

BASIC COURT OF GJILAN

PKR 56/13

05 December 2013

The judgments published may not be final and may be subject to an appeal according to the applicable law.

In the Name of the People

The Basic Court in Gjilan, in a trial panel comprised of:

EULEX Judge Anna Adamska – Gallant, as Presiding Judge,

Judge Behar Ymeri and Judge Hasan Sadiku as panel members,

with court recorder Cristine Sengl, in the criminal case against:

1. A. K., Kosovo Albanian,
2. I. P., Kosovo Albanian,
3. B. S., Kosovo Albanian,
4. H. M., Kosovo Albanian,

charged with the Indictment of the Special Prosecution Office of the Republic of Kosovo (PPS no.91/11), dated 13 April 2012, filed with the Court on the 23rd April 2012, with the following act:

that from an unspecified date to 09.09.2011, in co – perpetration with each other and a person called D. P., citizen of the Republic of Serbia, acting as an organized and structured criminal group have smuggled migrants – citizens of the Republic of Kosovo who were interested to illegally go out of Kosovo; defendant A. K. and H. M. found migrants S. Xh. and defendant H. M. two friends Xh. and another friend, then they sent these migrants to West European countries through the territory of the Republic of Serbia through suspect D. P.; on 09.09.2011 defendant I. P. found three migrants after agreeing so with A. K.: Sh. G., F. Sh. and S. L.; following the payments of at least 1.600 euros per person they took these three migrants to Gj. to A. K., who, as of the agreement took them to defendant B. S. who would then take the three migrants to the Village of S. to submit them to a person from Serbia who would further send them to France; however on the way, defendant B. S. and the three migrants Sh. G., F. Sh. and S. L. were stopped by the police and were taken to the police station,

which said actions were classified as the following criminal offences:

organized crime in violation of Article 274 paragraph to related to Article 23 of the Criminal Code of Kosovo,

smuggling of migrants in violation of Article 138 paragraph 6 related to paragraph 1 of the Criminal Code of Kosovo,

having held the main trial hearings open to the public on the 10th September, 21st and 22nd October, 03rd and 04th December 2013 in the presence of:

- the SPRK Prosecutor Besim Kelmendi,
- the injured F. Sh., present on the 21st October 2013,
- the accused A. K. and his defense counsel M. M.,
- the accused I. P. and his defense counsel H. J.,
- the accused B. S. and his defense counsel E. Q.,
- the accused H. M. and his defense counsel H. L.

having deliberated and voted on the 05th December 2013, pursuant to Article 471 paragraph 1 of the Criminal Procedure Code (hereinafter “ the CPC”), on the 05th December 2013 pronounces in public the following:

VERDICT

I. A. K., I. P. and B. S. are guilty because:

on the 09th September 2011, in the territory of the Republic of Kosovo, acting in co – perpetration with each other, with the intention of obtaining for themselves the material benefit they attempted to smuggle S. L., Sh. G. and F. Sh., Republic of Kosovo nationals, who were neither permanent residents or citizens of the Republic of Serbia nor any Schengen Area state, from the territory of the Republic of Kosovo to the territory of the Republic of Serbia by arranging for them for the payment of 600 Euros transportation to the Republic of Serbia, from where they were to enter the Schengen Area without complying with the necessary requirements for legal entry into this area and then to be transported to the territory of the Republic of Austria which was not accomplished because S. L., Sh. G. and F. Sh. were stopped by the Kosovo Police before crossing the border between the Republic of Kosovo and the Republic of Serbia, by which they committed the criminal offence of Attempted Smuggling of

Migrants pursuant to Article 170 Paragraph 1 of the CCRK and Article 28 Paragraphs 1 and 2 of the Criminal Code of the Republic of Kosovo of 20 April 2012 (CCRK) and Article 31 of the CCRK,

therefore

A. K. is hereby sentenced pursuant to Article 170 Paragraph 1 and Article 28 Paragraph 3 of the CCRK for this criminal offence to 2 (two) years imprisonment and a fine in the amount of Euro 2 000 (two thousand);

I. P. is hereby sentenced pursuant to Article 170 Paragraph 1, Article 28 Paragraph 3 and Article 76 Paragraph 1 subparagraph 4 of the CCRK for this criminal offence to 1 (one) year and 6 (six) months of imprisonment and a fine in the amount of Euro 200 (two hundred);

B. S. is hereby sentenced pursuant to Article 170 Paragraph 1 and Article 28 Paragraph 3, Article 75 paragraph 1 subparagraph 1 and Article 76 paragraph 1 subparagraph 4 of the CCRK for this criminal offence to 1 (one) year and 6 (six) months of imprisonment, and a fine in the amount of Euro 500 (five hundred) and pursuant to Article 51 Paragraph 2 and Article 52 Paragraph 2 of the CCRK the punishment of imprisonment imposed against B. S. shall not be executed if he does not commit another criminal offense for the verification period of 3 (three) years;

II. pursuant to Article 46 Paragraph 2 of the CCRK the deadline for payment of the fines by the accused A. K., I. P. and B. S. is hereby determined as 3 (three) months;

