COURT OF APPEALS

Case number: **PAKR 4/2013**

Date: **22 October 2013**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Tore Thomassen as Presiding and Reporting Judge, EULEX Judge Annemarie Meister and Kosovo Court of Appeals Judge Tonka Berisha as members of the Panel, with the participation of Andres Parmas, EULEX Legal Officer, acting as Recording Officer, in the criminal proceedings against

> **J. P.:** son of xxx and xxx; born on xxx in xxx, Serbia; Serbian national; residing in xxx, xxx; not married; with no previous convictions; in detention on remand since 17 May 2011. **J.P.** is charged with 1) Smuggling of goods, contrary to Art 273 (1) CCK; 2) Tax evasion, contrary to Art 249 (1) and (2) CCK; 3) Fraudulent evasion of import duty and excise tax, contrary to Art 298 of the Customs and Excise Code; 4) Money laundering, contrary to Section 10.2 of the UNMIK Regulation no. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences; 5) Organised crime, contrary to Art 274 (1) and (2) CCK; and 6) Unauthorised ownership, control, possession or use of weapons, contrary to Art 328 (2) CCK.

Acting upon the Defence Appeal against the Judgment P 2/12 filed with the District Court of Mitrovica on 3 December 2012;

Having considered the 2012 the response to the Appeal by Special Prosecutor filed via post on 31 December 2012 and Opinion and Motion of the Appellate State Prosecutor of Kosovo Claudio Pala submitted on 24 June 2013;

After having held a public sessions on 3 and 22 October 2013 in the presence of the Appellate State Prosecutor Judit Eva Tatrai, the Defendant **J. P** and his Defence Counsel Ž.J;

Having deliberated and voted on 22 October 2013,

Pursuant to Art-s 420 (1.4) and 426 (1) of the Criminal Procedure Code of Kosovo (KCCP)

Renders the following

JUDGMENT

1. The Judgment of the District Court of Mitrovica dated 20 September 2012 in the criminal case no. 2/2012 is modified in the following:

1.1. The indictment is rejected in part where J.P. has been charged with unauthorised ownership, control, possession or use of weapons, contrary to Art 328 (2) CCK.

1.2. The legal designation of the offences attributed to J.P. is changed in the following pursuant to KCCP Art-s 420 (1) 4) and 426 (1).

1.2.1. The conviction of J.P. in the criminal offence of money laundering contrary to Section 10.2 of the UNMIK Regulation no. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences is annulled.

1.2.2. J.P. is convicted of organised crime, contrary to Art 274 (1) and (2) CCK in conjunction with money laundering, contrary to Section 10.2 of the UNMIK Regulation no. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences.

1.3. J.P. is sentenced to 4 years of imprisonment and with a fine of 1.000 EUR.

1.4. The decision of the District Court to confiscate based on Art 60 (1) and (2) a black Mercedes car, registration number xxx and white Volkswagen car, registration number xxx is annulled.

2. In The remaining part the Judgment of the District Court of Mitrovica dated 20 September 2012 is confirmed.

3. The Appeal is partially granted as outlined above.

REASONING

I. Procedural History

1. On 13 October 2010, the Prosecutor issued a Ruling on Initiation of an Investigation in case no PPS 41/2010 against several suspects, including J.R., who is still at large. On 10 November 2010, the Prosecutor issued a Ruling on Expansion of the Investigation to S.D**.**

who is still at large. On 15 February 2011, EULEX Police with the assistance of KFOR, conducted searches named as “xxx”. Evidence obtained during this operation led the Prosecutor to issue a Ruling on Expansion of the Investigation in this case to the Defendant **J.P**., on 28 March 2011.

2. After having extended the investigation on 26 April and 16 May 2011 the EULEX Pre-Trial Judge granted an Order for Arrest and Order for Search both dated 16 May 2011, following the Prosecutor’s applications. On 17 May 2011 EULEX Police conducted the so-called operation “xxx” which resulted in the arrest of the Defendant. Since then the Defendant has been in detention on remand. On 14 October 2011 the Pre-Trial Judge granted the extension of the investigation until 13 April 2012.

3. The Prosecutor filed the indictment PPS no. 41/2010 against **J.P.** on 10 November 2011. He was indicted with following criminal offences:

   1) Smuggling of goods, contrary to Art 273 (1) CCK;
   2) Tax evasion, contrary to Art 249 (1) and (2) CCK;
   3) Fraudulent evasion of import duty and excise tax, contrary to Art 298 of the Customs and Excise Code;
   4) Money laundering, contrary to Section 10.2 of the UNMIK Regulation no. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences;
   5) Organised crime, contrary to Art 274 (1) and (2) CCK; and
   6) Unauthorised ownership, control, possession or use of weapons, contrary to Art 328 (2) CCK.

