

SUPREME COURT OF KOSOVO

Ap – Kž – 448/2011

9 October 2012

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Martti Harsia as Presiding Judge, and with EULEX Judges Anne Kerber and Elka Filcheva-Ermenkova and Supreme Court Judges Emine Mustafa and Avdi Dinaj as panel members, assisted by EULEX Legal Officer Noora Aarnio as the recording clerk,

In the criminal case against defendants;

1) **Xh Th**, convicted by the District Court of Prishtinë/Priština for the criminal offences of Unauthorized Purchase, Possession, Distribution and Sales of Dangerous Narcotic Drugs and Psychotropic Substances [Article 229 paragraphs 2 and 4 in of the Criminal Code Kosovo (CCK) in conjunction with Article 23 of the CCK] and Organized Crime [Article 274 paragraph 3 of the CCK],

2) **A K** convicted by the District Court of Prishtinë/Priština for the criminal offence of Organized Crime [Article 274 paragraph 3 of the CCK], and

3) **G I**, acquitted by the District Court of Prishtinë/Priština from all the charges

Acting upon the appeals of the Special Prosecutor Maarit Loimukoski and the defendants **Xh Th** and **A K** through their Defence Counsels **Q M** and **R G** as well as **V V** respectively,

Against the Judgment of the District Court of Prishtinë/Priština, P.nr 504/2010, dated 4 July 2011.

After having held a session on 9 October 2012 open to public, in the presence of the State Prosecutor Judit Eva Tatrai, the defendants **Xh Th** and **A K**, the Defence Counsels **Q M** and **R G**, **V V** and **G E**, and after a deliberation and voting held on the same day,

On 10 October 2012 pronounces the following

RULING

Xh Th, no nickname, name of father **H** mother **N A**, place of birth village of is also currently residing, date of birth

name of mother and maiden name of, municipality of Prizren where he Kosovar, businessman,



father of [redacted] children, elementary school, of good financial situation, no known previous convictions, in detention since 27 May 2010,

A. [redacted] K. [redacted], no nickname, name of father H. [redacted], name of mother and maiden name of mother M. [redacted] G. [redacted] place of birth village of [redacted], municipality of Prizren, [redacted], date of birth [redacted], Kosovar, business trader, [redacted] father of [redacted] children, primary school, of average financial situation, no known previous convictions, in detention since 27 May 2010,

G. [redacted] I. [redacted], no nickname, name of father Q. [redacted], name of mother and maiden name of mother S. [redacted] E. [redacted], place of birth village of [redacted] municipality of Kukes, Republic of Albania [redacted], date of birth [redacted], Albanian, taxi driver, [redacted], father of [redacted] children, primary school, of poor financial situation, no known previous convictions, in detention from 4 December 2010 until 4 July 2011,

The appeals filed on behalf of the defendant Xh. [redacted] Th. [redacted], Al. [redacted] K. [redacted] and the Special Prosecutor against the judgment of the District Court of Prishtinë/Priština, P.nr 504/2010, dated 4 July 2011, are hereby partially granted.

The Judgment of the District Court is annulled in its entirety and the case is sent back to the District Court of Prishtinë/Priština for retrial.

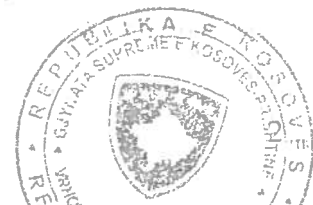
The defendants Xh. [redacted] Th. [redacted] and Al. [redacted] K. [redacted] are to be kept in detention.

The detention is not ordered for the defendant G. [redacted] I. [redacted]

REASONING

I. PROCEDURAL HISTORY

The Prosecutor of the Special Prosecution Office of the Republic of Kosovo (SPRK) filed an indictment against the defendants on 23 December 2010. Xh. [redacted] Th. [redacted] was indicted for two counts of criminal offence of Unauthorized Purchase, Possession, Distribution and Sales of Dangerous Narcotic Drugs and Psychotropic Substances [Article 229 paragraphs 1,2,3 and 4 of the Criminal Code Kosovo (CCK) in conjunction with Article 23 of the CCK] and Organized Crime [Article 274 paragraphs 1, 2 and 3 of the CCK],



A. K. was indicted for the criminal offence of Unauthorized Purchase, Possession, Distribution and Sales of Dangerous Narcotic Drugs and Psychotropic Substances [Article 229 paragraphs 1,2,3 and 4 of the Criminal Code Kosovo (CCK) in conjunction with Article 23 of the CCK] and Organized Crime [Article 274 paragraphs 1, 2 and 3 of the CCK],

