

Supreme Court of Kosovo
Pkl.-Kzz. No. 50/2009
16 November 2009
Prishtinë/Priština

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel constituted in compliance with Article 26 paragraph (3) of the Kosovo Code of Criminal Procedure ("KCCP"), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo ("Law on Jurisdiction"), composed of:

- Guy Van Craen, EULEX Judge, as presiding and reporting judge,
- Emilio Gatti, EULEX Judge,
- Miftar Jasiqi, Supreme Court Judge,
- Zait Xhemajli, Supreme Court Judge and
- Avdi Dinaj, Supreme Court Judge, as members of the panel;

In the criminal case against **Q.S.** et alia, convicted for the criminal offences of Organized Crime in violation of UNMIK Regulation No. 2001/22, section 2.4, in relation with Article 245 (2) of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), Unauthorized Production and Sale of Narcotics in-complicity in violation of Articles 22 and 245 paragraph (2) of the CC SFRY, and Unauthorized Possession of Weapons, in violation of UNMIK Reg. 2001/7, section 8.2;

Deciding on the request for protection of legality of defendant **Q.S.** filed through his Defence Counsel **Q.S.** against the judgment of the Supreme Court, Ap.-Kž. No. 355/2006, dated 11 November 2008, which partially granted his appeal against the verdict of the District Court of Prishtinë/Priština, P. No. 481/2004, dated 18 November 2005;

Having reviewed the court records, the request for protection of legality of the defendant, the arguments of the Public Prosecutor, and having analysed the relevant laws;

Following the deliberation on 16 November 2009;

Pursuant to Article 456 of the KCCP, the Supreme Court of Kosovo renders the following

Judgment
Supreme Court of Kosovo
Pkl.-Kzz. No. 50/2009
Q.S. et alia

JUDGMENT

R.S.

The request for protection of legality of defendant ██████████ filed through his Defence Counsel ██████████ against the judgment of the Supreme Court, Ap.-Kž. No. 355/2006, dated 11 November 2008 is **REJECTED as unfounded**.

REASONING

1. Procedure:

- The timely request of the defendant ██████████ was regularly introduced by his advocate ██████████ against the decision of the District Court of Prishtinë/Priština, dated 18 November 2005, and the appeal decision of the Supreme Court of Kosovo, dated 11 November 2008. By this request the defence proposes to annul the first and second instance decisions and to return the case to the first instance court for retrial so that ██████████ imposed a single punishment for the criminal offence of "organized crime" pursuant to section 2.4 of the UNMIK regulation 2001/22.

2. The request for protection of legality claims in essence:

- That the first and second instance decisions failed to present sufficient and admissible evidence as to the criminal offences and the punishment imposed;
- That the criminal law was infringed by the second instance court because it repeated the same violations as the first instance jurisdiction;
- That the UNMIK Regulation 2001/22 section 2.4 was violated because not one punishment was imposed for the crime of "organized crime" by the Supreme Court but instead and wrongly, a separate punishment for each account of the drugs related offences, the offence of illegal possession of arms and for the "organized crime" count, all resulting in a aggregated punishment.

The request argues that "in short "that "there is no single criminal offence of organized crime from section 2.4 of the UNMIK Regulation 2001/22, respectively 274 of the Criminal Code of Kosovo (CCK). A provision of section 2.4 of the above mentioned Regulation respectively of Article 274 of the CCK in terms of criminal law is called punitive provision [...]".

3. The Supreme Court, in the panel dealing with the request for the protection of legality:

- Considering the argumentation as to the jurisdictions "failed to present sufficient and admissible evidence", recalls Article 451 (2) of the KCCP by which a request for the protection of legality may not be filed on the ground of erroneous or incomplete determination of the factual situation. In so far the request of the defence refers to elements and evidence on which this factual assessment of the court is based this request can not be considered as admissible. Furthermore, within the framework and the limits of Article 455 of the KCCP, the defence does not specify by which, although largely and precisely motivated, the judicial decisions of the first and second instance jurisdiction, violated of the law. It has to be observed that the

second instance decision acquitted the defendant from counts A1 and A2. Finally the Court, in its *ex officio* legal analysis did not detect any illegality or contradiction in the motivation of the challenged decisions as to the reasoning leading to the punishment and/or the motivation on the punishment.

