 May 2013 **defence counsel Vehbi Beqiri** on behalf of **B.S.**, and on 20 May 2013 **defence counsel Bashkim Mehana** on behalf of **Kemalj Hoti** respectively filed responses against the appeal of the Special Prosecutor. All contend that the Special Prosecutor fails to substantiate his claims concerning alleged violations of criminal procedure, of the criminal law, and an erroneous or incomplete determination of the factual situation.

The defence counsel all object to the Special Prosecutor's position on the Ruling on Admissibility of Evidence and contend that the Basic Court correctly found that the said evidence was inadmissible, stressing that there were no order to implement the covert measures against the defendants and that the evidence was thus inadmissible. The defence counsel further assert that the Special Prosecutor's interpretation of Article 231(2)(5) PCPC is erroneous. The defence counsel of **B.S.** in particular stresses that the defendant never asserted in any statement the facts for which he was charged in the Indictment, and that cooperative witness A.H. gave contradictory and unreliable evidence. Defence counsel for **K.H.** also argues that the defendant never admitted or confirmed before the police or the public prosecutor that he undertook the acts with which he was charged. Defence counsel for **N.D.** points to Article 156(2) PCPC which provides that the statement given by the defendant to the police or the public prosecutor can be used to challenge the defendant's statement in court, and to Article 157(2) PCPC which states that a defendant cannot be found guilty solely on the basis of his statement before the police or the public prosecutor.

They all propose that the Court of Appeals dismiss as ungrounded the appeal filed by the Special Prosecutor and confirm the impugned Judgment.

E. Motion of the Appellate State Prosecutor

State Prosecutor Sabri Ademi on 10 September 2013 filed a motion requesting the Court of Appeals to reject as unfounded the appeals on behalf of the defendants **A.S.** and **N.P.**, and to approve as well-founded the appeal of the Special Prosecutor in such manner as to modify the impugned Judgment to impose a higher punishment against **A.S.** and **N.P.**, to annul the acquittal part of the Judgment and to return the case for retrial, or to find the acquitted defendants guilty of the criminal offences they were charged with. The State Prosecutor endorses and reiterates the arguments set forth in the appeal of the Special Prosecutor.

He adds in particular that the Basic Court erred in finding the evidence inadmissible in the Ruling on Admissibility of Evidence since at the time the measures were conducted, orders for covert measures concerning other defendants already existed, and through these measures incriminating actions were revealed. The State Prosecutor contends that the responses filed on behalf of **K.H.**, **B.S.**, **N.P.** and **N.D.** are ungrounded and should be disregarded by the Court of Appeals.

III. FINDINGS OF THE APPELLATE PANEL

A. Competence of the Panel

Pursuant to Article 472(1) CPC the Panel has reviewed its competence. 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 two Kosovo judges and one EULEX judge.

B. Admissibility of the appeals

The impugned Judgment was announced on 15 February 2013 and was drawn up on 25 March 2013. All appeals were filed within the 15-day deadline pursuant to Article 380(1) CPC. The three 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 first examine the section of the Judgment dealing with the conviction and sentencing of defendants **A.S.** and **N.P.** and will address in turn the related grounds of appeals from **A.S.**, **N.P.**, and the Special Prosecutor. Secondly, the Panel will turn to discuss the

challenges raised in the appeal of the Special Prosecutor concerning the acquittal of defendants **N.D.**, **B.S.**, **K.H.**, and **H.F.**.

1. Conviction and sentencing section of the Judgment

- a. Appeal of **A.S.**

The Appellate Panel first rejects the submission of **A.S.** that the Basic Court did not fully adjudicate the substance of the charge and failed to provide a description of the facts that led to his conviction. Rather, the Panel is satisfied that the Judgment sufficiently adjudicated the substance of the charge pursuant to Article 384(1.7) CPC and that the facts that led to the conviction of **A.S.** for Abusing Official Position or Authority are properly set forth in a full and detailed manner. In particular, the Panel notes the findings of the Basic Court that because **A.S.** “*revealed specific essential and confidential information to a non-police officer*”, he exceeded the limits of his functions.¹ The Basic Court further elaborated on the specific content of these instructions in a detailed manner in the Judgment, notably that “*he gave specific instructions to the Cooperative Witness concerning his shifts, at what time of the day would have been better to transport the goods, the fact that at least three vehicles should have been changed when transporting the good and the reassurance that they would have not been stopped had the Accused wore his uniform*”.²