III. pursuant to Article 97 Paragraph 1 of the CCRK

- the accused A. K. is obliged to pay 300 Euro as an amount of money corresponding to the material benefit acquired;
- the material benefit of 295 Euro seized on the 09 September 2009 from the accused B. S. shall be confiscated;
- the accused A. K. is obliged to pay 5 Euro as an amount of money corresponding to the material benefit acquired;

IV. the accused A. K., I. P., B. S. and H. M. are hereby acquitted of having committed the smuggling of migrants S. Xh. and defendant H. M. two friends Xh. and another friend as described in the enacting clause of the indictment, Article 138 paragraph 6 related to paragraph 1 of the Criminal Code of Kosovo, because it has not been proven that they had committed this act with which they have been charged;

- V. the accused H. M. is hereby acquitted of having committed the smuggling of migrants S. L., Sh. G. and F. Sh. as described in the enacting clause of the indictment, Article 138 paragraph 6 related to paragraph 1 of the Criminal Code of Kosovo, because it has not been proven that they had committed this act with which they have been charged;
- VI. the accused A. K., I. P., B. S. and H. M. are hereby acquitted of having committed of Organized Crime, under Article 274 paragraph 2 in conjunction with Article 23 of the Criminal Code of Kosovo (CCRK), because they have not actively participated in the criminal activities or other activities of an organized criminal group, knowing that their participation will contribute to the commission of serious crimes by the organized criminal group;
- VII. pursuant to 83 Paragraph 1 of the CCRK the periods of deprivation of liberty of the defendant are to be credited against the punishment of imprisonment imposed on him, respectively from the 05th December 2011 until the 05th March 2012 and from the 08 July 2013 until the 05th December 2013;
- VIII. pursuant to Article 451 paragraph 4 of the KCCP the cost of the criminal proceedings shall be partially reimbursed by the accused as follows:
 - by A. K. in the lump sum of 50 (fifty) Euro,
 - by I. P. in the lump sum of 50 (fifty) Euro,
 - by B. S. in the lump sum of 50 (fifty) Euro,
- IX. the costs of the criminal proceedings with regard to the acquittal shall be paid from the budgetary resources;
- X. the remaining costs of the criminal proceedings shall be paid from the budgetary resources.

REASONING

Procedural Background

The indictment

- 1) On the 23rd April 2012 the SPRK Public Prosecutor filed with the Basic Court in Gjilan the Indictment PPS nr. 91/11 against the accused A. K., I. P., B. S. and H. M. for the criminal offences of Organized Crime contrary to Article 274 paragraph 2 related to Article 23 of PCC, and for the criminal offence of Smuggling of Migrants contrary to Article 138 paragraph 6 related to paragraph 1 of Provisional Criminal Code (later the PCC).
- 2) As the accused A. K. was at large on the 23rd October 2012 his case was severed from the case against other three defendants. The international wanted notice was issued against him.
- 3) On the 05th December 2012 the confirmation judge of the District Court of Gjilan confirmed the aforementioned Indictment against the accused I. P., B. S. and H. M. through ruling KA Nr. 68/12. During the confirmation hearing they pleaded not guilty. The main trial against them commenced on the 06th June 2013. The accused sustained their stance with regard to the charges and pleaded not guilty.
- 4) On 7 July 2013, the Court received information that defendant A. K. is willing to surrender thus the main trial was adjourned until further notice.
- 5) On the 08th July 2013 the accused A. K. appeared before the Court. Then the initial hearing in his case was scheduled and it was held on the 17th July 2013. During this hearing the accused pleaded guilty on each charge of the indictment. The presiding judge was not satisfied that the matters provided for in paragraph 1 of Article 248 of CPC were established as the guilty plea was not supported by the facts of the case that were contained in the indictment, materials presented by the state prosecutor to supplement the indictment and accepted by the defendant and any other evidence (Article 248 (1.2) of the CPC). Therefore the ruling not accepting the guilty plea was rendered and the presiding judge proceeded with the initial hearing as if the guilty plea was not made.
- 6) The defence of the accused A. K. did not file any objections against the evidence and did not request to dismiss the indictment. The case against him was rejoined to the case of the accused I. P., B. S. and

H. M. (ruling of the 20th August 2013). Therefore it was necessary to commence the main trial from the beginning with all four accused.

- 7) The main trial against the four accused commenced on the 10th September 2013. The accused H. M. and I. P. pleaded not guilty, the accused B. S. pleaded guilty of the count of smuggling of migrants, and A. K. pleaded guilty of each count of the indictment. The Court found that the requirements under Article 148 paragraph 1 of the CPC were not met therefore the guilty plea of A. K. was not accepted.