4. The indictment was confirmed with Ruling KA no. 201/11 on 20 January 2012. The Confirmation Judge declared all the evidence admissible. The Rulings of the Confirmation Judge were not appealed.

5. The trial against **J.P.** was held in public before a panel of the District Court of Mitrovica composed of 2 EULEX judges and 1 Kosovar judge between 15 June and 20 September 2012, all in presence of the Defendant, his Defence Counsel and Prosecutor.

6. The verdict against **J.P.** was pronounced on 20 September 2012.

7. The Defendant **J.P.** was found guilty of the criminal offences of money laundering, contrary to Section 10.2 of the UNMIK Regulation no. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences; organised crime, contrary to Art 274 (1) and (2) CCK; and unauthorised ownership, control, possession or use of weapons pursuant to Art 328 (2) CCK.

8. **J.P.** was sentenced to 4 years of imprisonment and also with a fine of 1,000 Euro for money laundering; 8 years of imprisonment and also with a fine of 1,000 Euro for organised crime and to 1 year of imprisonment for the unauthorized ownership, control, possession or use of weapons. The aggregate punishment was determined in 9 years of imprisonment and a fine of 2,000 Euro. The time spent in detention on remand was credited. Pursuant to Art 328 (5) CCK the weapon illegally owned by **J. P**., was confiscated. Pursuant to Art 60 (1) and (2) CCK two motor vehicles and cash in Euro and Serbian Denar currencies recovered from the Defendant on his arrest on 17 May 2011 were confiscated. The Defendant was obliged to reimburse the costs of the criminal proceedings pursuant to Art 102 (1) KCCP.

9. **J.P.** was acquitted of the criminal offences of: smuggling of goods, contrary to Art 273 (1) CCK; tax evasion, contrary to Art 249 (1) and (2) CCK; and fraudulent evasion of import duty and excise tax, contrary to Art 298 of the Customs and Excise Code.

10. Defence Counsel Ž.J filed an Appeal on behalf of **J.P.** on 3 December 2012. On 31 December 2012 the Special Prosecutor filed a (belated) response to the Appeal via post. On 24 June 2013 EULEX Appellate Prosecutor Claudio Pala filed an Opinion and Motion in response to the Appeal.

II. Submissions of the Parties

A. The Appeal of the Defence Counsel

11. The Defence Counsel of **J.P.** proposes the judgment of the District Court to be annulled and the Defendant acquitted, or the case to be returned for a retrial, or the defendant to be punished more mildly. He contends that 1) there are serious violations of criminal procedure norms in the contested judgment; 2) the substantive criminal law has been applied erroneously; 3) the facts have been determined wrongly and incompletely; and 4) the rules of sentencing have been breached. More specifically the arguments of the Defence Counsel are as follows.

12. The Appellant contends that the enacting clause of the contested judgment is unclear and in contrast with reasoning. There are reasons lacking on decisive facts and reasoning is self-contradictory. According to the Defence there is no description of performance of the act of money laundering given in the Contested Judgment, apart from that it is assumed that in the process of currency exchange an act of money laundering was performed, because the exchanged money derived from criminal activity of other people (tax evasion, smuggling crimes). The Defence Counsel also opines that the enacting clause of the Contested Judgment is vague by determining **J.P.** together with other persons and companies as a

member of an organized criminal group that smuggled goods into Kosovo and evaded customs duties, excises and taxes. This is contradictory, because **J.P.** was acquitted of the underlying offences of smuggling and tax evasion

13. The presented evidence is valued wrongly, which leads to a wrong conclusion regarding the actions of the Defendant. The state of facts in regard of the type, amount and value of the goods is determined according to inadmissible evidence (surveys of imports of goods – regarding offences of smuggling and tax evasion which **P.** was acquitted of). Witnesses mostly denied any involvement of **P.** in those offences. The evidence (there under also statements of the Defendant) show that he had no knowledge of how the import of goods was going on and he definitely did not take any part in this. According to the Defence, the use of pre-trial statements of **J.P.** was wrongful, because he chose to remain silent in the court. **J.P.** has been found guilty of Art 328 CCK without any evidence. It has not been determined by the court on the basis of evidence that the gross amount of trade of allegedly smuggled goods reached 9 000 000 Euro. The Court must not have accepted such argument of the prosecution. The goods were not smuggled into Kosovo, but were brought legally through border gates and registered appropriately.

14. The act of money laundering has not been proven. **J.P.** was not aware that he was committing a criminal act; he had no premeditation or motive for committing a crime. In fact there can be no money laundering offence, because for money laundering it is necessary that perpetrator is aware of the criminal act he is performing and he should also be aware that the disputed property is the result of some kind of criminal activity. This all has not been established in **P.'s** case. He merely carried out orders of his appointers and made a small profit by exchanging currency and making payments for the oil.