With respect to **A.S.**’s argument that he was not in a position to perform the criminal offence since the defendant was not stationed in the relevant patrol unit, the Court of Appeals is not persuaded by this contention. The Panel finds on the contrary that whether or not **A.S.** was physically assigned to the patrol unit that was effectively checking vehicles is irrelevant given that he was still in a position to pass to A.H. crucial confidential information that he obtained only through his official position as Police Officer. The Panel recalls that the criminal offence of Abusing Official Position or Authority under Article 339(1) PCCK requires that that the person exceeds the limits of his or her authorizations. The Appellate Court finds that this was clearly the case when **A.S.** disclosed to A.H. confidential information regarding police shifts and that the criminal offence of Abusing Official Position or Authority is qualified.

As for the evidence of cooperative witness A.H., the Court of Appeals is of the view that the defence counsel listing a number of alleged inconsistencies in A.H.’s testimony falls short of demonstrating any error in the Basic Court’s assessment of his evidence. The Panel is satisfied that the Basic Court carefully considered **A.S.**’s explanations that his contacts with A.H. were only aimed at recovering the equipment and the fact that he denied having agreed with him concerning the smuggling activities.³ The Court of Appeals finds no error in the Basic Court’s factual findings and conclusion that **A.S.**’s version is not reliable in light of the undisputable

¹ See Basic Court Judgment, paras. 103, 110.

² See Basic Court Judgment, paras. 93-100.

³ See Basic Court Judgment, paras. 88-92, 100.

evidence resulting from the implementation of the covert measures corroborating the accounts of cooperative witness A.H..⁴ Therefore, the Court finds that the Basic Court did not err in finding his testimony credible and reliable.

Concerning the allegation of inconsistencies in the evidence of witness S.E., the Appellate Panel notes that the Basic Court did not base its finding that **A.S.** sold his equipment to A.H. on S.E.'s testimony but solely on the transcripts obtained during the implementation of the covert measures and the statement of cooperative witness A.H..⁵ In any event, the Panel observes that the Basic Court refers in the Judgment to the fact that witness S.E. corrected his testimony in this regard.⁶

The Court of Appeals finally summarily rejects as unsubstantiated **A.S.**'s submission regarding the sentencing.

b. Appeal of **N.P.**

Concerning the Ruling on Admissibility of Evidence, and more specifically the defence counsel's contention that the identity of the officer is missing from the order for covert measures and that the resulting evidence is inadmissible, the Appellate Panel recalls that the Basic Court already addressed this contention from the defence during the main trial session of 8 February 2013.⁷

In this respect, it is noteworthy that the investigation report from the Kosovo Police dated 23 November 2011 based on the Prosecution's order for extension of covert monitoring measures clearly identifies the identity of the duly authorized judicial police officers who carried out the operation.

The Panel is satisfied that the report and the order for covert measures were implemented in accordance with the provisions of Article 260(4) PCPC, and that the procedure was fully respected. Therefore, the Panel finds that the covert video surveillance recordings of **N.P.** of 18 November 2011 and the corresponding transcripts which formed the basis for his conviction were validly deemed admissible by the Basic Court which did not err in relying on this evidence. The Panel thus concurs with the Basic Court's assessment that the covert measures in place against defendants **A.S.** and **N.P.** were properly established and that the resulting evidence was admissible.

Turning to cooperative witness A.H., the Appellate Court, contrary to the defence's assertion, considers that the Basic Court properly assessed his evidence concerning **N.P.** in the Judgment. It expressly noted the fact that the cooperative witness, when testifying during the main trial,

⁴ See Basic Court Judgment, paras. 101, 102.

⁵ See Basic Court Judgment, para. 102, p. 27.

