

COURT OF APPEALS

Case number: PAKR 69/13

Date: 28 May 2013

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Hajnalka Veronika Karpati as Presiding and Reporting Judge, and Judges Tonka Berisha and Xhevdet Abazi as Panel Members, with the participation of Beti Hohler, EULEX Legal Officer, acting as Recording Officer,

in the criminal proceeding against

1. **SH. K.**, father's name B., mother's name and maiden name S. B., born ... in ..., residing in ..., ..., ..., ..., ..., of poor economic status, in detention on remand from 13.02.2009 until 21.02.2012,

charged with the following criminal offences as per Indictment no PPS 03/09 dated 07.08.2009 as amended through the Ruling of Confirmation Judge no. KA 128/2009 dated 24.09.2009: *Unauthorised Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances* pursuant to Article 229 Paragraph (4) Item 1) of Criminal Code of Kosovo 2004 (CCK);

2. **N. M.**, father's name G. M., mother's name and maiden name S. Th., born ... in ..., ..., residing in ..., ..., ..., ..., ..., of good economic status, in detention on remand from 13.02.2009 until 21.02.2012,

charged with the following criminal offences as per Indictment no PPS 03/09 dated 07.08.2009 as amended through the Ruling of Confirmation Judge no. KA 128/2009 dated 24.09.2009: *Unauthorised Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances* pursuant to Article 229 Paragraph (4) Item 1) CCK and *Unauthorised Ownership, Control, Possession or Use of Weapons* pursuant to Article 328 Paragraph (2) CCK;

3. **M. S.**, father's name A.S., mother's name and maiden name Z. D., born ... in ..., ..., residing in ..., ... citizen, ..., ..., ..., of average financial situation, in detention on remand from 13.02.2009 until 21.02.2012,

charged with the following criminal offences as per Indictment no PPS 03/09 dated 07.08.2009 as amended through the Ruling of Confirmation Judge no. KA 128/2009 dated 24.09.2009: *Unauthorised Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances* pursuant to Article 229 Paragraph (4) Item 1) CCK;

4. **A. R.**, father's name Ramadan, mother's name and maiden name H. K., born ... in ..., residing in ..., ..., ..., ..., ..., ..., of average economic situation, in detention on remand from 09.09.2009 until 21.02.2012,

charged with the following criminal offences as per Indictment no PPS 03/09 dated 30.09.2009: *Unauthorised Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances* pursuant to Article 229 Paragraph (4) Item 1) CCK;

all charges against all four Accused being rejected with the Judgment of the District Court of Prizren no. P 241/11 dated 23.05.2012 pursuant to Article 389 Item 4) KCCP,

acting upon the Appeal of the Special Prosecutor no. PPS 03/2009 dated 03.07.2012 and filed on 06.07.2012 with the (then) District Court of Prizren against the Judgment of the District Court of Prizren no. P 241/11 dated 23.05.2012,

having considered the Responses of Defence, namely the Response on Appeal filed by Defence Counsel Hazer Susuri on behalf of **N.M.** on 16.07.2012, Response to the Appeal filed by Defence Counsel Hajrip Krasniqi on behalf of defendant **M.S.** on 16.07.2012;

having reviewed the Opinion of the Appellate State Prosecutor no. PPA 369/11 dated 14.09.2012 and filed on 17.09.2012;

after having held a public session pursuant to Article 410 of the Kosovo Code of Criminal Procedure (KCCP)¹ on 28.05.2013 in the presence of the Accused **Sh. K.**, **N.M.** and **A.M.**,

¹ Kosovo Code of Criminal Procedure, as in force from 06.04.2004 until 31.12.2012.

Defence Counsel Haser Susuri and Kosovare Kelmendi, and Appellate State Prosecutor Idain Smaili;

having deliberated and voted on 28.05.2013,

pursuant to Articles 420 and the following of the KCCP;

renders the following

RULING ON APPEAL AGAINST JUDGMENT

I. The Appeal of the Special Prosecutor no. PPS 03/2009 dated 03.07.2012 and filed on 06.07.2012 with the (then) District Court of Prizren against the Judgment of the District Court of Prizren no. P 241/11 dated 23.05.2012 is hereby granted.