Applicable Substantive and Procedural Law

- 8) As in course of the criminal proceedings against the accused the substantive and procedural law was subject to fundamental changes, it is necessary to outline the applicable law as a preliminary matter before entering into the merits of the case.
- 9) In accordance with Article 3 (1) of the Criminal Code (later the CCRK), Law 04/L- 082 of 2012 (which entered into force on the 1st January 2013) the law in effect at the time a criminal offence was committed shall be applied to the perpetrator. In the event of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply, what is provided in the paragraph 2 of the mentioned provision.
- 10) The accused were charged with criminal offences of smuggling of migrants and organized crime. The first one under the Provisional Criminal Code (later the PCC) was punishable by imprisonment of two to twelve years (Article 138 (1) of the PCC) while the CCRK provides for this offence a fine and imprisonment of two to ten years (Article 170 (1) of the CCRK). The previous and present codes provide the same punishments for the criminal offence of organized crime. Therefore in accordance with Article 3 (1) of the CCRK the new law shall be applied as the more favorable to the perpetrator.
- 11) With the new Criminal Procedure Code ("CPC"), Law 04/L-123 of 2012 in force since the 1st January 2013, the procedure law has fundamentally changed. Whereas under the Provisional UNMIK Criminal Procedure Code 2004 (KCPC) the procedure was rather continental law oriented, the new code introduced more adversarial proceeding. For the case in hand the essential questions regarding applicable law are whether the proceedings before the Court (the indictment and plea stage, the main trial and the legal remedy stage) will be governed by the CPC or by the KCPC. It is also crucial to determine which provisions should be applied by the Court to assess the admissibility of the evidence obtained during the investigation conducted under the previous Code. To answer these questions it is necessary to refer to the transitional provisions contained in the Chapter XXXVIII of the CPC.

12) The Article 541 of the CPC reads as follows:

1. *Criminal proceedings in which indictment has been filed but was not confirmed before the entry into force of the present code, shall not be confirmed according to the provisions of the code that was in force at the time when the indictment was filed, but will be processed based on provisions of the present Code.*
2. *Criminal proceedings in which the indictment has been confirmed with a final decision before the entry into force of the present Code, and proceedings in which proposal indictment was filed, shall be concluded based on provisions of the present Code.*

13) In the present case the indictment was filed on the 23rd April 2012, a time when the KCPC was still applicable. The indictment had been confirmed in reference to the accused I. P., H. M. and B. S. and this decision had become final before the new Criminal Procedure Code entered into force. Therefore, as the legal requirements of Article 541 (2) of the CPC are met, the case before the Court has been processed based on the provisions of the new law.

14) With regard to the case of the accused A. K. which had been severed before the confirmation of the indictment the provision of article 541 (1) of the CPC shall be applied. Therefore no confirmation hearing was needed as this procedural phase was eliminated under the new code. Instead, the initial hearing was conducted pursuant to Articles 26 and 240 *et seq.* of the CPC.

15) Having considered what was mentioned above the Presiding Trial Judge takes the position that the proceedings before the Court in the case in hand should be conducted in accordance with the provisions of the CPC, while to assess the admissibility of the evidence collected during the investigation the old Code will be applied¹. It must be underlined that the Prosecutor in course of the investigation conducted under the previous Code could not have expected that the law would be subject to substantial changes and could not have foreseen different regulations applicable to the evidence to be introduced.

Competence of the Court and Panel Composition:

16) In accordance with Article 11 (1) of *the Law on Courts (Law No. 03/L-199)* the Basic Court is competent to adjudicate in the first instance all cases, except otherwise foreseen by Law.

¹ See also *Basic Court of Mitrovica, Indictment Ruling and Ruling on Extension of Detention, P 14/13, 12.04.13*

- 17) The criminal offences, according to the Indictment, were committed in the town of Gjilan/Gniljane which is in the territory of the Basic Court of Gjilan/Gniljane. Therefore, in accordance with Article 29 (1) of the CPC, this court has territorial jurisdiction to adjudicate the case.
- 18) No issue was raised by the parties regarding the composition of the trial-panel.

Main Trial

- 19) As it has been mentioned above the main trial initially had commenced against three accused: I. P., H. M. and B. S. After the ruling on rejoinder of the case of A. K. the main trial commenced from the beginning against the four accused.
- 20) The main trial was held in public on 10th September, 21st and 22nd October, 03rd and 04th December 2013 in the presence of the SPRK Prosecutor Besim Kelmendi, the injured party F. Sh. (present on the 21st October 2013), the accused A. K. and his defense counsel M. M., the accused I. P. and his defense counsel H. J., the accused B. S. and his defense counsel E. Q. and the accused H. M. and his defense counsel H. L..
- 21) The injured parties Sh. G. and S. L. were duly informed about the trial dates. They did not appear before the Court as they are staying abroad what results from the information obtained by the Police.
- 22) In accordance with the law international interpreters translated the court proceedings and all court documents relevant to the trial from English into Albanian and vice-versa.

Request to extend the indictment

- 23) On the 3rd November 2013 the defendant A. K. stated, *inter alia*, that he was harbored by H. M. while he was at large from the authorities. In light of this statement the prosecutor requested to the Court to extend the indictment against H. M. with unspecified charges. The latter decided to remain silent after receiving instructions from the court and his defense counsel that he may remain silent if there was any chance that he may incriminate himself
- 24) On the 4th November 2013 the Court decided to reject the request of the prosecutor to extend the indictment with additional charges against H. M. This situation is governed by Article 351 of CPCK which states:

1. If the accused commits a criminal offence during a hearing in the course of the main trial or if a previous criminal offence committed by the accused is discovered in the course of the main trial,

the trial panel shall, in acting upon a charge by the state prosecutor which may also be submitted orally, extend the main trial to include this new offence as well.

2. In such case, the court may recess the main trial to give the defense time to prepare, and after hearing the parties it may decide that the accused be tried separately for the offence under paragraph 1 of the present Article.