15. Possession of a weapon has not been proven either. The fingerprint on the holder is not enough of a proof of guilt for that sake. Actually the Defendant only had previously given the unused holder to his brother already years before the alleged crime.

16. The Appellant is of the view that by finding **J.P.** guilty of organised crime, it should have been established that there was a common decision and agreement for commission of crimes between several individuals, divided roles and leadership – nothing like this has been proven in the case at hand. There is no evidence in regard of who, and how organised the group, who leads it *etc*. Therefore there exists no group and hence there exists no act in the sense of Art 274 CCK. **J.P.** was operating independently and belongs to no group.

17. The Appellant opines that money laundering cannot be the underlying crime to organised crime, because the minimum punishment for this offence is below 4 years imprisonment that is the lowest condition for Art 274.

18. **J.P.** has been wrongly convicted unauthorised possession of a gun contrary to Art 328 CCK, because of the fact that he was not in possession of the gun; it was proven that the gun was actually at the gas station in the period of 25 January – 15 February 2011 and not in the hands of **J.P.**.

19. The Appellant insinuates that the evaluation of the court of the amount and the value of the imported goods does not rely on evidence, it lies only on presumptions and is not plausible even theoretically, because there is no capacity to contain the alleged amount of oil products in northern Kosovo and there is not even close so much consumption of the oil products in that region. Defence contends that the goods (in the quantity stated by the court) most probably crossed the border only on paper.

20. Regarding the charges of money laundering, the operations done by the Defendant were all legal and documented. He had even no suspicion and in fact should not have had a suspicion that the money could have originated in illegal activities. He had absolutely nothing to do with any actions that precede his own technical tasks of currency exchange and bank transactions. The transactions were economically necessary because the revenues in Kosovo were in euros, but the suppliers in Serbia accepted only dinars. The court's conclusion of his primary role is without any ground. The fact that **J.P.** operated an unlicensed exchange office should not be construed to his detriment, because this is common practice throughout the country. What is relevant is that he publicly owned the office. The Defence contends that money laundering usually is preceded with some criminal acts involving corruption, but this has not been established in this case. Trade in goods, on which there is a full documentation cannot be filed under the institute of money laundering. No person in his right mind would launder money in such a primitive way the Defendant has acted. Therefore it is ruled out that **J.P.** committed offence of money laundering.

21. The Appellant draws attention to the requirement that the conclusions of the court should be based on reasoning which leaves no place for doubt, otherwise the principles of presumption of innocence and *in dubio pro reo* would be breached.

22. In regard of sentencing the Defence Counsel expressed his view that the sentence is wrong already because of the violation of procedural and substantive law and wrong establishment of facts. It was also a violation of criminal law to pronounce the aggregate punishment by simply adding two fines of 1000 euro. He also stresses that the trial court found wrongly the aggravating circumstance in the arbitrary values which were never determined (amount of laundered money, time period of the performance of the act, frequency of individual acts, also the fact of him being a member of a criminal group). It was wrong to see as an aggravated circumstance in regard of the unlawfully owned weapon, that the weapon had

been in precarious possession. This cannot constitute an aggravating circumstance, because it is a constitutive element of the criminal offence stipulated in Art 328 CCK. The Appellant underlines that different from aggravating circumstances the mitigating factors are only stated, but have not given any importance by the District Court.

B. The Response to the Appeal

23. The EULEX Special Prosecutor in his response requests that the appeal be rejected as unfounded and the conviction of **J.P.** be upheld. The Prosecutor finds that the arguments of the Appellant are not in a logical order and partly not even placed under correct legal grounds. He contends that the factual findings and legal reasoning of the District Court supports the conclusions drawn in the contested judgment. As to the specific legal grounds allegedly violated by the District Court, the Prosecutor argues the following.

24. No violations of criminal procedure norms have occurred. The judgment is clear and concise; there are no inconsistencies within the enacting clause or between the enacting clause and the reasoning. Every conclusion of the District Court is well-founded. Specifically, concerning the charges on money-laundering, the enacting clause and reasoning (para 9.2 (e)) contain description of the criminal conduct of the Defendant and evidential findings regarding that offence. The Prosecutor disagrees with the Appellant that the Contested Judgment is based on inadmissible evidence, pointing out that already the reasoning as to the basis of for the alleged inadmissibility is unclear, the defence has failed to raise this argument timely during the trial and in any way there is also no basis for such claims. All evidence is correctly admitted and weighted. The claim of the defence as to the alleged wrongful admission of the pre-trial statements of the Defendant is in error and the District Court was entitled to lean on this evidence even in the situation where the Defendant chose the defence tactic of remaining silent during the trial.