II. The Judgment of the District Court of Prizren no. P 241/11 dated 23.05.2012, rejecting the charges against defendants Sh. K., N. M., M. S. and A. R. is hereby ANNULLED AND THE CASE IS RETURNED FOR RE-TRIAL to the Basic Court of Prizren.

REASONING

I. Procedural history of the case

1. The Indictment no. PPS 03/09 against the Accused Sh. K., N. M. and M. S. was filed on 07.08.2009. The Indictment was amended and confirmed through the Ruling of the Confirmation Judge of District Court of Prizren no. KA 128/09 dated 24.09.2009. The Indictment against A. R. dated 30.09.2009 was filed on 02.10.2009 and confirmed through the Ruling of the Confirmation Judge of District Court of Prizren on 14.10.2009.

2. The first main trial against the defendants commenced on 20.10.2009. The (then) District Court of Prizren on 09.02.2010 announced the Judgment no. P 159/09, finding the defendants guilty of the charged criminal offences. Acting upon Defence Appeals against this Judgment, the

Supreme Court of Kosovo on 26.07.2011 rendered a Ruling, accepting the appeals of the Defence. The Supreme Court annulled the Judgment dated 09.02.2010 and returned the case for re-trial to the first instance court.

3. The re-trial sessions before the District Court of Prizren in the case were held on 20.02.2012, 07.03.2012, 21.05.2012 before a new Trial Panel. The Court on 17.01.2012 in preparation for main trial also held a preliminary hearing session.

4. The Trial Panel announced its Judgment (Judgment no. P 241/11) on 23.05.2012 (hereinafter: Impugned Judgment). The Trial Panel rejected the charges against all four defendants on the basis that prosecution is barred pursuant to Article 389 Item 4) KCCP. The Trial Panel pursuant to Article 229 Paragraph (5) CCK confiscated narcotic substances in total weight of 13.882 kg; pursuant to Article 328 Paragraph (5) CCK seized the handgun with serial number C-211115 together with one magazine with 8 bullets; pursuant to Article 251 KCCP returned the Mercedes-Benz motor vehicle with registration number 319-KS-777 to its registered owner and ordered that all necessary expenditures of the Accused in the criminal proceeding be paid from the budgetary resources.

5. The reasoned Judgment was served upon the parties in late June, early July 2012.²

6. The Court of Appeals is seized of the Prosecution Appeal against the Impugned Judgment. The Appeal was filed on 6.07.2013.

7. The Court of Appeals held a public session in the case on 28.05.2013. All defendants, their Defence Counsel and the Appellate State Prosecutor were duly summoned to the session, as evidenced by the returned delivery slips in the case file. The Accused M. S. and Defence Counsel Fazli Balaj, Hajrip Krasniqi and Ruzhdi Gashi did not attend the session. Notwithstanding their absence, the Panel held the session in accordance with Article 410 Paragraph (4) KCCP.

II. Submissions of the Parties

II.1. The Appeal of the Special Prosecutor

² For exact dates of serving reference is made to the delivery slips documenting service of the Judgment to the defendants, their defence counsel and to the prosecution.

8. The Special Prosecutor challenges the Impugned Judgment on the basis of substantial violation of provisions of criminal procedure, on the basis of violation of criminal law and on the basis of an erroneous and incomplete determination of the factual situation (Article 402 Paragraph (1) Subparagraphs 1) to 3) KCCP). He requests that the Court of Appeals annuls the Impugned Judgment and returns the case for re-trial to the Court of First Instance.