3. If another department within the basic court is competent to adjudicate a matter under paragraph 1 of the present Article, the panel shall after hearing the parties decide whether it shall refer the matter about which it is conducting the main trial to the competent higher court for adjudication.

25) The Court notes that the statement of the defendant A. K. alleging that he was harbored at the house of the defendant H. M. suffices merely for a grounded suspicion. There is no other evidence in the case file which suggests that the defendant H. M. harbored A. K. while at large. The prosecutor mentioned that he may call witnesses to testify in this respect but he did not explain to the court who are the witnesses or about which circumstances they are going to testify. No pre-trial interview was conducted by the prosecutor regarding these possible witnesses. Calling someone in court to testify in the capacity of witness without a prior knowledge what he is going to say is purely an investigative activity. It is not up to the Court to investigate possible criminal offences that may have been committed because that would seriously undermine the court's role of the arbitrator among the equal parties – the prosecution and the defense.

26) Therefore, the motion of the prosecutor to extend the indictment was rejected.

Factual findings and evaluation of evidence presented

27) The charges as described in the indictment cover two situations when the accused allegedly participated in smuggling of migrants, acting as an organized and structured criminal group:

- from an unspecified date to 09.09.2011 defendant A. K. and H. M. found migrants S. Xh. and defendant H. M. two friends Xh. and another friend, then they sent these migrants to West European countries through the territory of the Republic of Serbia through suspect D. P.;
- on 09.09.2011 defendant I. P. found three migrants after agreeing so with A. K.: Sh. G., F. Sh. and S. L.; following the payments of at least 1.600 euros per person they took these three migrants to Gjilan to A. K., who, as of the agreement took them to defendant B. S. who would

then take the three migrants to the Village of S. to submit them to a person from Serbia who would further send them to France; however on the way, defendant B. S. and the three migrants Sh. G., F. Sh. and S. L. were stopped by the police and were taken to the police station.

- 28) With regard to the first situation the Prosecutor during the trial presented only one piece of evidence to prove it had taken place. It was a statement of the accused A. K. who described a situation when he met with H. M., D. P. and two other persons in a restaurant. There was a short conversation during which the persons met (one of them was allegedly S. Xh.) expressed their interest in leaving Kosovo. A. K. only heard that at least S. Xh. realized his plan and went to France. *(statement of A. K. from 3rd December 2013, p. 17 – 19 and 22nd December 2011, p. 8)*
- 29) There is no other evidence that any of the accused was engaged in arrangement of crossing the border by these people. It was not established whom H. M. and A. K. were to meet with. It was not established whether these persons (including S. Xh.) left Kosovo at all, and if so – in what way. Therefore the Court finds there is no evidence that the accused participated in arrangement of leaving Kosovo by any of these persons.

With regard to the second situation of smuggling of migrants covered by the indictment the Court established following facts:

- 30) I. P. was working as a taxi driver. In summer 2009 he learnt from his friend R. M. that A. K. was engaged in organizing of illegal crossing the border of Kosovo to Serbia and getting to the EU countries. In August 2009 when P. was waiting at the taxi stand in Peja for potential passengers he noticed two men (it later occurred that they were F. Sh. and Sh. G.) who were looking for a possibility to get illegally to Serbia by taxi. They were asking about it all taxi drivers waiting at this stand. They also approached I. P. who said he knew a person who could arrange this. Then he called his friend R. M. who gave him a phone number of A. K. *(statements of I. P. from 3rd December 2013)*
- 31) I. P. called A. K. and gave the phone to Sh. G. and F. Sh. who were talking with K. about the possibility of getting to Serbia. They came to an agreement. G. and Sh. told I. P. that they would come with two other persons and then he would take them all to Gjilan where A. K. would wait for them. Before the 9th September 2011 the injured parties met with I. P. few times to talk about the trip to Gjilan. *(statements of I. P. from 3rd December 2013 and of A. K. from 3rd December 2013)*