G. I. was indicted for the criminal offence of Unauthorized Purchase, Possession, Distribution and Sales of Dangerous Narcotic Drugs and Psychotropic Substances [Article 229 paragraphs 1, 2, 3 and 4 of the Criminal Code Kosovo (CCK) in conjunction with Article 23 of the CCK] or, alternatively of intentionally assisting in the commission of the said criminal offence [Article 25 of the CCK], and Organized Crime [Article 274 paragraphs 1 and 2 of the CCK],

This indictment was confirmed by the District Court of Pristina on 24 January 2011.

The main trial was held on 28, 29, 30 March 2011, 26, 27, 28 April 2011, 6, 14, 15, 29 June 2011 and 1 July 2011. The Judgment was announced on 4 July 2011.

The judgment was served to the SPRK Prosecutor on 7 September 2011. She filed an appeal against the verdict of the District Court on 21 September 2011.

The judgment was served to the defendant Xh. Th. personally to Detention Center Dubrava on 6 September 2011. The Defence Counsel Q. M. and R. G. filed a joint appeal against the verdict of the District Court on 16 September 2011.

The judgment was served to the defendant A. K. personally to Detention Center Dubrava on an unspecified date in September 2011. The Defence Counsel V. V. filed an appeal against the verdict of the District Court on 19 September 2011.

II. THE APPEALS

1. The Appeal of Special Prosecutor

The Special Prosecutor requests that the Judgment be modified as described in the appeal, or annulled in its entirety and the case sent back.

2. The Appeal of Xhëme Thaqi

The Defence Counsels Q. M. and R. G. propose that the Supreme Court amends the first instance verdict by acquitting Th. Failing that the Defence Counsels propose that the Supreme Court quashes the verdict and returns the case to the court of first instance for retrial. In the least favorable case the Defence Counsels propose that the Supreme Court amends the Judgment by imposing a much more lenient imprisonment and annuls the sentence of fines.



3. The Appeal of A. K.

The Defence Counsel V. V. proposes that the Supreme Court annuls the Judgment and returns the case to the court of first instance for retrial. Failing that the Defence Counsel proposes that the Supreme Court amends the first instance Judgment by acquitting K.

III. THE RESPONSES

4. The Response of Xh. Th.

Xh. Th. proposes that the Supreme Court rejects the appeal of the Special Prosecutor as ungrounded.

5. The Response of A. K.

A. K. proposes that the Supreme Court rejects the appeal of the Special Prosecutor as ungrounded.

6. The Response of Gëzim Iseberi

Gëzim Iseberi proposes that the appeal of the SPRK Prosecutor is rejected and the Judgment confirmed in its entirety.

7. The Response of the Special Prosecutor

The Special Prosecutor proposes that the Supreme Court rejects the appeals of Thaqi and Kukaj as ungrounded and upholds the conviction. The Special Prosecutor does, however, propose that the Judgment of the District Court is modified in relation to the time already spent in detention.

8. The Opinion of the State Prosecutor

The State Prosecutor proposes that the Supreme Court partly approves the appeal of the Special Prosecutor.



III COURT FINDINGS

A. Permissibility of the appeal

1. The Supreme Court finds that the appeals of the defendant Th and the SPRK Prosecutor were filed within the limit of 15 days as prescribed in Article 398 of the KCCP and they were thus timely and permissible. The appeals were filed by the Defence Counsel and Prosecutor, thus authorized persons.
2. To guarantee the defendant K his right to an effective legal remedy as stipulated in Article 398 of the KCCP his appeal must be presumed timely filed.
3. The Panel will now assess each of the arguments raised in the appeals of the Defence.