25. The Appellant erroneously asserts that the Defendant was not dealing with proceeds of crime, because not he himself or the other members of the alleged criminal group had not committed one of the predicate offences, namely smuggling of goods. According to the Prosecutor, the correct interpretation of the law indicates that smuggling of goods was indeed committed. It is of no importance to that conclusion, that the illegal activities were publicly known and tolerated by the authorities. The Prosecutor also disagrees with the Appellant that **J.P.** had no intent to commit money laundering, because he did not know of the underlying criminal activities. The District Court has correctly found it proven beyond reasonable doubt that he in fact had full knowledge of his co-perpetrators activities and intended to commit money laundering. The Prosecutor is on the opinion that the District Court has correctly found the Defendant guilty of the criminal offence of organised crime. The assertion of the Appellant that this is precluded already because of the fact that money

laundering cannot be considered as the predicate offence for the criminal offence of organised crime is not valid. The argument of the Defence Counsel that there is insufficient evidence of existence of a structured criminal group is contrary to voluminous evidence presented at main trial, which was not challenged by the Defence Counsel.

26. The Prosecutor does not agree with the argument by the defence that the Trial Panel made an incorrect and incomplete determination of material fact with regard of the calculation of the amount of the evaded taxes and the total sum of proceeds that were laundered by the defendant. According to the Prosecutor there were detailed documents and analysis submitted into evidence, which based on the documentary evidence in casefile clearly support the findings of the Trial Panel as to the guilt of the Defendant. The Appellant never challenged this evidence during the trial. The Appellant is also wrong, when arguing that the conviction in illegal possession of a weapon is without any evidence. In that regard specifically the DNA evidence and corroborating statement from witness S.A. are referred to by the Prosecutor, which clearly prove that the Defendant indeed had committed this criminal offence.

27. The allegations of the Appellant regarding sentencing are unmeritorious. Contrary to the arguments presented by the Defence Counsel, the Trial Panel clearly sets out each of the aggravating and mitigating circumstances it took into consideration. The aggregate penalty was fixed fairly with proper reference to these factors. The fact that the Trial Panel gave less weight to the mitigating factors than desired by the Appellant is not capable of founding a ground of appeal.

C. Opinion of the Appellate State Prosecutor

28. On 24 June 2013 The Appellate Prosecutor Claudio Pala submitted an opinion in response to the Appeals. He moved the Court of Appeals to reject the Appeal and affirm the Contested Judgment. The Appellate Prosecutor observed that the Defendant's knowledge of the criminal activities of the group was inferred not only from the documents seized from the Defendant, but also from the surveillance evidence, the constant and regular way the Defendant operated with the money received by the other members of the group, the Defendant's admission that he knew the origin of the money, the payments made by the Defendant to the police officers and border staff, and finally the Defendant's continuous cooperation with J.R. even after knowing that R. was sought by the police for criminal activities. The Appellate Prosecutor disagreed with the allegations of the Defence Counsel as if the amount of the proceeds of the criminal activities established by the District Court is based on unrealistic calculations, indicating that there is ample documentary evidence in support of this conclusion. The Appellate Prosecutor also expressed his view that the fact of

smuggling of oil products into Kosovo was correctly established by the Trial Court based on evidence.

III. Findings of the Panel

A. General Issues

29. The appeal is filed by a person authorised thereto and it is filed timely.

30. At the outset it should be noted that because the Appeal is poorly structured, the arguments of the Appellant are not in a logical order and they are partly put under wrong headings, the Court of Appeals finds it impossible to fully follow the structure of the Appeal in its analysis below. Therefore a number of the assertions raised by the Appellant are responded under different legal grounds than proposed by the Defence Counsel.

31. A further point to be raised, before going to analyse the arguments of the Appellant, concerns the effect of the Law No. 04/L-209 on amnesty (Amnesty Law) to the present case. This legal act was promulgated by the President of the Republic of Kosovo on 18 September 2013 and published in the Official Gazette of the Republic of Kosova / No. 39 on 19 September 2013. Hence the law came into force on 4 October 2013. Pursuant to Art 2 (1) of the Amnesty Law all perpetrators of offenses listed in Art 3 of this law that were committed before 20 June 2013 shall be granted a complete exemption from criminal prosecution or from the execution of punishment for such offenses, in accordance with the terms and conditions of Art 3 of this law. According to Art 3 (1.2.5.) also the criminal offence of unauthorized ownership, control or possession of weapons contrary to Art 328 (2) CCK falls under the scope of amnesty. Because **J.P.** committed the criminal offence of unauthorised weapon possession before the date set in Art 2 (1) of the Amnesty Law, he must be exempted from criminal prosecution in regard of this crime.

32. For the reasons above the Court of Appeals rejects the charge of the criminal offence of unauthorized ownership, control or possession of weapons contrary to Art 328 (2) CCK against **J. P**.. Therefore the arguments of the Appellant concerning only the conviction of **J.P.** under Art 328 (2) CCK are not dealt with below.