9. The Special Prosecutor lists the following substantial violations of criminal procedure pursuant to Article 403 KCCP:

- **substantial violation of criminal procedure pursuant to Article 403 Paragraph (1) Subparagraph 3) KCCP**, because the trial session on 21.05.2012 was conducted in the absence of an interpreter ... for the Accused **Sh. K.**;
- **substantial violation of criminal procedure pursuant to Article 403 Paragraph (1) Subparagraph 8) KCCP**, because the Impugned Judgment is based on inadmissible evidence, namely the summary report of the “Rambujeja” case prepared by witness A. O. dated 19.03.2012. This report is not qualified by law as evidence and this is the reason why the drafter of the report – witness A.O. – was proposed to be heard as a witness in the proceedings. Even the Defence challenged the admissibility of the report as evidence. The Trial Panel violated the provisions of criminal procedure when instead of deciding upon the motions of the Prosecutor, the Trial Panel immediately announced the Judgment without concluding the evidentiary procedure and hearing the closing statements of the Parties;
- **substantial violation of criminal procedure pursuant to Article 403 Paragraph (1) Subparagraph 12) KCCP**, because the enacting clause of the Impugned Judgment contradicts the reasoning part of the Impugned Judgment. Also, the Judgment contains no reasoning at all concerning crucial facts. The enacting clause refers to Article 389 Item (4) KCCP as the legal basis for rejecting the charges, which would entail that the charges were rejected because of expiration of statutory limitation period. The reasoning does not contain anything on the expiration of statutory limitation. To the contrary, the Trial Panel reasoned that the evidence gathered during the investigation is inadmissible, in effect stating this is the reason why the charges were rejected. The question thus arises whether the Judgment was brought because of expiry of statutory limitation or lack of admissible

evidence. Moreover, the Trial Panel has also rejected the charge of *Organized Crime* despite the fact that this charge was not confirmed, therefore, the defendants were not tried at all for this criminal offence. Concerning the confiscation, no reasoning on this is included in the Impugned Judgment. The Trial Panel also gave no reasons on why it decided to declare evidence as inadmissible;

- **substantial violation of criminal procedure pursuant to Article 403 Paragraph (2) Subparagraphs 1) and 2) KCCP**, because the Trial Panel did not act in accordance with Articles 360, 371, 372, 373, 374, 378, 379, 381, 382 and 383 of the KCCP and this had influenced the decision of the court. The Trial Panel failed to administer the evidence listed in the indictment and collected in the previous trial. It violated the rules on the conduct of main trial when it delivered the Judgment without summoning the witnesses and when the parties were not given the opportunity to propose new evidence, examine the Accused and give their closing statements.

10. The Appeal discusses further the admissibility of evidence collected by covert measures under Article 258 Paragraph (1) Item 1) (covert photographic and video surveillance in public places) KCCP.

11. Concerning erroneous and incomplete determination of the factual situation, the Appeal states that by violating the procedural provisions of the main trial and by mistakenly applying the provisions of the KCCP, the Trial Panel failed to establish the correct factual situation. This in turn also resulted in the violation of criminal law as the charges against the Accused were rejected.

II.2. Responses of Defence

12. Defense Counsel of **N.M.** and **M.S.** filed Responses to the Prosecution Appeal. The Defence Counsel propose to reject the Prosecution Appeal and affirm the Impugned Judgment.

13. Defense Counsel Hajrip Krasniqi in the Appeal filed on behalf of **M.S.** challenges the allegation of the Appeal that the Impugned Judgment is based on inadmissible evidence. He notes that witness **A.O.** was summoned in the capacity of a witness, he gave testimony and that testimony is evidence in the case. The Report dated 19.03.2012 was filed by the Prosecution because the Presiding Judge asked for clarifications of the circumstances of the case.

14. The Defence Counsel points out that during the entire proceedings the fact that the purchase of narcotics was a stimulated purchase was deliberately or accidentally concealed.

15. The Prosecution claim that the reasoning of the Impugned Judgment failed to analyze the evidence is unfounded as the Trial Panel clearly states in the reasoning why there was no assessment and analysis of the evidence. Also the Prosecutor's allegations that provisions of Articles 360 through 383 KCCP were violated and that violation influenced the rendering of a lawful decision, do not stand. The rejection of the charge was the consequence of the Indictment being based on unlawful actions and not by non-actions of the Trial Panel. Also, reasonable time was given to the parties to present their arguments during the trial.