⁶ See Basic Court Judgment, para. 45, p. 19.

⁷ See minutes of main trial, 8 February 2013, p. 19 (English).

“*completely departed*” from his statements dated 4 April 2011 and 20 July 2011 to the Prosecution where he had confirmed an agreement with the defendant.⁸ At trial, A.H. indeed corroborated the version of **N.P.** that the money exchanged was only a compensation for the fuel he consumed when using the defendant’s car and that there was no agreement among them.⁹ The Appellate Panel is satisfied that the Basic Court took into account these different versions in its assessment of the evidence. The Panel sees no reason to depart from the Basic Court’s consideration that this radical change of testimony demonstrates “*an aspiration of the cooperative witness A.H. to protect the accused N.P.*”¹⁰

The Court of Appeals further finds no error in the analysis conducted by the Basic Court that the probative value of the transcripts resulting from the implementation of the covert measures is overwhelming compared to the accounts of A.H. and **N.P.**¹¹ The Panel has carefully reviewed the evidence adduced at trial and finds that the transcripts constitute undisputable evidence that **N.P.** committed the criminal offences he was charged with. Therefore, the Basic Court did not err in disregarding the in-court testimony of A.H. in this respect.

The Panel has carefully reviewed the mitigating circumstances established by the Basic Court and the challenges raised by defence counsel for **N.P.** in this regard. While it is true that the Basic Court did not expressly refer to the letter of appreciation and the certificate of outstanding performance received by **N.P.** for his professional duties when evaluating the mitigating circumstances, the Appellate Panel is nevertheless of the view that this aspect was encompassed within the general consideration that the defendant had no previous criminal conviction, implying a good behavior in general. In any event, given that these two statements date back to 2002 and 2008, the Panel considers that they are of low relevance and probative value. Therefore, the Appellate Panel does not find that the Basic Court erred in evaluating the personal circumstances of the defendant as mitigating circumstances.

In light of the above, in the view of the Appellate Court, there exists clear and corroborated evidence against the two defendants **A.S.** and **N.P.** that they committed the criminal offences they were charged with, namely the evidence lawfully obtained under covert measures and the evidence from the cooperative witness A.H.. Therefore, the Panel finds that the Basic Court did not err in convicting them.

c. Appeal of the Special Prosecutor

⁸ See Basic Court Judgment, para. 124. Compare Statement of witness A.H., 4 April 2011, Prosecution Binder #1, pp. 84-87 and Record of examination of witness A.H., 20 July 2011, Prosecution Binder #1, pp. 126, 127, with minutes of main trial, 4 February 2013, pp. 27, 28, 37 (English).

⁹ See Basic Court Judgment, paras. 118, 124. See also minutes of main trial, 4 February 2013, pp. 27, 28, 37 (English).

¹⁰ See Basic Court Judgment, para. 124.

¹¹ See Basic Court Judgment, para. 126.

With regard to the sentencing, the Panel finds that the description of the facts in the enacting clause of the Judgment is sufficiently clear as to which sentence is suspended and further finds no error in the fact that the enacting clause does not specify the conditions for revocation of suspended sentence under Article 45 PCK given that these conditions are already clearly laid out in the law.

Turning to the Special Prosecutor's contention that the sentence imposed is too lenient given the aggravating circumstances of the case and given the absence of "relevant" mitigating circumstances, the Panel observes on the contrary that the Basic Court rightly considered as a valid mitigating factor the fact that both defendants did not have previous criminal convictions.¹²

The Appellate Panel observes that the Basic Court seems to have taken into consideration the fact that the defendants were holding positions as police officers as an aggravating circumstance when determining the sentence in the present case. The position of authority is however already an element of the criminal offence for which **N.P.** and **A.S.** were found guilty, namely, Abusing Official Position or Authority. Hence, these circumstances are exhausted when it comes to the determination of punishment because the elements of a crime are already reflected in the range of punishment of the criminal offence. It is a general rule and a legal consequence of the principle *ne bis in idem* or double-jeopardy that circumstances which constitute elements of a criminal offence for which the defendant is found guilty cannot additionally be considered for the determination of punishment at the sentencing stage.¹³ The Panel therefore finds that the Basic Court impermissibly double-counted an element of the criminal offence as an aggravating factor.

