

SUPREME COURT of KOSOVO

Supreme Court of Kosovo
Ap.-Kz. No. 167/2012
Prishtinë/Priština
07 August 2012

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) 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 (LoJ) on 07 August 2012 in the Supreme Court building in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge and EULEX Judges Martti Harsia and Tore Thomassen as well as Kosovo Supreme Court Judges Emine Mustafa and Salih Toplica as panel members

And with EULEX Legal Officer Holger Engelmann as court recorder,

In the presence of the

International Public Prosecutor Judith Eva Tatrai Office of the State Prosecutor of Kosovo (OSPK)

Defense Counsel Av. Gezim Kollcaku for the defendant Smajl GASHI,

In the criminal case number AP-KZ KA 602/11 resp. P.562/11 against the defendant:

S.G. [REDACTED], born on [REDACTED] Albanian, father's name [REDACTED] mother's maiden name [REDACTED] living in [REDACTED] secondary school education, occupied as labourer in the fields of ceramic tiles, average economic situation, unmarried, no children, currently detained in Dubrava Detention Centre;

In accordance with the Verdict of the first instance District Court of Prishtine/Pristina in the case no. KA 602/11 resp. P.562/11 dated 03 November 2011 and registered with the Registry of the District Court of Prishtine/Pristina on the same day, the defendant was found guilty of the following criminal offenses:

[i] Of the criminal offence of **Organized Crime**, contrary to 274 paragraph 3 of the CCK, because from 2008 to 2009 in Pristina, Peja and in other locations in Kosovo and abroad organized, established, managed and directed the activities of an organized criminal group dealing with trafficking of heroin from Kosovo to Switzerland;

[ii] Of the criminal offence of **Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances**, contrary to Article 229 paragraphs 3 and 4 (I) of the CCK, because from 2008 to 2009, in Pristina, Peja and in other locations in Kosovo, acting as a member of a group, on four occasions exported from Kosovo to Switzerland indefinite, but relevant quantities of heroine;

And therefore was convicted as follows:

To 6 years of imprisonment and 10.000 Euros of fine as to the criminal offense of **Organized Crime**, contrary to 274 paragraph 3 of the CCK;

To 4 years of imprisonment and 10.000 Euros of fine as to the criminal offense of **Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances**, contrary to Article 229 paragraphs 3 and 4 (I) of the CCK.

Pursuant to Article 71 paragraphs 1 and 2 of the CCK, an aggregate punishment of 6 years and six months of imprisonment and 15.000 Euros of fine was determined by the District Court.

It was moreover ruled that the fine had to be paid within three months from the day the Judgment would become final and that regarding the imprisonment the time spent in detention on remand by the defendant from 04 May 2011 until the Judgment would become final was to be credited pursuant to Article 391 paragraph 1, sub-paragraph 5 and Article 278 paragraph 7 of the KCCP.

The defendant was obliged to reimburse the costs of the criminal proceedings pursuant to Article 102 paragraph 1 of the KCCP with the exception of the costs of interpretation and translation.

The Defense Counsel of the defendant timely filed an appeal dated 26 March 2012 against the Verdict. It was asserted that the punishment imposed upon the defendant was too high and that *"the words 'organized crime' should be vanished because from 7 years on these words are applicable"*.

The SPRK responded to the appeal of the Defense Counsel on 26 April 2012, pointing out on their opinion according to which the decision of the District Court is in compliance with the law and the Confirmation Judge was competent to issue a Judgment, due to the interpretation of Article 308A of the KCCP as *lex specialis* in relation to Articles 309 through 317 of the KCCP.

The OSPK, with a response dated 31 May 2012 and registered with the Registry of the Supreme Court of Kosovo on 4 June 2012 proposed to partly grant the appeal lodged by the Defense Counsel and, pursuant to Article 420 paragraph 1 item 3 of the KCCP, to annul the Judgment and return the case to the Confirmation Judge of the District Court of Prishtine/Pristina with the following instructions:

- a) To decide on the confirmation of the indictment (and eventual detention on remand if it expires when the case is under his/her competence); and
- b) To send the case, once – and if – the indictment is confirmed, to the trial panel for the decision on the Guilty Plea Agreement reached by the parties.

Based on the written Verdict in case KA 602/11 resp. P.562/11 dated 03 November 2011 of the District Court of Prishtine/Pristina, the submitted written appeals of the defendant, the relevant file records and the oral submissions of the parties during the hearing session on 07 August 2012, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 07 August 2012, hereby issues the following:

RULING

(1) The Judgment of the District Court of Prishtinë/Priština P. No. 562/2011, dated 3 November 2011 is *ex officio* ANNULLED and the case is RETURNED FOR RETRIAL.

(2) The appeal of the Defence Counsel filed on behalf of the defendant against the aforementioned Judgment is not considered in the merits and is set aside.