16. Defence Counsel Hazer Susuri filed a Response on behalf of the Accused **N.M.**. In his Response to the Prosecution Appeal, he argues that the challenges to the Impugned Judgment are unfounded. Concerning the absence of a Turkish interpreter on 21.05.2012, there was no violation of the procedure as the Accused declared that he understood the Albanian language. The Defence Counsel further points out that it is not the Judgment that is based on inadmissible evidence but that the Indictment itself was initiated upon inadmissible evidence, therefore the Judgment correctly rejected the charges. He further elaborates on the admissibility of the evidence collected through covert measure and on the statement given by witness **A.O.** 17. He concludes that the examination of witnesses and further examination of A.O. would not be legal as there was no order for the covert measure; therefore there was no need to continue with the evidentiary procedure and also no need for closing statements.

18. He emphasizes that the Enacting Clause and the reasoning of the Impugned Judgment are not contradictory. The charge was not rejected due to statutory limitation but due to other circumstances that exclude criminal prosecution. The Impugned Judgment correctly states that there was a violation of Article 1 of the KCCP because no judicial order was issued for the simulated purchase of drugs as required by Article 258 Paragraph (2) Item 8) KCCP. Furthermore, the rejection of the charge of *Organized Crime* that was not a confirmed charge, cannot be considered as essential violation of the criminal procedure as the consequence of this rejection are not relevant. Also the failure to indicate the type of the narcotics and the person from whom the weapon was seized is not an essential violation of the law. The Defence Counsel points out that there was no violation of defense rights during the main trial.

19. Concerning the allegations of the appeal that the factual state was determined erroneously and incompletely, these allegations are also unfounded. The Judgment justly and fully corroborated the factual situation when it rejected the charge. The Prosecution was unable to provide lawful evidence to support the Indictment. New evidence proposed by the Prosecutor was not necessary and would have been unlawful and the evidence listed in the Appeal of the Prosecutor is also inadmissible. There was no violation of the Criminal Code of Kosovo as the Impugned Judgment was rendered in favour of the Accused through the rejection of the charge.

II.3. Opinion of the Appellate State Prosecutor

20. The Appellate State Prosecutor supports the Appeal filed by the Special Prosecutor and in her Opinion mainly repeats the reasoning of the Appeal. She proposes to the Court of Appeals to accept the Appeal and commit the case to the Basic Court for re-trial.

III. Findings of the Court of Appeals

III.1. Competence of the Court of Appeals

21. The Court of Appeals is the competent court to decide on the Appeal pursuant to Articles 17 and 18 of the Law on Courts (Law no. 03/L-199). The case was pending before the Supreme Court on 31.12.2012 as a second instance case and is therefore in accordance with Article 39 Paragraph (1) of the Law on Courts from 01.01.2013 treated as a case pending before the Court of Appeals.

22. The Panel of the Court of Appeals is constituted in accordance with Article 19 Paragraph (1) of the Law on Courts and Article 3 of the Law on the jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo (Law no 03/L-053). Pursuant to the decision of the President of the Assembly of EULEX Judges no. 2013.OPEJ.0239-001 dated 22.05.2013, taken in accordance with Article 3.7. of the Law on the jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo, the Panel was composed of one EULEX Judge and two Kosovo Court of Appeals Judges.

III.2 Applicable procedural law - *mutatis mutandis* Kosovo Code of Criminal Procedure as in force until 31.12.2012

23. The Court of Appeals finds it appropriate to restate that the procedural law applicable in the respective criminal case is the (old) Kosovo Code of Criminal Procedure that remained in force until 31.12.2012.³ The proper interpretation of the transitory provisions of the (new) Criminal Procedure Code (CPC), in force since 01.01.2013, stipulates that in criminal proceedings initiated prior to the entry into force of the new Code, for which the trial already commenced but was not completed with a final decision, provisions of the KCCP will apply *mutatis mutandis* until the decision becomes final. Reference in this regard is made to the Legal opinion no. 56/2013 of the Supreme Court of Kosovo, adopted in its general session on 23.01.2013.