However, after having carefully reviewed the circumstances of the case and the aggravating circumstances, and keeping in mind the general rules on punishment prescribed by Article 64 PCK, the Court of Appeals observes that the respective sentences of imprisonment imposed on **N.P.** and **A.S.** are fair given the circumstances of the case and given the range of punishment prescribed by Article 339(1) PCK, namely up to one year of imprisonment, and Article 343(1) PCK, that is, between six months and five years of imprisonment. The Panel is therefore convinced that the error of the Basic Court has no impact and that the sentence imposed on the two defendants has been appropriately determined by the Basic Court.

The Court of Appeals recalls the broad discretion trials panels are vested with in the determination of an appropriate sentence and the resulting limited scope of review for the Court of Appeals.¹⁴ In light of the above, the Panel does not find any error in the Basic Court's decision to impose a suspended sentence of imprisonment with a verification period. The Panel finds that this reflects an appropriate punishment in view of the circumstances of the case and is reasonable

¹² See Basic Court Judgment, para. 153.

¹³ See e.g., PAKR 1122/2012, Judgment, 25 April 2013, para. 58.

¹⁴ See e.g., PAKR 1122/2012, Judgment, 25 April 2013, para. 53.

and in accordance with the relevant provisions of the criminal code, namely Articles 42 to 44 PCKK.

In conclusion, the Appellate Panel rejects as unfounded the appeals of **A.S.** and **N.P.** in their entirety, as well as the appeal of the Special Prosecutor insofar as it relates to the sentencing of **A.S.** and **N.P.**. The impugned Judgment is affirmed in this respect.

The Panel will now turn to examine whether the Basic Court erred in acquitting defendants **N.D.**, **B.S.**, **K.H.** and **H.F.**.

2. Acquittal section of the Judgment

The Panel recalls that the Supreme Court considered that the question of whether there is sufficient corroborative evidence presented has to be assessed on a case by case basis, and that when doing so, the trial court has to take into consideration all the evidence presented in the case and the reliability of that evidence.¹⁵ A reading of the Judgment reveals that the Basic Court did not expressly refer to the evidence contained in the admissible portions of the pre-trial statements of the defendants. The Appellate Court finds that the Basic Court erred in not considering this evidence.

However, the Panel also recalls that pursuant to Article 157(2) PCPC and Article 262(2) CPC, a defendant cannot be found guilty solely on the basis of his statements to the police or the public prosecutor, and that pursuant to Article 157(4) PCPC and Article 162(4) CPC, a conviction cannot occur on the sole basis of the evidence of a cooperative witness.¹⁶

In light of the above, and given that in the present case the evidence against **N.D.**, **B.S.** and **K.H.** rests solely on their pre-trial statements, insofar as they are admissible, and the testimony of the cooperative witness A.H., the Panel finds that the evidence, even combined, does not suffice to trigger a conviction since each evidence, taken separately, lacks sufficient reliability and probative value pursuant to Articles 157(2) and 157(4) PCPC. Therefore, their combination cannot reach the minimum threshold to constitute a basis for a finding of guilt against **N.D.**, **B.S.**, and **K.H.**

¹⁵ See Supreme Court Judgment, PML.Kzz 98/2014, 3 September 2014, p. 17.

¹⁶ The Panel is of the view that contrary to the contention of **N.D.**'s defence counsel, statements of the defendant to the police or the public prosecutor under Article 156(2) PCPC cannot solely be used to challenge the defendant in court, but can also be used as direct evidence.

In any event, the Panel has carefully reviewed the admissible portions of their pre-trial statements given to the Special Prosecutor and is satisfied that they contain no or little incriminating information concerning the criminal offences the defendants were charged with.¹⁷

The Court of Appeals thus finds that the Basic Court's failure not to consider the evidence contained in the defendants' pre-trial statements has no impact on its overall assessment of the facts and on its determination of the outcome of the case. The Panel is satisfied that the Basic Court did not err in finding that the evidence adduced at trial could not prove beyond reasonable doubt that **N.D.**, **B.S.**, and **K.H.** committed the criminal offences they were charged with.