REASONING

Procedural History

A Ruling on Initiation of Investigation against the defendant was issued on 14 January 2010 by the District Court of Prishtine/Pristina, after a first such Ruling as filed on 23 September 2009 turned out to be directed against the wrong person, wearing by chance the same name as the defendant.

As of 05 May 2011 the defendant was placed and later kept in detention, based upon an initial detention hearing on 05 May 2011 and several interlocutory rulings on extension of detention on remand. By ruling issued on 03 November 2011 detention was ordered until the Judgment would become final.

An Indictment was filed against the defendant with the District Court of Prishtine/Pristina on 12 September 2011, charging the defendant with **Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Substances**, contrary to Article 229 paragraphs 3 and 4 (I) of the CCK and with **Organized Crime**, contrary to 274 paragraph 3 of the CCK.

It was asserted that the defendant, who was arrested together with two other Kosovo Albanians in Switzerland on 18 January 2009, was involved in the trafficking of 12,5 kg of heroin, which the latter had been seized on the occasion mentioned. According to

information provided by Swiss authorities, the defendant allegedly was one of the organizers of drug trafficking from Kosovo throughout Western European countries and was acting with the support of other accomplices.

A first Confirmation Hearing was scheduled in front of the Confirmation Judge at the District Court of Prishtine/Pristina on 26 October 2011, and a Guilty Plea Agreement was presented by the parties and accepted by the Judge.

On 03 November 2011 a Confirmation Hearing was held at the District Court of Prishtine/Pristina. The defendant and his Defense Counsel waived the right of a confirmation hearing and a main trial session and asked for the issuance of a sentence decision in line with the Guilty Plea Agreement.

Based upon Article 308A paragraph 15 of the KCCP (and having in mind also paragraph 12 of the same provision), the Confirmation Judge of the District Court of Prishtine/Pristina issued the challenged Judgment at the end of the Confirmation session on 03 November 2011.

The Defense Counsel of the defendant timely filed an appeal dated 26 March 2012 against the Verdict and asserted as pointed out before.

The SPRK responded to the appeal of the Defense Counsel on 26 April 2012, thus pointing out on their interpretation according to which the word 'Court' as used in Article 308A paragraph 15 of the KCCP can be understood autonomously from the framework of the KCCP within the context of the Law No. 03/L-003 on Amendment and Supplementation of the Kosovo Provisional Code of Criminal Procedure No. 2003/26, dated 06 November 2008.

The OSPK, with a response dated 31 May 2012 and registered with the Registry of the Supreme Court of Kosovo dated 04 June 2012 proposed to partly grant the appeal lodged by the Defense Counsel as pointed out before.

FINDINGS OF THE COURT

A. Appeal filed in time:

The question appears whether or not the appeal dated 26 March 2012 as filed by the Defense Counsel against the challenged decision was filed in time in accordance with Article 398 paragraph 1 of the KCCP.

The Supreme Court finds that no other information can be derived from the case files than that the challenged ruling was served to the defendant and his Defense Counsel on 16 March 2012, which implicates in the favor of the defendant that the appeal dated 26 March 2012 was filed within the deadline of fifteen days from the day when "*a copy of the judgment was served*", so that it has to be considered as filed in time.

B. Substantial violation of the provisions of the Criminal Procedure

Despite the fact that also the enacting clause of the challenged decision is insufficient and not in compliance with the requirements of the law, in that all reference to whatsoever kind of decisive facts is missing, the focus of the Supreme Court in the case at hand exclusively refers to the question of whether or not the Confirmation Judge can be competent to immediately render a Judgment. Although the issue was not appealed by the Defense, the court of second instance has to examine this aspect of the Judgment *ex officio* as per Article 415 paragraph 1 item 1 as read with Article 403 paragraph 1 item 1 of the KCCP. In addition, the issue was also challenged by the OSPK opinion dated 31 May 2012.

I. PRIORITY OF THE ENGLISH, ALBANIAN AND/OR SERBIAN VERSION OF ARTICLE 308A OF THE KCCP:

Prior to a material decision and on the background of Article 556 of the KCCP the question arises whether the English or the Albanian and/or Serbian version of Article 308A of the KCCP prevails. Whilst according to the English version of Article 308A paragraph 1 of the KCCP negotiations on the terms of a written plea agreement may be conducted “[a]t any time following the filing of the indictment and before the completion of the court trial”, the Albanian and Serbian version of the same provision provide that negotiations regarding a guilty plea agreement “may begin only after the indictment has been confirmed and before the main trial has commenced”. The difference between both versions clearly can be found in the fact that according to the Albanian and Serbian version of the law even in the case of guilty plea agreement the confirmation judge is limited to his role as defined by the law and thus is supposed to finish the confirmation stage of the case by a proper ruling, before the consequences of a guilty plea agreement may be assessed in the course of a main trial session, whilst the English version gives the impression that after the filing of the indictment the case can be finalized in an appropriate way based upon a guilty plea agreement, but not necessarily only in the main trial stage.