33. Concerning the arguments raised in the Appeal, the court of Appeals holds the following.

B. Alleged Violation of the Procedural Law

34. The Court of Appeals disagrees with the argument put forward by the Appellant that the District Court has substantially violated the norms of procedural law.

35. The Defence Counsel contests the District Court's Judgment because of 1) the contradictions between the enacting clause and the reasoning of the District Court's judgment and 2) also within the reasoning of the judgment. Such contradictions could be seen only in a situation, where there are logical inconsistencies between conclusions articulated by the Court in the enacting clause and the reasoning of the judgment or between different facts established by the court. However, none of such inconsistencies can be identified in the District Court's judgment by this Panel. Merely the fact Defence Counsel does not agree with the conclusions drawn in the Contested Judgment does not constitute the violations claimed by him.

36. Neither does the Court of Appeals concur with the allegation of the Appellant that the Contested Judgment is unclear and lacking reasoning on crucial facts. This Panel opines that the reasoning of the District Court can be easily followed, it is logical and consistent. All conclusions of the Trial Court are well grounded and stand on strong factual basis. Hence the accusation that the Contested Judgment is unclear has no ground. The position of the Appellant that inadmissible evidence has been used for conviction of the Defendant does not stand. At first it should be noted what the Defence Counsel explicitly stated at the hearing, namely that he is not challenging any evidence presented by the prosecution. To change this position only in the appeal is clearly belated, unprofessional and in the light of the actual evidence also without merit. The main critique of the Appellant against the evidence is, that it is wrong to lean on surveys of goods concerning the crimes of which the Defendant was found to be not guilty. The defence does not specifically point out, why exactly this evidence is inadmissible. The reason for that cannot be merely the fact that the Defendant was acquitted of smuggling charges, and charges of evading customs duties, excises and taxes. The Court of Appeals finds that notwithstanding the fact that **J.P.** was found not guilty in the aforementioned criminal offences, the evidence concerning the commission of these crimes is relevant in deciding upon his guilt in the acts of money laundering and organised crime. The existence of these underlying offences is a crucial element showing that **J.P.** was intentionally operating with proceeds of criminal activities. The amount of smuggled goods and the extent of customs duties, excises and taxes evaded is corroborating evidence in establishing the extent of criminal proceeds that were laundered by the Defendant. This is also a contributing factor when establishing the exact sentence for the defendant's violation.

37. It is wrongly asserted by the Appellant that the legal evaluation of the District Court that the goods were indeed smuggled into Kosovo and not legally imported, would in any way breach the procedural law. It is the primary task of the Trial Court to assess legal arguments and to qualify the facts. This has been done by the District Court in the case at hand and this is not in any way in breach of the procedural law.

38. The Appellant does not clarify in which way the enacting clause is vague when acquitting **P.** of smuggling and tax evasion charges, but still convicting him of the charge organised crime. It is clear from the enacting clause what was convicted and of what he was acquitted. From the reasoning it is also clear why he was so. **J. P. 's** part in the operations of the organised criminal group was established as the role of a money-man. He was standing behind financial operations with the revenues from the sales of the smuggled goods and hence rightfully considered as a member of the organised criminal group.

39. The Defence Counsel also errs when arguing that the pre-trial statements of the Defendant could not have been considered by the court, when the Defendant chose to remain silent during the trial. If the Defendant has at any stage of the proceedings testified and only later chooses to remain silent, this does not mean that his new defence strategy will affect the already given statements. KCCP does not preclude the use of such previous statements of the Defendant.

C. Establishment of Facts

40. The Court of Appeals does not agree with the allegation of the Appellant that the District Court has established the factual situation wrongfully and incompletely.

41. Concerning the objection by the Defence as to the assessment of the overall amount of smuggled goods and evaded taxes, this Panel notes that it is primarily the privilege of the Trial Court to make such assessments. The role of the appellate review should constrain itself first and foremost in determining whether the assessments are done according to the relevant procedural, substantive law norms and that it is not done in an arbitrary fashion. It is a general principle of appellate proceedings that the Court of Appeals must give a margin of deference to the finding of fact reached by the trial panel because it is the trial panel which is best placed to assess the evidence. The Supreme Court of Kosovo has in that respect applied the standard of not to "*disturb the trial court's findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous*" (*Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, para. 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, para. 30*). The approach taken by the Supreme Court reflects a principle of appellate proceedings which is applied – although with some variance – not only in common law but also in civil law jurisdiction as well as in international criminal law proceedings (*see e.g. Supreme Court of Ireland, Hay v. O'Grady, [1992] IR 210; Federal Court of Justice Germany, BGHSt10, 208 (210); International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Kupreskić et al., IT-95-16-A, Appeals Judgment, para. 28 et seq.)*. The Panel finds no violations in regard of the evaluation of facts in the court of first instance.