- 32) On the 8th September 2011 P. was informed by G. and Sh. that only two of them would travel to Serbia. He called then A. K. and it was agreed that he would bring these two men to Gjilan on the following morning. They were to meet with A. K. about 9.00 on the entrance to the town from the direction of Ferizaj. P. agreed for 20 euros from each person for the drive from Peja to Gjilan. *(statements of Ibrahim P. from 3rd December 2013)*
- 33) On the 9th September 2011 Sh. G. and F. Sh. met with I. P. in Peja about 6 a.m. and he took them by his taxi to Gjilan. When they were approaching Gjilan one of the injured parties called A. K. and talked with him about the exact place of the meeting. They arrived there about 9 a.m. and I. P. together with the injured parties came to A. K. who was waiting for them. There was a short conversation about what was going to happen next. I. P. wanted to be sure that everything would go well as it was him to arrange contacts between the injured parties and A. K.. *(statement of F. Sh. from 21st October 2011, statement of I. P. from 3rd December 2013)*
- 34) In the meantime the third injured person – S. L. arrived to the place of the meeting. A. K. told Sh. G., F. Sh. and S. L. to wait for him in the hotel K. They were also talking about the payments and they agreed that 200 euros would be paid by each of them on that day. The rest (1400 euros per person) was to be paid after they successfully reached V., Austria. Having made this arrangement A. K. left them and I. P. took G. and Sh. to the Hotel K. S. L. also went there by himself. P. left G. and Sh. at the entrance to the hotel and drove back to Peja. The injured parties were waiting for A. K. in a hotel restaurant. *(statement of F. Sh. from 21st October 2011, statements of I. P. and A. K. from 3rd December 2013, statement of S. L. from 22 December 2011, statement of Sh. G. from 22nd March 2012)*
- 35) Meanwhile, A. K. drove to B. S. house to take him. He needed his help in transporting the injured parties to the border because he was not able to do it himself as he had his wedding on the same day. *(statement of A. K. from 3rd December 2013, statement of B. S. from 22nd October 2013)*
- 36) After about 30 minutes from the meeting with the injured parties at the outskirts of Gjilan A. K. came to the Hotel K. by Mercedes with his relative B. S. He took the injured parties into the car and then he was driving around the town to look for a taxi. *(statement of A. K. from 3rd December 2013, statement of B. S. from 22nd October 2013, statement of F. Sh. from 21st October 2011)*
- 37) A. K. received jointly 600 euros from the injured parties, 300 euros he kept for himself, the rest he gave to B. S. *(statement of A. K. from 3rd December 2013, Record on temporary seizure of items dated 09th September 2011, no. 2011-YE-436)*

- 38) After some time A. K. found a taxi with a driver Z. J. A. K. asked him if he could take 4 persons to S. and the driver agreed to do it for 10 euros. They were talking with each other through the windows of their cars as they both were sitting inside. After this short conversation B. S., F. Sh., Sh. G. and S. L. changed from Mercedes to the taxi. (*statement of Z. J. – 21st October 2013 and 06 June 2013, statement of B. S. from 22nd October 2013, statement of A. K. from 3rd December 2013, statement of F. Sh. from 21st October 2011, statement of S. L. from 22 December 2011, statement of Sh. G. from 22nd March 2012*)
- 39) B. S. received from A. K. money to pay for a taxi (10 euros) and additional 45 euros for himself as remuneration for “danger”. After arrival to S. the injured parties were to be taken by another person who was to help them in crossing illegally the border. For this person S. got from K. another 245 euros (*statement of B. S. from 22nd October 2013, statement of A. K. from 3rd December 2013, Record on temporary seizure of items dated 09th September 2011, no. 2011-YE-436*)
- 40) On the way to S. the taxi driven by Z. J. was stopped by the police. All the travelling persons (including the driver) were arrested and taken to the police station. During the search 295 euro was seized from B. S. (*statement of Z. J. – 21st October 2013 and 06 June 2013, statement of B. S. from 22nd October 2013, statement of F. Sh. from 21st October 2011, statement of S. L. from 22 December 2011, statement of Sh. G. from 22nd March 2012, Record on temporary seizure of items dated 09th September 2011, no. 2011-YE-436*)
- 41) Few days later I. P. was contacted by families of F. Sh. and Sh. G. who demanded him to pay back the money paid by them for smuggling. To resolve this problem he wanted to return them half of this money (300 euro) as he felt responsible for the loss. (*statement of I. P. from 3rd December 2013*)
- 42) While assessing the credibility of the statements of the accused it must be underlined that in case of I. P. and B. S. there is a visible tendency to reduce their role in the event with intent to exclude or at least limit their criminal liability. On the other hand, in relation to A. K. the Court observes that he shows inclination to exaggerate his own position and the scale of his criminal activity. He decided to cooperate with the Prosecutor what might have influenced on his statements as he attempts to provide as many details as it is possible, not necessarily taking care about their accuracy and reliability. It must be also noticed that the defence had no opportunity to challenge the statements of two injured parties Sh. G. and S. L. Therefore the Court has to base the factual findings mainly on the evidence produced by the defendants which must be examined thoroughly with the biggest scrutiny.

- 43) H. M. during the whole proceedings consequently stated that he had nothing in common with smuggling of migrants and did not participate in any criminal activities. He claimed he was not engaged in any organized criminal group (*statements from 22nd October 2013*). His statements must be assessed by the Court as credible as the Prosecutor did not present any evidence to support his allegations that the accused M. took part in criminal activities which he is charged with. As it has been mentioned above the only proof against him was a very general statement of A. K. which was not corroborated by another piece of evidence. It must be also mentioned that during the main trial A. K. admitted that H. M. had nothing in common with smuggling of migrants on the 09th September 2011.
- 44) The statements of the accused A. K., I. P. and B. S. the Court finds as credible in a scope they correspond with each other and are supported by other reliable evidence gathered during the proceedings.
- 45) The analysis of the statements of these three accused leads to the conclusion that the most accurate and truthful version was presented by each of them during their examination at the main trial. All three accused presented detailed accounts of the events that had taken place on the 09th September 2011 and these which directly had been leading to them. The versions presented by them during the trial are coherent with each other and additionally supported by other evidence collected during the proceedings.
- 46) With regard to the statement of I. P. the Court did not believe that he was not aware in what activities he had been participating. Actually, this is just his sole statement, which stays in contradiction not only with other evidence produced during the proceedings but also with the further account of the very accused. From the very beginning he knew that the injured parties were looking for an opportunity to leave Kosovo illegally, he contacted them with a person that had such possibilities (A. K.), he met few times with the injured parties to discuss the details. Furthermore on the 09th September 2011 not only he brought them to Gjilan, but also was present at the conversation between them and A. K. When the whole operation failed because of the intervention of the police he felt responsible towards them and he wanted to pay back at least part of money. If he had been acting only as a taxi driver chosen by chance by the injured parties he would not have engaged himself so deeply in this situation and his role would have been limited only to driving them from Peja to Gjilan.
- 47) The statements of I. P. are supported by A. K. who during the statement made before the Court confirmed that it was him to play a crucial role in arrangement of illegal crossing the border by three