III.3. Admissibility of the Appeal

24. The contested Judgment was announced on 23.05.2012. The written Judgment was served on the Special Prosecutor on 02.07.2012, as documented by the delivery slip in the case file. The Special Prosecutor announced the filing of an appeal immediately after the Judgment was rendered, in session on 23.05.2013. The Special Prosecutor filed the Appeal on 6.07.2013. The Court of Appeals finds that the Appeal was filed by an authorized person and on time in accordance with Article 398 Paragraph (1) KCCP and Article 399 Paragraph (1) KCCP.

III.4. Findings on merits

(a) Alleged substantial violation of criminal procedure pursuant to Article 403 Paragraph (1) Subparagraph 12) KCCP and alleged substantial violation of criminal procedure pursuant to Article 403 Paragraph (2) Subparagraphs 1) and 2) KCCP

25. The Trial Panel rejected the charges against the defendants on the basis of Article 389 Item 4) KCCP. The respective provision reads: *“The court shall render a judgment rejecting the charge if [...] the period of statutory limitation has expired, an amnesty or pardon covers the act, or there are other circumstances which bar prosecution.”*

26. The Special Prosecutor in his Appeal argues that the Trial Panel rejected the charge due to expiry of statutory limitation and argues that the reasoning does not contain any explanation to this effect and is thus inconsistent with the enacting clause.

³ Kosovo Code of Criminal Procedure, in force since 06.04.2004 until 31.12.2012.

27. The Trial Panel nowhere in the Impugned Judgment referred to expiry of statutory limitation. The Trial Panel, as explained in the reasoning part of the Impugned Judgment, rejected the charges because it considered that *circumstances which bar prosecution exist* not because of expiry of statutory limitation. The Trial Panel reasoned that because the Special Prosecutor was unable to produce the judicial orders on which the police actions of 12.02.2009 were based, it was unable to assess the admissibility of evidence presented by the Prosecutor and in turn could not determine whether Prosecution was conducted in accordance with Article 1 KCCP. The Trial Panel concluded that “[t]his comes for the account of the Prosecutor and leads to a bar on prosecution.”⁴

28. In essence, the Trial Panel considered that the inability to verify whether the actions of the Special Prosecutor were legal, amounted to a circumstance barring prosecution in terms of Article 389 Item 4) KCCP. The Trial Panel explained its line of reasoning with sufficient clarity in the Judgment. The Court of Appeals finds no discrepancy between the enacting clause (reference to Article 389 Item 4) KCCP) and the reasoning part of the Impugned Judgment.

29. However, the Court of Appeals does find that the Trial Panel misapplied Article 389 Item 4) KCCP and this influenced the rendering of a lawful and proper judgment.

30. A judgment rejecting the charges does not entail any evaluation of the merits of the case, but is rendered because a *formal procedural prerequisite* is not fulfilled or is no longer fulfilled.

31. Article 389 KCCP regulates the rendering of a judgment, rejecting the charges. Pursuant to this Article, the court will render such judgment when there is no longer a valid charge against the defendant (the Prosecutor has withdrawn the charge between the opening and conclusion of the main trial or the injured party withdrew the motion for prosecution when such motion is a prerequisite pursuant to the CCK) or the Accused was previously convicted/acquitted/proceedings were terminated in a final form for the same act (manifestation of principle *ne bis in idem*), or the period of statutory limitation has expired, an amnesty and pardon covers the act or *other circumstances exist which bar prosecution*.

32. The Court of Appeals, by relying on teleological and systematic interpretation of the provision, finds that the term “other circumstances which bar prosecution” in Article 389 Item 4)

⁴ See Impugned Judgment, p. 5 of the English version.

KCCP refers to procedural conditions other than those specifically mentioned but of similar nature and effect on criminal proceedings. Examples of such circumstances are the death of the Accused, or immunity of Accused from criminal proceedings. The circumstances must be of formal nature and do not presuppose any review of evidence or review on merits.

33. In all other instances, when the Trial Panel would engage in any sort of review of evidence, even when determining that the prosecution was initiated and based on illegally obtained evidence, the court must render a judgment of merit. If the court finds that the evidence the Prosecution relies on is inadmissible and the Prosecution has consequently failed to prove that the Accused has committed the act with which he or she has been charged, the court must render a judgment of not-guilty in accordance with Article 390 Item 3) KCCP.