B. The alleged essential violations of the criminal procedure

1. Clarity of the enacting clause
 4. According to Article 396 paragraph 3 of the KCCP *“The enacting clause of the judgment shall include the personal data of the accused (Article 233 paragraph 1 of the present Code) and the decision by which the accused is pronounced guilty of the act of which he ... is accused or by which he ...is acquitted of the charge for that act or by which the charge is rejected.”* Paragraph 4 of the said Article further specifies that *“If the accused has been convicted, the enacting clause of the judgment shall contain the necessary data specified in Article 391 of the present Code, and if he ...was acquitted ... the enacting clause shall contain a description of the act with which he ... was charged ...”*
 5. Article 391 of the KCCP stipulates, amongst other, that *“In a judgment pronouncing the accused guilty the court shall state: 1) **The act** of which he ...has been found guilty, together with facts and circumstances indicating the criminal nature of the act committed, and facts and circumstances on which the application of pertinent provisions of criminal law depends; 2) **The legal designation of the act** and the provisions of the criminal law applied in passing the judgment; ...”*¹ The Supreme Court notes that the term “the act” must be interpreted as the factual situation – a description of the conduct/behaviour of the defendant – whereas the term “the legal designation” refers to the title and the description in the criminal code.
6. In relation to **count 1** K and Th were found not guilty because *“there is insufficient evidence to prove the charge beyond a reasonable doubt; specifically, there was insufficient proof of the nature and quantity of the narcotic drugs and psychotropic*

¹ Bolding by the Supreme Court



substances allegedly possessed and distributed by the Defendants.”² Also, the Judgement summarizes the offences of the indictment by stating that “*Count 1: Unauthorized Purchase, Possession, Distribution, and Sale of Dangerous Narcotic Drugs and Psychotropic Substances, pursuant to Article 229, Paragraphs 1, 2, 3 and 4 of the Criminal Code of Kosovo (CCK) in conjunction with Article 23 thereof and punishable from three to fifteen years of imprisonment; an offence alleged to have occurred between 24 July 2009 and 15 September 2009 by A. K. j and Xh. Th.*”³

7. Supreme Court notes that a description of the act with which they were charged with is merely a rephrasing of the code. Based on this description it is impossible to say what are the criminal activities of each of the defendants are found not guilty of.

8. In relation to **count 2** G. I. was found not guilty because “... there is insufficient evidence to prove the charge beyond a reasonable doubt; specifically, there was insufficient proof of the nature and quantity of the narcotic drugs and psychotropic substances allegedly possessed and distributed by the Defendant.”⁴ Also, the Judgement summarizes the offences of the indictment by stating that “*Count 2: Unauthorized Purchase, Possession, Distribution, and Sale of Dangerous Narcotic Drugs and Psychotropic Substances, pursuant to Article 229, Paragraphs 1, 2, 3 and 4 of the Criminal Code of Kosovo (CCK) in conjunction with Article 23 thereof and punishable from three to fifteen years of imprisonment; an offence alleged to have occurred between 4 September 2009 and 6 September 2009 by G. I.*”⁵

9. Supreme Court notes that just as with Count 1 the description of the act with which he was charged with is merely a rephrasing of the code. Based on this description it is impossible to determine which are the criminal activities the defendant is found not guilty of.

10. In relation to **count 3** Th was “... found guilty of the criminal offence of unauthorized purchase, possession, distribution, and sale of dangerous narcotic drugs and psychotropic substances, contrary to Article 229 paragraph 2 and paragraph 4 CCK in conjunction with Article 23 thereof.

Because Xh. Th in co-operation with others, including but not limited to S. T., G. Gj., A. T. and H. T., organized, supervised and directed the **purchase** of narcotic substance, specifically, 109 kilograms of cannabis sativa, and planned its importation from Albania to Kosovo for intended distribution elsewhere in Europe.”⁶

11. Also, the Judgement summarizes the offences of the indictment by stating that “*Count 3: Unauthorized Purchase, Possession, Distribution, and Sale of Dangerous Narcotic Drugs and Psychotropic Substances, pursuant to Article 229, Paragraphs 1, 2,*

² Judgment dated 4 July 2011, page 2 of the English version

³ Judgment dated 4 July 2011, page 1 of the English version

⁴ Judgment dated 4 July 2011, page 2 of the English version

⁵ Judgment dated 4 July 2011, page 1 of the English version

⁶ Judgment dated 4 July 2011, page 2-3 of the English version, bolding by the Supreme Court



3 and 4 of the Criminal Code of Kosovo (CCK) in conjunction with Article 23 thereof and punishable from three to fifteen years of imprisonment; an offence alleged to have occurred between 1 October 2009 and 25 November 2009 by Xh Th ...⁷

12. Supreme Court notes that just as with count 1 the description of the act with which he was charged with is merely a rephrasing of the code. Based on this description it is impossible to determine which are the criminal activities the defendant is found not guilty of.