persons on the 09th September 2011. K. also admitted that he was paid by them 600 euro and the rest was to be paid after they reached Vienna.

- 48) As the Court found credible the statements of the accused I. P. and A. K. made during the main trial, the testimony of the witness F. Sh. was assessed as partially false. Definitely it is not the truth that he met I. P. only by chance on the 9th September 2011 as the accused admitted himself that he had been in touch with the injured parties before and it was him who had contacted them with A. K.
- 49) Additionally, there is no sufficient evidence to prove that I. P. received from the injured parties other money than the sum of 20 euro per person paid for the drive from Peja to Gjilan. Such finding is not supported by the witness F. Sh. who said before the Court that he paid only 200 euro to A. K. and the rest was to be paid after successful getting to Vienna. In this way he withdrew from his previous statement made in front of the Prosecutor during the investigation. A. K. was also consequent in this matter as during the whole proceedings he declared that he was the only one to receive money for the “service” of smuggling of migrants.
- 50) With regard to this element the Court also considered the testimonies of two other injured parties: Sh. G. and S. L. It was not possible to examine them directly before the Court as both of them had left Kosovo and their present place of residence is not known. Therefore the Court used the possibility provided by Article 338 paragraph 1 of the CPC which allows in such situations to read the previous statements of witnesses. Nevertheless, they must be assessed very thoroughly, and cannot be used as the direct evidence to make factual findings. These pieces of evidence support the finding that the injured parties wanted to leave Kosovo illegally and for this purpose they acted with the assistance of I. P. and A. K. They also confirmed the fact of being arrested by the police before crossing the border between Kosovo and Serbia together with the taxi driver Z. J. and the accused B. S.
- 51) The testimony of Sh. G. cannot be treated as a proof for a finding that I. P. obtained 1000 euros from him and F. Sh. This statement stays in contradiction with the testimony of F. Sh. and statements of I. P. and A. K.
- 52) After meticulous reciprocal comparison of statements given by A. K. and I. P. supported by testimonies of the witness F. Sh. during the main trial and the remaining pieces of evidence that were indicated above the Court came to conclusion that in relation to essential elements all these pieces of evidence fully corroborated and confirmed each other. All these persons consistently declared that at this stage of smuggling each of the injured parties paid 200 euro for A. K., and the rest of money was to be paid after reaching Vienna, Austria. A. K. was consistent that it was him who received the money, the same

was stated by F. Sh. and I. P. Additionally, this finding is corroborated by behavior of I. P. who wanted to return to injured parties half of this money (300 euro) as he felt responsible for this loss.

- 53) The fact that the only money for smuggling were paid to A. K. who gave half of them to B. S. is corroborated by the results of search of the latter which was conducted after the taxi had been stopped by the police on the way to S.. The sum 295 euros was found and seized afterwards. There is no other justification why B. S. could have quite big amount of money with him at this time.
- 54) The Court assessed the statements of B. S. as reliable with regard to his participation in the smuggling of migrants on the 09th September 2011. There is no doubt he was aware in what action he was participating as he admitted that was to receive from A. K. a specific sum of money for “danger” as he described it. He knew his activities were illegal, and his duty was to bring the injured parties to S. where he was to pass them on to another person.
- 55) There is no sufficient evidence to prove beyond reasonable doubts that B. S. was engaged in smuggling of migrants more often than this one time. From the statement of A. K. given at the main trial results that he used him only once during this situation on the 09th September 2011 because he was not able to participate in it himself.
- 56) The Court found as reliable and truthful statements of the witness Z.J. He described in a consistent way what happened on the 9th September 2011, especially the circumstances in which it was agreed he would take four persons to S. During cross-examination in the court the witness confirmed the facts presented in his statement given to the public prosecutor. The Court took into consideration that witness testimony was clearly consistent in relation to the above presented facts. Small inconsistencies in his statement are rather to be attributed to the time that had passes since the events that are subject of this trial. Actually, the only weak point of this witness’ statement is his consistent negation as to the agreeing with A. K. about the course to S. The witness confirmed that except of four people who were travelling with him there was also a driver of a Mercedes but he did not recognize him as A.K. This statement stays in contradiction with the statement of the very accused K. and other witnesses. The Court opines that Z. J. could have simply forgot the face of the person from the Mercedes what is understandable as he saw him only for few minutes and had no reasons to pay attention on him.
- 57) There were no reasons to doubt the credibility of the Record on temporary seizure of items dated 09th September 2011, no. 2011-YE-436 and the Report on Forensic Examination 511-01-115/1-10240/09VN dated 16th December 2009. The Court assessed as credible the Police Report of 09 September 2011 no

2011-YE-436 but of course only as a proof that the information presented in the report was obtained and recorded by the police and not as proof of the truthfulness of the information itself.