42. The Panel underlines that the documents based on which the District Court did its evaluation, were not contested by the Defence Counsel during the trial phase. There is actually nothing in those documents, making them challengeable either, because these documents represent solely the summary of calculations based on the book-keeping of involved companies and of documents concerning the import declarations presented on the border. It is definitely wrong to claim, as the Defence Counsel has done, that there is no evidence supporting the District Court's conclusion in this regard. In the Contested Judgment there are clear references made to Motion to admit written evidence: key documents – dated 27 July 2012, which was taken into consideration by the court (see p 17, p 8.1).

43. The Appellant is wrong when stating that the act of money laundering has not been properly described in the judgment. In fact even the Appellant himself refers to a part of this description: **J.P.** was exchanging currency for other members of the gang. But there is more – in the judgment the money laundering activities have been described as exchanging and making transactions with money that was known to originate from criminal activities, the Defendant also kept records of payments to the border staff and police, he was operating with big quantities of cash (collecting it from the gas stations, where smuggled oil products were sold) and turning this into "legitimate" money on various accounts (see pp 21-24 of the District Court's judgment).

44. This Panel does not concur with the critique of the Defence Councel that the evidence has been valued wrongly. The Appellant just does not agree with the conclusions of the District Court, but cannot provide any analysis to overthrow or leastways undermine these conclusions. As there are no procedural mistakes present, which would demand the opposite, the evaluation of the District Court has to be agreed with, because it remains within their primary discretion to evaluate the evidence. That also concerns the assessment as to the fact whether the Defendant knew about criminal background of the money processed by him or not. The District Court has rightfully concluded that **J.P.** not only knew about underlying criminal activities in general, but was in fact a part in the scheme with a specific function of dealing with the revenues from the sale of smuggled goods.

45. The Court of Appeals considers unmeritorious the position of the Defence Counsel that the evaluation of the court of the amount and the value of the imported goods does not rely on evidence, but is based on presumptions and is not plausible even theoretically, because there is no capacity to contain the alleged amount of oil products in northern Kosovo and there is not even close so much consumption of the oil products in that region. The above speculations of the Defence Counsel are not supported by any facts, whereas the criticised conclusions of the District Court are based on the import declarations of oil products, but also documentation seized from the companies involved, which show the sales of the

smuggled oil products in Kosovo. It should be noted that the sales of oil products in northern Kosovo has not been limited to only local inhabitants. Therefore it is pointless to indicate that the local inhabitants could not have used the all amount of allegedly smuggled oil products.

46. There is no evidence supporting the view presented by the Appellant that the goods were actually only crossing Kosovo border on paper or that at least they were instantly re-exported back to Serbia. This is nothing but another speculation of the Defence Counsel, which runs contrary to collected evidence (first and foremost the documents referred to in Prosecutor's Motion to admit written evidence: key documents, which was submitted to the District Court on 27 July 2012).

47. The argument of the Appellant that **J.P.'s** acts cannot be considered money laundering, because his actions were public and documented, represents a misunderstanding of the law. The operations which constitute money laundering can very easily be (and they indeed mostly are) normal financial transactions from appearance. What turns these transactions criminal is the origin of assets used and the purpose of the transactions. The arguments of being not aware of the underlying criminal activities and having nothing to do with those are overthrown by the consistent and well-grounded analysis presented in the District Court's judgment. The understanding of the Appellant that the criminal offence of money laundering should be combined with corruption is arbitrary and has no standing whatsoever. Money laundering is trying to show criminal proceeds as legal revenues and it does not necessarily have to be linked with any corruption crimes. The possibility that on some occasions there might be occurrences where the money laundering schemes are also combined with corruption does not change this.

48. According to the Defence Counsel the fact that the Defendant operated an unlicensed currency exchange office should not be construed to his detriment. This is true, but shortly put this has not been construed to detriment of the Defendant. The fact that **J.P.** was operating as currency exchanger (licensed or not) is relevant only because it was one of the ways how he carried out money laundering operations.

D. Application of substantive law

49. The Court of Appeals does not agree with the assessment of the Defence Counsel that the District Court has applied substantive law wrongly to the detriment of the Defendant. The arguments of the Appellant in this regard are based on a wrong understanding of the law, as well as on simple disagreement with the facts established by the District Court. This Panel fully concurs with the evaluation of the factual situation by the District Court. In more detail the Court of Appeals finds the following.