The Supreme Court finds that despite Article 556 of the KCCP according to which “[t]he English, Albanian and Serbian versions of the present Code are equally authentic” but that “[i]n case of conflict the English language version shall prevail”, does not apply in the case at hand and that with regards to Article 308A of the KCCP the Albanian language version of the provision must prevail. This interpretation is based upon the fact that the KCCP as a whole in its original version, i.e. including the referred Article 556 of the KCCP was implemented as an UNMIK Regulation in the year 2004, originally in English language, but that Article 308A of the KCCP was introduced by the Law No. 03/L-003 on Amendment and Supplementation of the Kosovo Provisional Code of Criminal Procedure No. 2003/26, dated 06 November 2008, which the latter in its original version is a Kosovo Law, drafted in Albanian language.

II. THE ROLE OF THE CONFIRMATION JUDGE IN ACCORDANCE WITH ARTICLE 308A OF THE KCCP:

The Supreme Court finds that Article 308A paragraph 15 of the KCCP as introduced by Article 6 of the Law on Amendment and Supplementation of the Kosovo Provisional Code of Criminal Procedure No. 2003/26 (Law No. 03/L-003), dated 06 November 2008, does not provide a legal basis for the Confirmation Judge to render a Judgment. This is very clear and does not need any further interpretation considering the referred Albanian and Serbian language versions of the provision. However, the English language version does not allow for any other interpretation either.

In the case at hand, the Confirmation Judge has assessed whether or not all conditions and requirements of the law regarding a Guilty Plea Agreement are met and in line with Article 308A paragraph 12 of the KCCP. After the Confirmation Judge was satisfied that the Guilty Plea Agreement presented to him was in compliance with the referred legal requirements, he has accepted it in accordance with Article 308A paragraph 15 of the KCCP and ordered it to be filed with the Court.

However, the Confirmation Judge then has continued to proceed as suggested by Article 308A paragraph 15 of the KCCP and – after the parties have made their statements – instead of rendering a ruling in compliance with Articles 309 ff. of the KCCP has rendered a Judgment and imposed a punishment upon the defendant, thus reading the provision of Article 308A paragraph 15 of the KCCP as a legal basis for him to shorten criminal court proceedings in that he would be competent to immediately issue a Judgment, but without holding a main trial session.

Article 308A paragraph 15 of the KCCP (in its English version) reads as follows:

If the court is satisfied that all of the conditions set forth in paragraph 12 of the present article are established, the court shall accept the guilty plea agreement and order that the agreement be filed with the court. The court shall set a date for the parties to make their statements regarding sentencing after which the court shall impose the punishment. This date, however, may be deferred for the defendant to serve as a co-operative witness.

For a solution of this question it is decisive, whether or not the confirmation judge can be considered as 'the court' in the meaning of Article 308A paragraph 15 of the KCCP. Only in this case, a competence of the confirmation judge to render a judgment can be derived from the provision.

An answer can be found through legal analysis and interpretation of the law based upon the wording of the relevant provision, its systematic context and its *ratio legis*.

1. **The wording of Article 308A paragraph 15 of the KCCP provides for 'the court' to impose a punishment upon the defendant. Therefore, the question needs to be raised whether or not the confirmation judge can be considered as 'the court' in this meaning.**

Although the law does not provide any legal definition on what a 'court' is, an answer can be found nevertheless reading Article 151 of the KCCP on legal definitions, which provides under item 12 that "[t]he term 'confirmation hearing' means a hearing at which a judge renders a ruling on the indictment and the defendant is afforded an opportunity to plead guilty or not guilty [...]", whereas according to item 14 of the same provision "[t]he term 'presiding judge' means the presiding judge of a trial panel, an individual judge when proceedings are conducted under Article 22 paragraph 2 of the present Code, a single judge who conducts proceedings on the confirmation of the indictment or the presiding judge of an appellate panel or a panel which decides on an extraordinary legal remedy".

The wording of the provision as read together with the wording of other relevant provisions of the KCCP with regards to the confirmation phase does not provide for an interpretation according to which Article 308A paragraph 15 of the KCCP wants to introduce a specific 'agreement' different from the regular guilty plea, as suggested by the SPRK in their opinion dated 26 April 2012. The latter in particular becomes clear when analyzing the systematic context and the *ratio legis* of Article 308A paragraph 15 of the KCCP with regards to the confirmation phase in total.

From this – as well as from the use of the term 'final court judgment' in Article 151 item 13 of the KCCP it derives that the confirmation judge has only limited competences, which cannot be exceeded beyond the score of the confirmation stage of each case and that in particular s/he cannot be considered as a 'court' in the sense of Article 308A paragraph 15 of the KCCP.