Legal classification of the accused's action

- 58) The assessment of evidence related to the first element of the charge against the accused (smuggling of a group of migrants with S. Xh. before the 09th September 2011) led to conclusion that all the accused were not guilty of this action. There is no sufficient evidence that any of the persons mentioned by the Prosecutor in the indictment was illegally smuggled across the border of Kosovo to any country. The Prosecutor did not present the proof that the criminal offence had been at all committed. Therefore all the accused were acquitted from this charge.
- 59) The Court came to the conclusion that A. K., I. P. and B. S. committed the criminal offence of Attempted Smuggling of Migrants pursuant to Article 170 Paragraph 1 of the CCRK and Article 28 Paragraphs 1 and 2 of the Criminal Code of the Republic of Kosovo of 20 April 2012 (CCRK) and Article 31 of the CCRK. It was established that on the 09th September 2011, in the territory of the Republic of Kosovo, acting in co – perpetration with each other, with the intention of obtaining for themselves the material benefit they attempted to smuggle S. L., Sh. G. and F. Sh., Republic of Kosovo nationals, who were neither permanent residents or citizens of the Republic of Serbia nor any Schengen Area state, from the territory of the Republic of Kosovo to the territory of the Republic of Serbia by arranging for them for the payment of 600 Euros transportation to the Republic of Serbia, from where they were to enter the Schengen Area without complying with the necessary requirements for legal entry into this area and then to be transported to the territory of the Republic of Austria. This purpose was not accomplished because S. L., Sh. G. and F. Sh. were stopped by the Kosovo Police before crossing the border between the Republic of Kosovo and the Republic of Serbia.
- 60) The Article 170 (4) of the CCRK provides that an attempt to commit the offense provided in paragraph 1 of this Article shall be punishable.
- 61) It must be presumed up to the level of certainty that the three accused acted in cooperation as they all were aware that they participate in smuggling of migrants across the border of Kosovo. Each of them was to obtain a material benefit of this common activity. They executed a jointly accepted plan and therefore that they jointly committed the crime which is an essence of co-perpetration described in Article 23 of the CCRK.

62) There is no evidence that H. M. participated in smuggling of migrants on the 09th September 2011 therefore the only decision to be taken is acquittal.

63) The accused were also charged with the offence of organized crime in violation of Article 274 (without specifying a paragraph) of the CCRK which stipulates as follows:

- 1 *Whoever commits a serious crime as part of an organized criminal group shall be punished by a fine of up to 250.000 EUR and by imprisonment of at least seven years.*
- 2 *Whoever actively participates in the criminal or other activities of an organized criminal group, knowing that his or her participation will contribute to the commission of serious crimes by the organized criminal group, shall be punished by imprisonment of at least five years.*
- 3 *Whoever organizes, establishes, supervises, manages or directs the activities of an organized criminal group shall be punished by a fine of up to 500.000 EUR and by imprisonment of seven to twenty years.*

64) The necessary legal definition to determine the elements of the offence of organized crime are contained in the paragraph 7 of this Article that reads as follows:

For the purposes of the present article,

- 1) *The term "organized crime" means a serious crime committed by a structured group in order to obtain, directly or indirectly, a financial or other material benefit.*
- 2) *The term "organized criminal group" means a structured group existing for a period of time and acting in concert with the aim of committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit.*
- 3) *The term "serious crime" means an offence punishable by imprisonment of at least four years.*
- 4) *The term "structured group" means a group of three or more persons that is not randomly formed for the immediate commission of an offence and does not need to have formally defined roles for its members, continuity of its membership or a developed structure.*

65) The offence of organized crime requires the commission of an 'underlying' offence to be completed in addition to the offence of organized crime under Article 274 of the CCRK. The formulation used throughout Article 274 of the CCRK clearly stipulates that the commission of a basic offence is

a constitutive element to this offence. Otherwise, an individual could be found guilty for the same act, forming part of both criminal offences, of organized crime and of the underlying offence.²

66) With regard to the criminal offence of the organized crime the new Criminal Code is not more favorable for the Defendants than the Provisional Criminal Code. Therefore in accordance with the principle established in Article 3 (1) of CC the law in effect at the time a criminal offence was committed shall be applied.

67) The Court considered the charge of organized crime in reference to the accused A. K., I. P. and B. S. because only in case of them it was established that the underlying crime (smuggling of migrants) had been committed. The analysis of the evidence presented during the trial does not lead to the conclusion that the accused acted as a structured group existing for a period of time and in concert with the aim of committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit. It was not proven beyond reasonable doubts that the activities of the three accused on the 09th September 2011 were not randomly formed. As it results from the obtained evidence the accused I. P. did not know A. K. before, they contacted only in this one case when P. looked for a person to help to illegally cross the border between Kosovo and Serbia. Additionally, B. S. was engaged into whole action at the very last moment and only because A. K. was not able to accompany the migrants himself because of the wedding. There is no proof that B. S. was permanently engaged in the activities connected with smuggling of migrants. There is also some logic in the statements of A. K. who said that if he had travelled with the migrants there would have been no case as he would have known what to tell the police, while B. S. had no idea how to talk with them. It must be underlined that the police stopped them when they were still in the accidental taxi, on the territory of Kosovo so it should have been for them quite easy to explain why they were travelling to S. The fact they were not able to do it strengthens the conclusion that B. S. was joint in this situation at the very end without any particular knowledge how he should have behaved.