50. The District Court has diligently and above reasonable doubt proven the crimes, **J.P.** was found guilty of. A long list of evidence in support of finding him guilty in money laundering has been presented in the Contested Judgment (see pp 21-23 of the Contested Judgment for the description of the presented evidence; and pp 23-24 for the evaluation of this evidence by the District Court). Subsequently the District Court has explained why the conclusion of **J.P.** being guilty of money laundering has been reached based on the referred evidence. District Court has also adequately reasoned, why the acts of the Defendant constitute the criminal offence of organised crime (see pp 24-25 of the Contested Judgment).

51. The argument of the Defence Counsel that money laundering cannot be the underlying offence of the criminal offence of organised crime, is also wrong. The Defence Counsel asserts that **J.P.** cannot be charged with the criminal offence of organised crime, because he has not been indicted with any crime which would carry the mandatory minimum punishment. The Defence argues that the underlying criminal offence for the organised crime should carry a minimum punishment of four years imprisonment, but in the case at hand the minimum punishment for money laundering is the minimum term of imprisonment set by the CCK (30 days). The above suggestion of the Appellant is wrong, because the term 'punishable by imprisonment of at least' should be construed as 'to be capable of being punished by' a specific sentence rather than 'to be punishable with a minimum of' a specific sentence (see in that regard previous practice of CoA, *e.g.* Ruling in case no. PN 496/13 (G.) dated 19 June 2013, with a further reference to a previous interpretation of law by the Supreme Court in an identical question).

52. Although the arguments of the Defence Counsel are not capable of revoking the application of substantive law by the District Court, the Court of Appeals notes that the application of substantive law by the District Court has indeed been erroneous and the Contested Judgment needs to be modified in this regard.

53. **J.P.** was convicted for both criminal offences: organised crime contrary to Art 274 (1) and (2) CCK and money laundering contrary to Section 10.2 of the UNMIK Regulation no. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences. Supreme Court of Kosovo has in a previous judgment stressed that the offence of organised crime requires the commission of an 'underlying' offence, in addition to the offence of organised crime under art 274 CCK. The formulation used throughout Art 274 CCK 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 organised crime and of the underlying offence. This situation might amount a breach of

the prohibition to impose a double punishment for one single offence.[1] The Court of Appeals concurs with the above interpretation by the Supreme Court and finds that it necessitates the modification of the Contested Judgment. In the case at hand the criminal offence of organised crime subsumes the criminal offence of money laundering as the 'underlying' criminal offence to it. Therefore **J.P.** is guilty of having committed the criminal offence of organised crime contrary to Art 274 (1) and (2) CCK in conjunction with the offence of money laundering contrary to Section 10.2 of the UNMIK Regulation no. 2004/2 on the Deterrence of Money Laundering and Related Criminal Offences. For this reason and taking into consideration the discretionary power of the Court of Appeals according to article 420 (1) 4) and article 426 (1) of KCCP, the legal designation of the criminal offences attributable to **J.P.** has to be amended accordingly.

E. Sentencing

54. The Panel notes that applicable KCCP entitles the Appellate Court to review the determination of punishment by the First Instance Courts. However, the Panel also acknowledges that the determination of punishment is first and foremost the task of the Trial Panel which generally has to be respected by the Court of Appeals. The Judges of the Trial Panel are vested with broad discretion in determining an appropriate sentence due to their obligation to individualize the penalties to fit the circumstances of the accused and the gravity of the crime. The scope of review for the Court of Appeals is therefore limited wherefore this Appeals Panel is of the opinion that is should only interfere with the findings of the Trial Panel in case the Trial Panel in rendering a decision on punishment exceeded its authority under the law (Art 404 (5) KCCP), failed to determine the punishment correctly (Article 406 (1) KCCP) or imposed a punishment which by no means can be considered as just; the latter being the case if the punishment, in light of the possible range of sentences available, is unjustifiably high or low.

55. As a consequence of the findings in part III D of this judgment, the Panel notes that the first instance court wrongfully sentenced the Defendants to separate punishments for criminal offences of organised crime and money laundering. The District Court sentenced **J.P.** to 4 years of imprisonment and also with a fine of 1,000 Euro for money laundering; and to 8 years of imprisonment and also with a fine of 1,000 Euro for organised crime. Therefore the Contested judgment has to be modified and **J.P.** has to be sentenced by one single sentence for the criminal offence of organised crime in conjunction with the criminal offence of money laundering.

[1] See Judgment of the Supreme Court of Kosovo in case no. Ap-Kz 61/2012 dated 2 October 2012, para 48.