13. The Supreme Court also notes that the Article quoted in the enacting clause, namely "Article 229 paragraph 2 and paragraph 4 CCK", does not stipulate of purchasing of narcotics. The criminalisation of purchasing of narcotics is stipulated in the paragraph 1 that is not quoted in the enacting clause as the legal basis of the criminal responsibility of Th Paragraph 2 stipulates of distributing, selling, transporting or delivering of narcotics and paragraph 4 stipulates of further aggravating circumstances.

14. The Supreme Court further notes that the indictment states that "Between 1st October 2009 and 25th November 2009, Xh Th on the territory of Kosovo committed the offence ... **by participating in the importation from Albania to Kosovo and transportation through Kosovo or export to countries in Western Europe, namely Switzerland, Netherlands, Italy and/or Germany, of a shipment of at least 105 kg of cannabis sativa as a member of a group.**"⁸ It is noteworthy that the indictment does not charge Th with any kind of involvement in the purchase of the narcotics.

15. The Ruling on Confirmation of the Indictment states that "The indictment filed with the Court on 23 December 2011, is hereby confirmed with regard to all counts and all defendants."⁹ The said Ruling does not modify the indictment.

16. There is no indication in the minutes of the main trial that the prosecutor did at any point amend the indictment.

17. However, in the closing argument the prosecutor states that "... the prosecutor has presented evidence that Xh Th organized, supervised and directed the purchase of narcotic substance from associates in Albania ..."¹⁰

18. Further, the enacting clause speaks of "planning" of the importation whereas Th is found guilty for having committed the criminal offence of Unauthorized Purchase, Possession, Distribution and Sales of Dangerous Narcotic Drugs and Psychotropic Substances.

19. Therefore the enacting clause in relation to count 3 must be considered wholly incomprehensible.

⁷ Judgment dated 4 July 2011, page 1 of the English version

⁸ Indictment dated 20th December 2010, page 6 of the English version. bolding by the Supreme Court

⁹ Ruling on Confirmation of the Indictment dated 24 January 2011, page 1 of the English version.

¹⁰ The closing argument of the prosecutor, page 16 of the English version



20. In relation to **count 4** Th... was "... found guilty of the criminal offence of organized crime contrary to article 274 paragraph 3 CCK, ...
Because between 24 July and 30 November 2009 Xh... Th... and Al... Ki... participated in an active, structured organized crime group consisting of three or more persons whose purpose was to transport, deliver and distribute narcotic drugs with the intent that they be distributed, sold or offered for sale. Xh... Th... organized, supervised and managed the activities of the organized crime group by arranging and coordinating the importation, shipment and financing of shipments of controlled substances."¹¹
21. The Supreme Court notes that just as with Count 1 the description of the act with which he was charged with is merely a rephrasing of the code. Based on this description it is impossible to determine which are the criminal activities the defendant is found guilty of.
22. Further, the Supreme Court notes that a commission of the so called "base-crime", a serious crime, is a prerequisite for an act to constitute the criminal offence of organized crime under Article 274 paragraph 1 of the CCK. Therefore, the liability for the criminal offence of organized crime cannot be established unless criminal liability for a serious criminal offence is established first.
23. The Supreme Court recalls that the District Court has found Th... not guilty for the base crime stated in count 1 of the indictment – Unauthorized Purchase, Possession, Distribution, and Sale of Dangerous Narcotic Drugs and Psychotropic Substances, between 24 July 2009 and 15 September 2009 – due to insufficient evidence. However, the Supreme Court has found Thaqi guilty of count 4, Organized crime, for also the abovementioned period of time for which he was acquitted in relation to the "base crime". Moreover, the enacting clause does not describe any other conduct of Th... that would constitute a serious crime, the "base crime", during the time period of 24 July 2009 and 15 September 2009. Therefore the enacting clause is conflicting.
24. In relation to **count 4** Ki... was "... found guilty of the criminal offence of organized crime contrary to article 274 paragraph 2 CCK,
Because between 24 July and 30 November 2009 Xh... Th... and Al... Ki... participated in an active, structured organized crime group consisting of three or more persons whose purpose was to transport, deliver and distribute narcotic drugs with the intent that they be distributed, sold or offered for sale. ... Al... Ki... actively participated in the organized crime group by, amongst other activities, arranging couriers to transport the controlled substances, knowing that his participation would contribute to the commission of serious crimes by the organized criminal group."
25. Supreme Court notes that just as with Count 1 the description of the act with which he was charged with is merely a rephrasing of the code. Based on this description it is

¹¹ Judgment dated 4 July 2011, page 3 of the English version



impossible to determine which are the criminal activities the defendant is found not guilty of.

