

SUPREME COURT OF KOSOVO

Case number: Pml.Kzz. 159/2016

Date: 5 October 2016

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in the Panel composed of the Supreme Court Judge Nesrin Lushta (Presiding), EULEX Judge Anna Adamska – Gallant (Reporting) and the Supreme Court Judge Valdete Daka as Panel members, assisted by EULEX Legal Officer Maja Mähl as the Recording Officer,

in the criminal case against:

I. S.M.1;

II. S.M.2;

acquitted by the Judgment of the Basic Court of Pristina P. no. 958/12 dated 6 November 2014 confirmed by the Judgment of the Court of Appeals PAKR no. 146/15 dated 2 October 2015 of the criminal offences of;

1. War crime against the civilian population contrary to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, currently criminalized under Articles 31 and 152 (2) of the Criminal Code of the Republic of Kosovo (CCK)¹, in violation of Article 3 common to the four Geneva Conventions of 12 August 1949 (“common Article 3”) and Articles 1 and 17 of Protocol II of 8 June 1977, Additional to the 1949 Geneva Conventions (“Additional Protocol II”), all rules of international law effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present charge the defendants in their capacity as Serbian military or paramilitary members, in co-perpetration with each other and with other Serbian military or paramilitary members, including S.F., I.P., D.T., S.T.1 and N.P., treated inhumanely S.B. and H.D., two civilians not taking part in the hostilities, by keeping them detained in inhuman conditions (filthiness, lack of food, water and medical care); in around Novobërdë/Novo Brdo between 19 and 22 April 1999;

2. War crime against the civilian population contrary to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, currently criminalized under Articles 31 and 152 (2) of the CCK, in violation of common Article 3 and Articles 1 and 17 of Additional Protocol II, all rules of international law effective at the time of the

¹ The (new) Criminal Code of the Republic of Kosovo (CCK) entered into force on 1 January 2013. The current criminalization is therefore governed by the CCK and not – as referred to in the challenged Judgments – the Provisional Criminal Code of Kosovo.

internal armed conflict in Kosovo and at all times relevant to the present charge the defendants in their capacity as Serbian military or paramilitary officers, including D.T., S.T.1, S.T.2 and N.P., violated the bodily integrity and health of S.B. and H.D, two civilians not taking part in the hostilities, by repeatedly beating them, in and around Novobërdë/Novo Brdo between 17 and 21 April 1999;

and

III. S.S;

acquitted by Judgment of the Basic Court of Pristina P. no. 958/12 dated 6 November 2014 and Judgment of the Court of Appeals PAKR no. 146/15 dated 2 October 2015 of the criminal offence of;

War crime against the civilian population contrary to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, currently criminalized under Articles 31 and 152 (2) of the CCK, in violation of common Article 3 and Articles 1 and 17 of Additional Protocol II, all rules of international law effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present charge the defendant in her capacity as Serbian police officer or paramilitary member, in co-perpetration with other Serbian military or paramilitary officers, violated the bodily integrity and health of S.B. and H.D., two civilians not taking part in the hostilities, by beating them, and particular by striking H.D. on the head with wooden trunk in Novobërdë/Novo Brdo in or about 21 April 1999;

acting upon the Request for Protection of Legality filed on 22 February 2016 by the Chief State Prosecutor against the Judgment of the Basic Court of Pristina P. no. 958/12 dated 6 November 2014 and the Judgment of the Court of Appeals PAKR no. 146/15 dated 2 October 2015;

having considered the response filed by defence counsel D.V. on 29 July 2016;

having deliberated and voted on 5 October 2016;

pursuant to Articles 418 and 432—441 of the Criminal Procedure Code (hereafter: the CPC)

renders the following

JUDGMENT

1. The Request for Protection of Legality filed by the Chief State Prosecutor against the Judgment of the Basic Court of Pristina P. No. 958/12 dated 6 November 2014 and the Judgment of the Court of Appeals PAKR No. 146/15 dated 2 October 2015 is hereby granted.

2. The Supreme Court of Kosovo establishes that the challenged Judgments pursuant to Article 384 (1.12) of the CPC contain substantial violation of the provisions of criminal procedure, namely Article 370 (7) of the CPC.