Determination of the Punishment

68) While determining the punishment for A. K., I. P. and B. S. the Court has been obliged to take into account the purposes of punishment determined in Article 41 of the CCRK which stipulates them as follows:

² Supreme Court Of Kosovo, Ap-Kz no. 61/2012, judgment of 2 October 2012

- to prevent the perpetrator from committing a criminal offenses in the future and to rehabilitate the perpetrator;
- to prevent other persons from committing criminal offenses,
- to provide compensation to victims or the community for losses or damages caused by the criminal conduct; and
- to express the judgment of society for criminal offences, increase morality and strengthen the obligation to respect the law.

69) In case of a person who attempted to commit a criminal offence he or she shall be punished as if he or she committed the criminal offence, however, the punishment may be reduced (Article 28 (3) of the CCRK). In such cases the court may impose a punishment below the limits provided by law or impose a lesser type of punishment (Article 75 (1.1) of the CCRK. The limits on mitigation of punishments are determined in Article 76 of the CCRK. In accordance with its paragraph 1.4 if a period of two (2) years is provided as the minimum term of imprisonment for a criminal offense (as in Article 170 (1) of the CCRK), the punishment can be mitigated to imprisonment of up to six (6) months.

70) While determining the punishment the Court considered all mitigating and aggravating factors, pursuant to Article 74 Paragraph (1) of the CCRK.

71) The Court considered the aggravating factors as follows:

- with regard to A. K. – a high degree of his participation in the criminal offence as he was the main person responsible for smuggling of migrants on the 09th September 2011;
- with regard to A. K. and I. P. – a high degree of intention to commit the criminal offence;
 - with regard to all the accused – the fact that criminal offence of smuggling of migrants appear to be committed frequently in Kosovo nowadays. This seriously affects public order; therefore the punishment for this kind of crime should serve as a general deterrent for all potential perpetrators;
- with regard to the accused I. P. the fact that he had already been sentenced for criminal offence (information from the Basic Court of Peja form the 02nd December 2013).

72) The Court took into account the following mitigating factors:

- with regard to all the accused – general cooperation in criminal proceedings,

- with regard to A. K. - remorse shown;
- with regard to B. S. – his minor role in the criminal offense as he was not the principal perpetrator;
- with regard to B. S. – the young age, the fact that he still has a possibility to continue education and no previous criminal convictions;
- with regard to I. P. – the fact he is a family man, with 10 children, earning himself for his family living.

73) Taking the above into consideration the Court imposed on the defendants the following punishments:

- A. K. - 2 (two) years imprisonment and a fine in the amount of Euro 2 000 (two thousand);
- I. P. - 1 (one) year and 6 (six) months of imprisonment and a fine in the amount of Euro 200 (two hundred);
- B. S. - 1 (one) year and 6 (six) months of imprisonment, and a fine in the amount of Euro 500 (five hundred).

74) In case of I. P. and B. S. the Court used the possibility provided in Article 28 (3) of the CCRK and reduced the punishment applying the rules prescribed by the Code.

75) Additionally, pursuant to Article 51 Paragraph 2 and Article 52 Paragraph 2 of the CCRK the Court decided that the punishment of imprisonment imposed against B. S. shall not be executed if he does not commit another criminal offense for the verification period of 3 (three) years. The Court believes that a reprimand with the threat of punishment is sufficient to prevent B. S. from committing a criminal offence.

76) Pursuant to Article 97 Paragraph 1 of the CCRK

- the accused A. K. is obliged to pay 300 Euro as an amount of money corresponding to the material benefit he acquired;
- the material benefit of 295 Euro seized on the 09 September 2009 from the accused B. S. shall be confiscated;
- the accused A. K. is obliged to pay 5 Euro as an amount of money corresponding to the material benefit acquired as this sum of money had not been confiscated during the search of B. S..

77) Pursuant to Article 83 Paragraph 1 of the CCRK it was the duty of the Court to credit the period of time that the accused spent in house detention against the punishment of imprisonment which was imposed on him. This kind of measure was applied only against A. K., respectively from the 05th

December 2011 until the 05th March 2012 and from the 08 July 2013 until the 05th December 2013 and these periods were credited against the punishment.

Costs

78) The Court based its decision on the costs of criminal proceedings on legal provisions quoted in enacting clause.

Prepared in English, an authorized language. Reasoned Judgment completed on 3 January 2014.

Presiding Judge, Anna Adamska – Gallant

Court Recorder, Christine Sengl

Legal remedy:

Authorized persons may file an appeal in written form against this judgment through the Basic Court of Gjilan/Gnjilane to the Court of Appeals within fifteen (15) days from the date the copy of the judgment has been served, pursuant to Article 380 paragraph 1 of the CPC.