26. Further, the Supreme Court notes that just as for Th [redacted] the District Court has found Kukaj not guilty for the “base crime” stated in count 1 of the indictment due to insufficient evidence. But unlike Th [redacted] K [redacted] has not been indicted for any other “base crime”. Moreover, the District Court has found K [redacted] guilty of count 4, Organized crime. However, the enacting clause does not describe any other conduct of K [redacted] that would constitute active participation or knowledge of this contribution to a serious crime, the “base crime”. Therefore the enacting clause is conflicting.

27. In relation to **count 5** G [redacted] I [redacted] was found not guilty because “... *there is insufficient evidence to prove the charge beyond a reasonable doubt; specifically, there was insufficient proof that the Defendant was a member of an organized crime group or knew that he was contributing to the commission of serious crimes by an organized criminal group.*”¹² Also, the Judgment summarizes the offences of the indictment by stating that “*Count 5: Organized crime, pursuant to Article 274, of the CCK and punishable from seven to twenty years of imprisonment; an offence alleged to have occurred between 4 September 2009 and 6 September 2009 by G [redacted]*”¹³

28. The Supreme Court notes that just as with Count 1 the description of the act with which he was charged with is merely a rephrasing of the code. Based on this description it is impossible to determine which are the criminal activities to which the defendant is found not guilty.

2. Sufficiency of the reasoning

29. Also, the reasoning of the appealed Judgment is insufficient. It is unclear which facts the District Court has found proven. There is no factual description that would clarify which acts – meaning their behavior rather than the legal designation – each of the defendants have been proven to have committed.

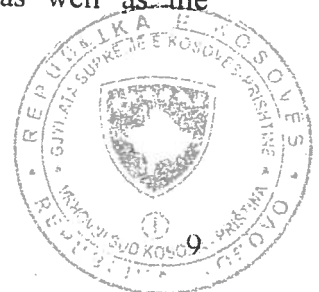
30. In relation to **count 1** the Judgment finds that “*The defendants had series on communications concerning the September shipment ... calls and SMS messages were sent between the members of the criminal group. In the various communications leading up to the so-called September shipment there are references to delivering the drugs to Italy .. and to Switzerland ...*”¹⁴ The Judgment also states that “*The group originally planned to bring the drugs to Xh. Th. [redacted]’s house in [redacted] and then there, send them on to Switzerland and elsewhere.*”¹⁵ Then the Judgment goes on describing the organizing of the transportation by communications and meetings as well as the

¹² Judgment dated 4 July 2011, page 3 of the English version

¹³ Judgment dated 4 July 2011, page 2 of the English version

¹⁴ Judgment dated 4 July 2011, page 9 of the English version

¹⁵ Judgment dated 4 July 2011, page 14 of the English version



transportation by Th , K “a large number of people”, S: . T , G: I: , “two people”, “a new person” and H: T: .¹⁶ However, to conclude discussing the so called “September shipment” the Judgment reads “*the September 2009 alleged shipment*” and “... *the alleged controlled substances were not seized and the intercepted telephone calls are not sufficiently clear to determine the nature of the substance. As a result, the panel cannot surmise or presume what was contained in the package that was allegedly transported.*”¹⁷

31. The Supreme Court notes that it remains unclear whether the Panel found that something was transported but the quality of the substance remained unclear or whether the panel did not find enough proof that any substance was transported.

32. In relation to **count 2** the Judgment finds that “*The prosecution argues that this is circumstantial evidence that I left the drugs in the garage where he picked them up the next day.*”¹⁸ The Judgment does not state whether or not the District Court agreed with this contention. Further, as explained above the Judgment discusses the communication between Th , G , I: and “two people”.¹⁹ The Judgment goes on stating that “... *a new person ... took over as the driver of the van. I exited the van and remained on foot. ... it is believed that the driver of the van realized that he was being observed ... and that the driver threw the drugs into a nearby field, intending to retrieve them later.*”²⁰ The conclusions of the District Court are joint with the above-explained conclusions for the count 1.

33. The Supreme Court notes that, just as with the count 1, it remains unclear whether the Panel found that something was transported but the quality of the substance remained unclear or whether the panel did not find enough proof that any substance was transported. It is further worth pointing out that the Judgment clearly concludes that I was not driving the van when, allegedly, the narcotics were thrown out of it.