- This Court underlines that the rights of the defence were guaranteed by both jurisdictions and in particular as far as Article 6 of the European Convention of Human Rights (ECHR), the Constitution and the KCCP are concerned. This Court noticed as well that the defendant was convicted on charges, precisely qualified, which are included in the indictment, dated 20 September 2004, the amended indictment and the confirmation decision, dated 18 December 2004.
- Considering the argumentation as to the illegal punishment in so far the first and second jurisdiction should have imposed only one punishment instead of the aggregated punishment the Court underlines:

a) that the *ratio legis* (see introductory note prior to section 1 of the UNMIK Regulation 2001/22) and the wording of Regulation 2001/22, applicable in this case, are clear by defining “organized crime” as an autonomous crime and in this case as a separate crime. Indeed, Section 2.1 of Regulation 2001/22 clearly stipulates: “the penalties [...] for committing an organized crime are to be ADDED to the sentence imposed for committing the “serious crime” within the limits set out in Article 48 of the applicable Criminal Code” *emphasis added*. In this sense the crime of “organized crime” has its objective and moral substance which differs from the committed “serious crimes” for which the structured group is constituted “in order to obtain, directly or indirectly, a financial or other material benefit“ (*conferatur* section 1 of the UNMIK Regulation 2001/22).

In casu the “serious crimes” are the drugs related crimes of transfer and sale (on different dates and places and constituting separate crimes as correctly stated by the appeal’s court and accepted by this Supreme Court) as specified in the counts confirmed in the appeal court’s decision: A3, A4, A5.

- b) that the offence of “organized crime” is in line with the definition of a criminal offence, as stipulated in Article 8 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY): “a criminal act is a socially dangerous act which is defined by law as a criminal act, the characteristics of which are defined by law “ and more precisely defined in Article 6 of the CCK, namely: “an unlawful act which is defined by law as a criminal offence, the characteristics of which are defined by law and for which a criminal sanction [...] is prescribed by law”. The Regulation 2001/22 describes precisely the criminal act, its characteristics and its substantial elements. Moreover, the mentioned Regulation foresees also the different forms of participation in committing this crime and the sanctions to be imposed.
- c) that, contrary to the arguments of the defence, the provisions prescribed in Regulation 2001/22 / Article 274 of the CCK for the criminal offence of organized crime are NOT merely “*punitive provisions*” but the applicable

normative sanctions applicable when committing the autonomous offence of organized crime.

Therefore this unlawful act of organized crime, should NOT be defined as an "overall crime" absorbing the "serious crimes" (*in casu* counts A3, A4, A5), neither as an aggravating circumstance nor as a form of collaboration or assistance in crime.

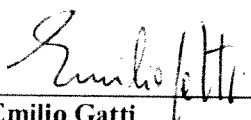
Q.S.

4. Conclusion:

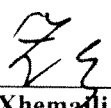
The Supreme Court through the procedure of Protection of Legality by reviewing the decisions of the jurisdictions as requested by the defence of [REDACTED] and within the limits of its competence (*conferatur* Articles 451-455 of the KCCP) considers that the reasoning leading to the conviction of the defendant and to the sanction imposed, the conviction and the sanction imposed (the aggregated punishment), are in conformity with the applicable law in Kosovo. The request of the defence for the protection of legality has to be, for the above mentioned reasons, REJECTED as being unfounded (*conferatur* Article 456 of the KCCP). The alleged "violation of Article 403, paragraph 1 items 10/12, paragraph 2 item 2, Article 404, item, 4 of the KCCP" (described in the request for protection of legality) by both jurisdictions is not founded.

Supreme Court of Kosovo
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Members of the panel:



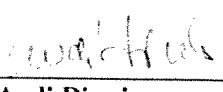
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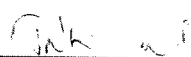
Avdi Dinaj
Supreme Court Judge

Presiding Judge:



Guy Van Craen
EULEX Judge

Recording officer:



Judit Eva Tatrai
EULEX Legal Office