34. The Trial Panel correctly pointed out in the Impugned Judgment that pursuant to Article 1 KCCP the prosecution of criminal offences must be done in accordance with the law and that breaches of the law may result in evidence being declared inadmissible. The Trial Panel then instead of making a determination on inadmissibility of evidence and thereafter proceeding with main trial in accordance with the KCCP, concluded that it is unable to assess admissibility and therefore the prosecution in the case is barred. The Court of Appeals finds no support for such reading of the law in the KCCP.

35. The Trial Panel failed to apply or incorrectly applied a number of provisions of the KCCP. The Trial Panel showed a serious lack of understanding of the criminal procedure under the KCCP.

36. The Trial Panel, in light of the newly produced police report dated 19.03.2012 and following the motions of Defence to declare evidence inadmissible, was under the obligation to issue a reasoned ruling to that effect pursuant to Article 154 Paragraph (1) KCCP, i.e. either declaring evidence admissible or inadmissible. The Trial Panel failed to do so.

37. If the Trial Panel considered that the Special Prosecutor failed to provide a judicial order required by Article 258 Paragraph (4) KCCP, it should have declared the evidence inadmissible in accordance with Article 153 Paragraph (1) KCCP in conjunction with Article 264 Paragraph (1) KCCP, then removed the inadmissible evidence from the case file in accordance with Article

154 Paragraph (4) KCCP and it should have continued with the main trial in accordance with Articles 360 *et seq* KCCP. Upon conclusion of the main trial, the Trial Panel was then under the obligation to consider and evaluate all (admissible) evidence and return the appropriate judgment of merit. Even if the Trial Panel declared the respective evidence which arguably represents the very basis of the charges against the defendants inadmissible, it was still obliged to assess the remaining evidence in the case file, decide upon outstanding evidentiary motions, examine the Accused, hear closing statements, and finally return a judgment of merit.

38. The Court of Appeals finds that the misapplication of Article 389 Item 4) KCCP, and the non-application of Articles 360, 371, 372, 373, 374, 378, 379, 381, 382, 383 KCCP influenced the rendering of a lawful and proper judgment.

39. There was no legal basis for rendering a judgment rejecting the charges. The Trial Panel should have rendered a judgment of merit. The Trial Panel should have pronounced on the admissibility of evidence and evaluated the facts and evidence in the Judgment. The Trial Panel did not do so and the Impugned Judgment consequently lacks any statement relating to material facts.

The Court of Appeals finds there has been a substantial violation of criminal procedure pursuant to Article 403 Paragraph (2) Subparagraph 1) KCCP.

40. The Special Prosecutor in his Appeal also argues that the Trial Panel did not include any reasoning with regard to the confiscation part of the enacting clause.

41. Regarding the auxiliary pronouncements in the Impugned Judgment the Trial Panel provided reasoning only on the return of the vehicle Mercedes Benz.

42. The Court of Appeals finds that the Trial Panel did not only omit to reason the confiscation ruling in the Impugned Judgment but also applied the wrong legal basis for the confiscation.

43. The Trial Panel applied Article 229 Paragraph (5) CCK as legal basis for confiscation of narcotics and Article 328 Paragraph (5) CCK as legal basis for confiscation of the seized handgun.

The Court of Appeals finds that the Trial Panel did not apply the correct legal basis and also failed to reason its decision on confiscation of narcotics and the firearm.

44. The Trial Panel should have applied Article 489 Paragraph (1) KCCP **in conjunction with** Articles 229 Paragraph (5) CCK and 328 Paragraph (5) CCK. It is Article 489 Paragraph (1) KCCP that provides the legal basis for confiscation even when no guilty verdict is rendered. Reference to just Articles 229 Paragraph (5) and 328 Paragraph (5) CCK would imply a guilty verdict.⁵

45. The Trial Panel was also under the obligation to reason its decision in the reasoning section of the Impugned Judgment. The Trial Panel failed to provide any reasoning on this part which amounts to a substantial violation of procedural law enshrined in Article 403 Paragraph (1) Subparagraph 12) KCCP. The Trial Panel, as pointed out by the Prosecutor, also does not refer to the nature of narcotics (heroin), although this can be deduced from other parts of the Judgment (e.g. p. 4, English version, reference to heroin) and from the case file. However, the Court of Appeal reiterates that the nature of narcotics should have been unequivocally stated also in the enacting clause along with other identifying data (i.e. when and from whom the narcotics were seized).