34. In relation to **count 3** the Judgment finds that “*Beginning of October 2009 Xh: Th: organized supervised and directed the purchase of 109 kilograms of cannabis sativa from associates in Albania.*”²¹

35. As noted under points 13 – 16 above the indictment speaks of participating in the **importation and transportation** of narcotics through Kosovo but does not mention participation in the purchase of those narcotics. Article 229 paragraph 3 speaks of transporting narcotics across state borders as it states that “*Whoever, without authorisation, exports or imports substances or preparations which have been declared to be dangerous narcotic drugs or psychotropic substances shall be punished ...*” The panel has found that “*Th: planned its transportation from Albania to Kosovo for*

¹⁶ Judgment dated 4 July 2011, pages 14 – 16 of the English version

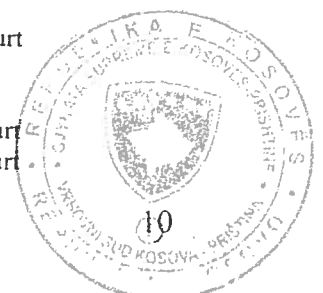
¹⁷ Judgment dated 4 July 2011, page 15 of the English version, bolding by the Supreme Court

¹⁸ Judgment dated 4 July 2011, page 15 of the English version

¹⁹ Judgment dated 4 July 2011, pages 14 – 15 of the English version

²⁰ Judgment dated 4 July 2011, page 15 of the English version, bolding by the Supreme Court

²¹ Judgment dated 4 July 2011, page 17 of the English version, bolding by the Supreme Court



intended distribution to and sale in other European destinations. The drugs, however, did not make it to Kosovo. ... the Albanian Police intercepted a Mercedes Benz vehicle ... abandoned by the couriers ... contained 102 packages ... with a total weight of 109 kilograms. ... confirmed their contents as cannabis sativa."²² Therefore the panel has not found that Th did transport the narcotics. On the contrary the panel explicitly stated that the narcotics never crossed state boundaries, and that Th only planned to import them to Kosovo.

36. Th has been found guilty to the said narcotics offence based on Article 229 paragraph 2 of the CCK. The Supreme Court recalls that the said paragraph states that "*Whoever, without authorisation, distributes, sells, transports or delivers substances or preparations which have been declared to be dangerous narcotic drugs or psychotropic substances, with the intent that they shall be distributed, sold or offered for sale shall be punished ...*" The Judgment does not include a finding that Th had been in direct contact with the 109 kg of the cannabis sativa confiscated by the Albanian police on 25 November 2009 (so called "November shipment"). Nor does the Judgment explicitly state which are the actions of Th that resulted in his criminal responsibility, in co-perpetration with the others, for the distribution, selling, transportation or delivering the narcotics. The Supreme Court finds that the Judgment lacks statement of grounds relating to material facts.

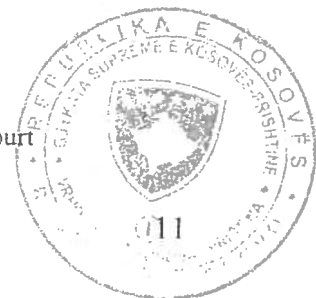
37. It is stated in the reasoning that "*Following the September events, Xh Th ... continued to participate in the organized crime group. Xh Th role was to organize, supervise and manage the activities of the organized criminal group by arranging and coordinating the importation, shipment and financing of shipments to controlled substances.*"²³ Then the Judgment goes on explaining how Th communicated with H: T: and A: T: who live in the Netherlands about the financing and the quantity of the narcotics, with A: K: about the financing, and with G: Gj about the quantity of the narcotics, the delivery dates and the courier. The Judgment also notes that Th and G: Gj have met.²⁴

38. The Supreme Court notes that after the above explained discussion about Th role as arranging and coordinating the **importation, shipment and financing** of shipments the reasoning suddenly concludes that "*The prosecution has proved beyond a reasonable doubt that Xh Th is guilty of Count 3, ... (the November shipment)*" which according to the enacting clause is the organizing, supervising and directing the **purchase** of the narcotics. The Judgment does not explain why it considers the liability of Th to the **purchase** of the narcotics. Supreme Court finds this conclusion inconsistent with the Article quoted in the enacting clause as well as the reasoning. Therefore the Supreme Court finds the reasoning insufficient in relation to the liability of Th or purchasing the narcotics.