56. When imposing a sentence to **J.P.** for the criminal offence of organised crime the Court of Appeals finds that there are particularly mitigating circumstances in the sense of Art 66 2) CCK, which indicate that the purpose of punishment can be achieved by imposing a lesser punishment. First it has to be noted that the acts of money laundering involved proceeds from criminal activities, which might fall under amnesty. The criminal offences of smuggling of goods, contrary to Art 273 (1) CCK; tax evasion, contrary to Art 249 (1) and (2) CCK; and fraudulent evasion of import duty and excise tax, contrary to Art 298 of the Customs and Excise Code – the underlying offences, from which all the laundered criminal revenues stem – are covered by Art 3 (1.2.8.4); (1.2.8.3); and (1.1.13.12.3) of the Amnesty Law respectively. Therefore it might be the case that **J.P.** will be punished for laundering the proceeds of above mentioned criminal proceeds, but the persons who have actually committed the crimes referred to above, walk free because of the amnesty. Notwithstanding the facts that the criminal offence of money laundering is criminalised as a wrongdoing in its own right and that the imposition of amnesty does not lose the criminality of criminal offences of smuggling of goods; tax, customs or excises evasion, the Court of Appeals opines that for the sake of reconciliation pursued by the amnesty law, but also for the sake of fairness the sentence imposed to **J.P.** has to be reduced significantly. As additional factors in favour of mitigating the punishment the Court of Appeals notes that the role of **J.P.** was limited to transactions with the proceeds of the underlying crimes. Even though **J.P.** was undoubtedly a member of the criminal group, he had obviously no overall or effective control over the policies of this group in what to do with the proceeds of crimes, being merely a person fulfilling the tasks given to him by other higher standing members of the group. He is perceived by this Panel to have been only a minor figure in the whole criminal setup. Also, his personal gain from the crime committed was very modest.

57. For the criminal offence of organized crime contrary to Art 274 (1) and (2) CCK the minimum punishment provided is imprisonment of seven years. Pursuant to Art 67 (1.2) CCK when the conditions provided for in Art 66 CCK exist, the court can mitigate the punishment to imprisonment of one year, if a period of at least three years is provided as the minimum term of imprisonment for a criminal offence. The undersigned Panel finds that taking into account the mitigating factors described in paragraph 55 of this judgment and the limits set by Art 67 (1.2) CCK, **J.P.** should be punished with an imprisonment of 4 years and a fine of 1.000 Euro.

58. Further, as the charge of unauthorised ownership, control, possession or use of weapons, contrary to Art 328 (2) CCK against **J.P.** has to be rejected, the Contested Judgment consequently also has to be modified in regard of the sentence imposed on him for this crime, by annulling this sentence.

59. As evident from the above **J.P.** will only be punished with one single sentence. Therefore the Contested Judgment has to be annulled in regard of the aggregate punishment imposed on him.

60. The Court of Appeals notes that although the charge of the criminal offence of unauthorized ownership, control or possession of weapons contrary to Art 328 (2) CCK against **J.P.** is rejected, it does not exempt the Defendant of all the consequences of his original conviction in this criminal offence by the then District Court of Mitrovica. Namely, with the Contested Judgment the Trial Court confiscated the gun and ammunition that were found to be in unauthorised possession of **J.P..** According to Art 9 of the Amnesty Law regardless of the application of amnesty under this law to any criminal offence, if an object has been confiscated in accordance with the law during the criminal proceedings based in whole or in part on that criminal offence, the person receiving amnesty does not have a right to ask for the return of that confiscated object. Therefore the Court of Appeals upholds the decision of the District Court of Mitrovica to confiscate pursuant to Art 328 (5) CCK the gun and ammunition, that was seized from illegal possession of **J. P..**

61. Pursuant to Art 60 (1) and (2) CKK the District Court confiscated two motor vehicles and cash in Euro and Serbian Denar currencies recovered from the Defendant on his arrest on 17 May 2011. The Court of Appeals is satisfied that based on the evidence (see par 7.1 of the Contested Judgment) there is sufficient reason to believe that the money recovered from **J.P.** upon his arrest is indeed derived from the commission of criminal offences and therefore the confiscation of these assets is legal. However the Court of Appeals does not concur with the conclusion that also the motor vehicles taken from **J.P.** can be confiscated based on Art 60 (1) or (2) CCK. There is no indication whatsoever in the Contested Judgment that the motor vehicles owned by **J.P.** should be considered as deriving from criminal activities. Although some of the evidence referring to money laundering committed by **J.P.,** was indeed seized from those vehicles, this is not enough to turn the vehicles into objects destined for use in the commission of a criminal offence. Therefore the Contested judgment has to be modified in this regard.

62. For the reasons above the Court of Appeals decides as in the enacting clause.

Prepared in English, an authorized language. Reasoned Judgment completed and signed on 19 November 2013.

Presiding Judge

Tore Thomassen
EULEX Judge

Panel member	Panel member	Recording Officer
Annemarie Meister	Tonka Berisha	Andres Parmas
EULEX Judge	Judge	EULEX Legal Officer

COURT OF APPEALS OF KOSOVO
PaKr 4/2013
22 October 2013