46. The Special Prosecutor in the Appeal also states that the Trial Panel in the Impugned Judgment rejected the charge of *Organized Crime*, although this charge has already been rejected by the Confirmation Judge and was no longer part of the Indictment. It is not clear whether the Special Prosecutor with this assertion attempts to allege a violation pursuant to Article 403 Paragraph (1) Subparagraph 10) KCCP – i.e. that the judgment exceeded the scope of the charge.

47. The Court of Appeals finds that the reference relating to criminal offence of *Organized Crime* in the enacting clause is made in form of citation of Article 274 Paragraph (1) CCK in relation to **N.M.** and **M.S.** but not Sh. K.. With regard to Sh. K., the Trial Panel makes reference to amendment of indictment through the Ruling of the Confirmation Judge and does not list Article 274 Paragraph (1) CCK amongst the charges. On the other hand, with regard to the other two defendants (M., S.), reference is made only to the original Indictment PPS 03/09 dated

⁵ When an accused is found guilty of a criminal offence, such confiscation is based on Article 60 CCK and on the specific Article of the special part of the CCK.

07.08.2009 and the Trial Panel continues to list Article 274 Paragraph (1) CCK amongst the charges. It appears that the Trial Panel for some reason only considered the amendment of indictment through the Confirmation Ruling dated 24.09.2009 to apply to Sh. K.. This is incorrect. The Confirmation Judge unequivocally rejected the charge of *Organized Crime* with regard to all three Accused. The Indictment was only confirmed for the criminal offence under Article 229 Paragraph (4) Item 1) CCK therefore this is the only remaining charge for all the Accused. It is noted that Accused **A. R.** was never charged with the criminal offence of Organized Crime,, as is evident from the Indictment no. PPS 03/09 dated 30.09.2009 filed against him.

(b) Alleged substantial violation of criminal procedure pursuant to Article 403 Paragraph (1) Subparagraph 3) KCCP

48. The Special Prosecutor alleges that the right to an interpreter for Turkish language for Accused **Sh.K.** was violated in the criminal proceedings on 21.05.2012 which amounted to substantial violation of criminal procedure enshrined in Article 403 Paragraph (1) Subparagraph 3) KCCP. The Defence Counsel of **N.M.** argues that no such violation occurred as the Accused proclaimed he understood Albanian and could follow proceedings in Albanian.

49. The Court of Appeals examined the Record of the main trial and confirms that Turkish interpreter was present in some of the sessions, but not all sessions of the main trial. No Turkish interpreter was present at least in one part of the session on 07.03.2012 and on 21.05.2012.

50. The Court of Appeals makes specific reference to the Record of session of 07.03.2012 when the ability of defendants **Sh.K.** and **N.M.** to follow the proceedings in Albanian was discussed. **Sh. K.** confirmed that he is able to follow the case in Albanian and the Defence Counsel of **N.M.** confirmed that his client can understand the “general language”.⁶ At the end of the session on 21.05.2012 **N.M.** stated that “up to now we understand, but from now onwards I don’t think I will understand.”⁷ In session 21.05.2012, **Sh. K.** confirmed he understood the proceedings.⁸ The Court of Appeals notes that the next and final session was held on 23.05.2013 when the

⁶ Record of Main Trial, session of 07.03.2013, p. 10 (English version).

⁷ Record of main trial, session 21.05.2012, p. 5 (English version).

⁸ Ibid.

Judgment was announced. It is not clear from the Record of that's session whether there was a Turkish interpreter present.

51. The Court of Appeals gives particular weight to assertion of Defence Counsel Susuri in his Response to the Appeal that the Accused were able to follow the proceedings in Albanian.