As to defendant **H.F.**, the Appellate Panel recalls that the covert video surveillance recordings of **H.F.** of 2 December 2010 and the corresponding transcripts were considered admissible by the Basic Court in its Ruling on Admissibility of Evidence, and that the Basic Court found that the intercepted conversation did not reveal any element that would "*corroborate what stated*" A.H..¹⁸

The Panel concurs with the Basic Court's assessment that there is nothing incriminating in the intercepted evidence of **H.F.**. In addition, a review of **H.F.**'s pre-trial statement dated 20 May 2011 reflects that it contains no element concerning the criminal offences he was charged with.

Nevertheless, the Court of Appeals notes a discrepancy between the initial statement of A.H. to the Special Prosecutor, where he mentions that **H.F.** provided information on checkpoints against financial compensation,¹⁹ and his second statement and his in-court testimony, where he indicates that they had no arrangement among them.²⁰

In any event, the Appellate Court is satisfied that there was no incriminating evidence adduced at trial against **H.F.** and sees no error in the Basic Court's decision to acquit him.

Turning finally to the Prosecution's contention concerning the Ruling on Admissibility of Evidence, the Panel finds that the fact that valid orders for covert measures were in place against **N.P.** does not suffice to make the measures conducted against **N.D.**, **K.H.**, and **B.S.** lawful and to render the resulting evidence admissible. Given that no order for covert monitoring of conversations in public places and covert photographing and video-surveillance were in place

¹⁷ See Statement of **N.D.**, 1 June 2011, Prosecution Binder #1; Record of examination of **N.D.**, 12 July 2011, Prosecution Binder #1; Statement of **B.S.**, 3 June 2011, Prosecution Binder #1; Statement of **K.H.**, 3 June 2011, Prosecution Binder #1.

¹⁸ See Basic Court Judgment, para. 135.

¹⁹ See Statement of witness A.H., 4 April 2011, Prosecution Binder #1, pp. 91, 92.

²⁰ See Record of examination of witness A.H., 20 July 2011, Prosecution Binder #1, p. 124; minutes of main trial, 4 February 2013, pp. 26, 27 (English).

against these specific defendants at the time the evidence was obtained, this evidence has to be considered inadmissible pursuant to Article 264(1) PCPC.

The Court of Appeals further rejects the Prosecution's submission that the evidence should nevertheless be considered admissible given that incriminating actions were revealed in this evidence which was yet obtained without any order for covert measures.

As rightly pointed out by the Basic Court in its Ruling on Admissibility of Evidence, Article 257 PCPC refers to the fact that orders for covert measures have to be against "a particular person", and Article 259(1.1) PCPC provides that such orders have to specify the "name and address of the subject or subjects of the order". These provisions further confirm that covert measures need to target specifically identified persons and cannot be extended to unidentified persons on a random basis. Otherwise, it would constitute a violation of the right to respect for private life enshrined under Article 8 of the European Convention on Human Rights. The Panel thus stresses the fundamental importance of strict controls and regulations concerning the implementation of covert measures which are intrusive in nature.

In light of the foregoing, the Appellate Court rejects as unfounded the appeal of the Special Prosecutor concerning the acquittal section of the Judgment and affirms the impugned Judgment in this respect.

D. Conclusion

The Court of Appeals, for the reasons elaborated above, rejects the appeal of the Special Prosecutor's and the appeals filed on behalf of **N.P.** and **A.S.** and affirms the impugned Judgment.

Done in English, an authorized language. Reasoned Judgment completed on 8 October 2015.

Presiding Judge

Roman Raab
EULEX Judge

Panel member

Fillim Skoro
Kosovo Court of Appeals Judge

Panel member

Abdullah Ahmeti
Kosovo Court of Appeals Judge

Recording Officer

Anne-Gaëlle Denier
EULEX Legal Officer

COURT OF APPEALS OF KOSOVO
PAKR 547/14
18.08.2015