2. **The systematic context of Article 308A of the KCCP amongst the provisions on the confirmation hearing does not allow concluding that the confirmation judge under certain circumstances is empowered to immediately issue a judgment, thus depriving the defendant of numerous legal remedies and other possibilities to defend himself in the course of a main trial and thereafter.** From the systematic context of Article 308A of the KCCP it can only be concluded that the provision describes the competences of the confirmation judge, when a guilty plea agreement was reached and up to the point when the judge was satisfied with the agreement and has accepted it. Having in mind that Article 308 A of the KCCP was introduced just as a supplementation to the provisions on the confirmation stage as laid down in Articles 309 through 318 of the KCCP, it becomes clear that the competence of the confirmation judge is limited to the conduct of a confirmation hearing and – based upon its results – to the issuance of a confirmation ruling, thus confirming or rejecting the indictment. It is also clear beyond all doubts that the defendant at the confirmation stage under certain conditions can waive his rights to undergo a confirmation hearing and have the indictment reviewed together with the evidence presented.

However, in particular Article 311 paragraph 2 of the KCCP clearly reads that the confirmation judge in such a case shall render a ruling to accept the waiver. Also the decision on the confirmation of the indictment needs to be issued in the form of a ruling, pursuant to Article 312 of the KCCP, which both of them can be appealed pursuant to Article 317 paragraph 2 and Articles 431 ff. of the KCCP. It is

undisputed that the defendant may of course waive his/her rights to challenge the indictment and the evidence, but nothing else and in particular not the main trial.

3. **The *ratio legis* of Article 308A of the KCCP**, also in the lights of what was said before, needs to be limited to the possibility to avoid a lengthy and detailed confirmation procedure in cases, where the evidence and the participation of the defendant in a criminal activity are merely undisputed. Only on this background the provision can be read as *lex posterior* and *lex specialis* to all the other provisions concerning the confirmation procedure as suggested by the SPRK in their opinion dated 26 April 2012.

The KCCP does not provide a legal structure similar to the tool of a 'punishment order' as known in several European countries such as Germany, within which in certain clearly defined cases a written punishment order can be sent out to the defendant, given that nothing else than a fine or a short-term punishment of not more than six months of imprisonment can be expected. This in particular becomes clear having in mind that the law does not provide for any possibility to waive also the main trial as erroneously ruled out by the challenged Judgment (p.1 of the challenged Judgment in its English version) in the case at hand. As one of the leading ideas behind this fact it may of course be considered that the main trial guarantees a careful and much deeper assessment of facts and evidence, as it can be conducted by the (single) confirmation judge in the course of a summary assessment.

This is in particular true in a case like the one at hand, where also the charges regarding alleged Organized Crime are under discussion, a maximum punishment expectation of up to 20 years is at stake and a five-judge panel would need to rule upon the case in the main-trial stage, pursuant to Article 24 of the KCCP¹.

At the other side, the law arms the defendant with a number of legal remedies in the course of the conduct of the main trial session as well as regarding the final decision, which all of them would be cut off by the possibility to waive a possible main trial session already at the confirmation stage.

Therefore, the issuance of a Judgment by the Confirmation Judge in the case at hand represents a most serious violation of the provisions of criminal procedure, pursuant to Article 403 paragraph 1 item 1 of the KCCP, which is why the challenged decision needs to be annulled and sent back to the District Court for proper proceedings.

C. Substantial violation of the Criminal Law

Considering the aforementioned findings, it is left open in the case at hand, whether or not also the criminal law was violated by the District Court, as it in particular was challenged by the Defense Counsel, stressing that "*the words 'organized crime' should be vanished because from 7 years on these words are applicable*".

¹ UNMiK Regulation 2000/64 On Assignment of International Judges/Prosecutors and/or Change of Venue, Section 2.1 in conjunction with Article 3.7 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo prescribe in case of participation of international judges in this situation a panel of only three professional judges.

D. Decision on the punishment

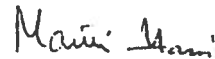
Considering the findings under count A. of this ruling, the Supreme Court does not take any stand on the question of the punishment being fair and balanced or not. A decision in this regard will be subject to a possible main trial session, in case the Indictment will be confirmed.

For the foregoing reasons the Supreme Court decided as in the enacting clause.

Members of the panel:



Emine Mustafa
Supreme Court Judge



Martti Harsia
EULEX Judge



Salih Toplica
Supreme Court Judge



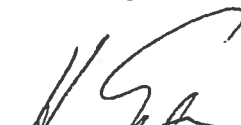
Tore Thomassen
EULEX Judge

Presiding Judge:

Recording Clerk



Gerrit-Marc Sprenger
EULEX Judge



Holger Engelmann
EULEX Legal Officer

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