²² Judgment dated 4 July 2011, page 17 of the English version

²³ Judgment dated 4 July 2011, page 16 of the English version, bolding by the Supreme Court

²⁴ Judgment dated 4 July 2011, pages 17 - 18 of the English version



39. The Supreme Court notes that the enacting clause also refers Article 229 paragraph 4 of the CCK as the basis of the criminal liability of Th... The enacting clause does not explicitly specify as to which of the aggravating conditions stipulated in the nine items listed under the said paragraph is considered fulfilled. The enacting clause does establish "co-perpetration with others" but it is unclear whether this is also interpreted as "acting as a member of a group" as is stipulated in Article 229 paragraph 4 item 1 of the CCK. Nor does the Judgment discuss the relationship between the criminal liability as a co-perpetrator, the aggravating circumstance of "acting as a member of a group" and the criminal liability based on acting as a member of an organized criminal group.

40. In relation to **counts 4 and 5**, organized crime, the Judgment finds that "The intercepted communication between Xh... Th... S... T... Al... K... H... T... G... Gj... G... I... and others prove the existence of a well-organized international crime group whose purpose is to import and distribute controlled substances at a substantial profit to the members of the group. The intercepted phone calls are replete with the references to financial arrangements, profits and the shipment of drugs. ... it is clear from the totality of the intercepted communications that they are speaking of one thing, and one thing only: organized crime focused on the importation and distribution of illegal narcotics."²⁵ Then in the following discussion about the "September shipment" the Judgment outlines the reasoning and concludes that this narcotics offence was not proven beyond the reasonable doubt. The Judgment also reads that "Following the September events, Xh... Th... Al... K... and others continued to participate in the organized criminal group."²⁶ After having given reasoning in relation to the "November shipment" the Judgment goes on stating that "Additionally, the Prosecution has proved beyond a reasonable doubt that Xh... Th... and Al... K... are guilty of Count 4, Organized Crime..."²⁷

41. The Supreme Court notes that the timeframe of the alleged criminal offence of organized crime is 24 July 2009 to 30 November 2009, and thus covers both the "September shipment" and the "November shipment".

42. In relation to the "September shipment" that covered the time from 24 July 2009 to 15 September 2009 the Supreme Court recalls that both Th... and K... were acquitted from the criminal offence of unauthorized purchase, possession, distribution and sale of dangerous narcotic drugs, the so called "base crime". The Judgment does not contain a description of the actions of Th... or K... on which the criminal responsibility for the criminal offence of organized crime is based between 24 July 2009 and 15 September 2009.

43. Further, in relation to the "November shipment" that covered the time between 16 September and 30 November 2009 the Supreme Court recalls that the enacting clause finds that Th... committed the criminal offence of organized crime by organizing, supervising and managing the activities of the organized crime group "by arranging and

²⁵ Judgment dated 4 July 2011, page 9 of the English version

²⁶ Judgment dated 4 July 2011, page 16 of the English version

²⁷ Judgment dated 4 July 2011, page 18 of the English version



*coordinating the importation, shipment and financing of shipments...*²⁸ However, the Judgment explicitly states that the narcotics of the “November shipment” were abandoned by the group members and intercepted by the police in Albania and thus they were not imported to Kosovo. Also, as the Judgment in relation to count 3 finds Th. [redacted] guilty for a “base crime” of organizing, supervising and directing the **purchase** of 109 kilograms of cannabis sativa, the “November shipment”, the description of the “base crime” and the organized crime are not compatible. Therefore the Judgment does not contain a description of the actions of Th. [redacted] on which the criminal responsibility for the criminal offence of organized crime is based between 16 September and 30 November 2009.

44. Moreover, K. [redacted] was not indicted for count 3, the “November shipment” covering the time period of between 16 September and 30 November 2009. In the reasoning K. [redacted] is mentioned once as someone that Th. [redacted] calls to on 26 October 2009.²⁹ The Judgment also notes that 13.000 euros were confiscated from the house of K. [redacted], that he does not have a legitimate source of income and his explanation for having a large sum of cash in his residence was simply not believable.³⁰ Therefore the Judgment does not contain a description of the actions of K. [redacted] on which the criminal responsibility for the criminal offence of organized crime is based between 16 September and 30 November 2009. Further, the reasoning fails to mention that witness Sh. [redacted] gives an explanation as to the origin of the money that matches the explanation given by K. [redacted] – namely that Sh. [redacted] borrowed the money from his girlfriend and then lend it to K. [redacted]. The case file also contains a statement of the girlfriend of Sh. [redacted] with similar content. The District Court has not given any reasoning as to why it did not deem the statements of K. [redacted] and Sh. [redacted] reliable. Therefore the Supreme Court finds that the Judgment lacks proper reasoning.