The Court of Appeals in light of this rejects this ground of Special Prosecutor's Appeal.

52. The Court of Appeals however remarks the importance that the Trial Panel verifies at the beginning of the trial that all participants understand the language in which the trial is conducted and that, if necessary, appropriate interpretation is secured for the defendants throughout the trial, including translation of rulings and judgment.

(c) Alleged substantial violation of criminal procedure pursuant to Article 403 Paragraph (1) Subparagraph 8) KCCP

53. The Special Prosecutor states that the Impugned Judgment is based on inadmissible evidence. Such reading of the Impugned Judgment, as also pointed out in Defence Responses, is incorrect. As the Court of Appeals already established, the Trial Panel in this case did not actually return a ruling on admissibility of challenged evidence, presumably obtained without a valid judicial order.

54. The Impugned Judgment is not based on inadmissible evidence but is based on a misapplication of Article 389 Item 4) KCCP.

This ground of the Special Prosecutor's Appeal is therefore rejected.

55. Insofar the Special Prosecutor discusses admissibility of evidence in the case, the Court of Appeals remarks that any such determination of the Trial Panel will have to be made in accordance with Article 153 Paragraph KCCP, Article 258 KCCP and Article 264 KCCP.

(d) The alleged violation of criminal law and incomplete determination of factual situation

56. The Court of Appeals concurs with the Special Prosecutor that the procedural violations in the case resulted also in an incomplete determination of factual situation.

57. The Court of Appeals finds that due to the misapplication of Article 389 Item 4) KCCP the Trial Panel did not establish a factual situation at all.

The Court of Appeals finds the Trial Panel did not determine the factual situation in the case which amounts to a breach pursuant to Article 405 Paragraph (3) KCCP.

The Court of Appeals did not find any further violations of criminal law pursuant to Article 404 CCK, except the one established above (regarding legal basis for confiscation).

IV. Conclusion

58. The Court of Appeals has accepted the Appeal of the Special Prosecutor as elaborated above. The Court of Appeals has established a substantial violation of criminal procedure pursuant to Article 403 KCCP and incomplete determination of factual situation pursuant to Article 405 Paragraph (3) KCCP. The Court of Appeals also found a violation of criminal law pursuant to Article 404 Item 5) CCK (re legal basis for confiscation).

59. Pursuant to Article 424 Paragraph (1) KCCP the Court of Appeals annuls the Impugned Judgment of the District Court of Prizren no. P 241/2011 dated 23.05.2013 and returns the case for re-trial to be held by the Basic Court of Prizren.

60. No defendants are under any restrictive measures so no pronouncement in this regard is made.

61. The Basic Court of Prizren shall conduct a new main trial on the basis of Indictment no PPS 03/09 dated 07.08.2009 as amended through the Ruling of Confirmation Judge no. KA 128/2009 dated 24.09.2009 (Sh.K., N.M., M.S.) and Indictment no. PPS 03/09 dated 30.09.2009 (R.). The Court of Appeals notes that the Basic Court should address the issue of admissibility of evidence obtained in the case, in light of the information contained in the Report dated 19.03.2013 and to conduct the re-trial in accordance with the law. The Trial Panel should, prior to the commencement of main trial, establish whether any of the Accused requires interpretation into Turkish language in order to follow the course of main trial in his own language. If interpretation is requested, this must duly be recorded in the Record of every session of main trial.

62. The Court of Appeals remarks that in accordance with the transitional provision of Article 544 of the Code of Criminal Procedure (CPC), the re-trial will be conducted in accordance with the KCCP, i.e. pursuant to the old procedural code *mutatis mutandis*.

63. It is therefore decided as in the enacting clause.

Done in English, an authorized language.

Presiding Judge

Hajnalka Veronika Karpati

EULEX Judge

Panel member

Tonka Berisha
Judge

Panel member

Xhevdet Abazi
Judge

Recording Officer

Beti Hohler
EULEX Legal Officer

Reasoned Ruling finalized 8.07.2013

COURT OF APPEALS OF KOSOVO

Pakr 69/13

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