45. Also, in relation to I. [redacted] as stated above the Judgment finds that the intercepted communications between Th. [redacted] K. [redacted] and I. [redacted] prove the existence of a well-organized international crime group. However, after having given reasoning in relation to the “September shipment” and noting that the prosecution has failed to prove the elements of count 2 beyond a reasonable doubt the Judgment goes on stating that *“Additionally, the Prosecution has failed to prove the elements of Count 5, Organized Crime, against G. [redacted] I. [redacted] and he is acquitted of that offence.”*³¹ As these two statements in the reasoning seem to be contradictory the reasoning in the Judgment is unclear.

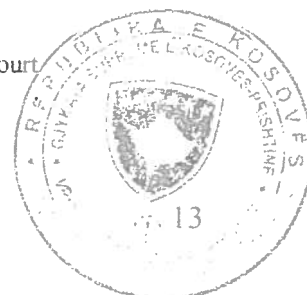
46. Lastly, the Judgment does not contain reasoning as to why the court was guided in settling points of law and, in particular, in establishing the existence of a criminal offence and the criminal liability of the accused, or applied specific provisions of criminal law to the accused and his act – as stipulated in the Article 396 paragraph 7 of the KCCP.

²⁸ Judgment dated 4 July 2009, page 3 of the English version, bolding by the Supreme Court

²⁹ Judgment dated 4 July 2009, page 17 of the English version

³⁰ Judgment, page 18 of the English version

³¹ Judgment dated 4 July 2011, page 16 of the English version



47. The Supreme Court concludes that the First Instance Court has essentially violated the provisions of criminal procedure.

C. The determination of the factual situation

48. The Supreme Court reiterates that it is the prerogative of the trial panel to assess the evidence presented even when it is contradictory. This is because the District Court, having directly heard the evidence is in the best position to assess the credibility of the witnesses and/or expert witnesses. It is the duty of the Supreme Court to determine if the trial Court has done this assessment properly. The Supreme Court's revision of the District Courts assessment is thus restricted to the questions as to whether the facts have been explored carefully, whether the evidence presented was admissible and whether the evaluation was plausible, logical and comprehensible. The First Instance Court has discretion over the assessment of the evidence and the Supreme Court only reassesses the evidence if it finds that the trial Court's assessment is faulty. The Supreme Court will only exceptionally take evidence.

49. The defendants still deny that they had any involvement with dangerous narcotics or that they formed an organized criminal group. Thus the defendants do not accept having committed the criminal offence of unauthorized purchase, possession, distribution and sale of dangerous narcotic drugs or the criminal offence of organized crime.

50. As stated above the Supreme Court has found that the factual description was insufficiently described in the Judgment and that the reasoning was also insufficient. As it is unclear what are the findings of the District Court and how the District Court has come to those conclusions the Supreme Court is in no position to assess the assessment done by the District Court of the evidence presented.

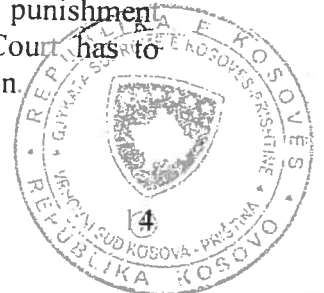
D. The alleged violations of criminal law, confiscation and sentencing

51. The Supreme Court opines that as the case is returned for retrial there is no need to state on these issues.

E. Detention

52. According to the Article 391 paragraph 1 item 5 of the KCCP *"In a judgment pronouncing the accused guilty the court shall state: ... The decision to include the time spent in detention on remand ... in the amount of the punishment;"*

53. The Supreme Court notes that the appealed Judgment does not include the decision to include the time spent in detention on remand into the amount of the punishment imposed to the defendants. The Supreme Court notes that the District Court has to include this statement into the Judgment in case the retrial results in conviction.



IV. CONCLUSIONS

53. Based on all of the above stated reasons it is decided as in the enacting clause.

Dated this 9 October 2012.
Ap.-Kž. No. 448/2011

Presiding Judge

Martti Harsia
Martti Harsia

Recording clerk

Noora Aarnio
Noora Aarnio

Member of the Panel

Anne Kerber
Anne Kerber

Member of the Panel

Elka Filcheva-Ermenkova
Elka Filcheva-Ermenkova

Member of the Panel

Emine Mustafa
Emine Mustafa

Member of the Panel

Avdi Dinaj
Avdi Dinaj