REASONING

I. Relevant Procedural History

1. On 20 November 2010, the Special Prosecutor of the Republic of Kosovo (hereafter: SPRK Prosecutor) filed Indictment PPS no. 240/09 against the defendants for the criminal offences described above. On 31 March 2011, the indictment was entirely confirmed.
2. The first main trial commenced on 7 June 2011 and was concluded on 20 July 2011. It was held before a Panel of the (then) District Court of Pristina composed of two EULEX judges and one local judge. On 22 July 2011, the District Court announced Judgment P. no. 445/10 by which the defendants were acquitted of all the charges brought against them because it was not proved that they committed the acts they were accused of.
3. The District Court's factual and legal findings in Judgment P. no. 445/10 can be summarized as follows:

The pivotal piece of evidence in the main trial consisted of the statements of the two victims S.B. and H.D. Among these two witnesses, only S.B. claimed to have been able to recognize the persons who were beating and torturing him and H.D. Other witnesses' statements and the declarations of the defendants only confirmed mere side circumstances. Because of this, the Panel concluded that it was of paramount importance to carefully assess the reliability of the recognition made by S.B.

The following statements by S.B. were assessed by the Panel:

- 1) Statement given before the UNMIK police on 21 September 2000
- 2) Written statement provided to the investigators on 10 September 2007
- 3) Other statements given before the police and the Prosecutor
- 4) Statements given during the main trial

When comparing the statements given by S.B, the Panel concluded that they included many contradictions, discrepancies and inconsistencies. This led the Panel to the conclusion that S.B's statements were unfit to ground the convictions of the defendants. Since no other piece of evidence proved that the defendants were responsible for the torture, the defendants were acquitted of all the charges brought against them.

4. SPRK Prosecutor appealed the abovementioned Judgment and argued that it was based on inadmissible evidence since legal provisions were not respected during statements given by S.B. on 21 September 2000 and in 2007 and 2008.

5. With Ruling PAKR no. 978/12 dated 25 July 2013, the Court of Appeals granted the appeal, annulled the District Court's Judgment and returned the case to the Basic Court of Pristina for reconsideration and retrial. The Court of Appeals concluded: The Basic Court had based its verdict mainly on the statement given by S.B. on 21 September 2000. This statement is not inadmissible but includes several violations of law² why it could not be considered a correct witness statement as such. The statement given by S.B. in 2000 and the written statement provided by him in 2007 are very short and are lacking of details. The omissions of the defendants' names as perpetrators in these two statements had not been properly examined at the main trial. The violations may have influenced the rendering of a lawful and proper judgment, especially since the Basic Court had relied on the statements of 2000 and 2007 to such a considerable extent.
6. The re-trial commenced on 4 November 2013 and was concluded on 6 November 2014. It was held before a Panel of the Basic Court of Pristina composed of two EULEX judges and one local judge. S.B. was, amongst others, heard again. For the purpose of evaluating his personality, the Panel also appointed a panel of experts consisting of H.K. and J.M., EULEX psychologists, and S.U., clinical psychologist within the University Clinical Center of Kosovo. During the re-trial, the court heard the testimony of H.K. and S.U.
7. In Judgment P. no. 958/12 dated 6 November 2014 (hereafter: the first instance judgment), the Basic Court acquitted the defendants of all the charges brought against them because it was not proved that the defendants committed the acts they were accused of. The Basic Court concluded that the evidentiary situation had not changed since the announcement of the Judgment of 2011 and that it could not be affirmed beyond reasonable doubt that the defendants took an active part in the crimes of which they were accused.
8. SPRK Prosecutor appealed the first instance judgment. In Judgment PAKR no. 146/15 dated 2 October 2015 (hereafter: the second instance judgment), the Court of Appeals rejected the appeal and affirmed the first instance judgment.
9. On 22 February 2016, the Chief State Prosecutor (hereafter: the Prosecutor) filed the Request for Protection of Legality against the first and second instance judgments. On 29 July 2016, defence counsel D.V. filed a response to the Request.

III. Submissions of Parties

The Request filed by the Prosecutor

² According to the Court of Appeals, the violations of law consisted of the fact that the record of the statement did not contain information about the persons who were present, who wrote it down or whether or not S.B. had been informed of his rights and obligations provided by law. In addition, the statement was never translated into Albanian and was not signed by S.B.

10. The Prosecutor proposes that the Supreme Court pursuant to Article 438 (2) of the CPC establishes that the challenged Judgments contain substantial violations of the provisions of criminal procedure, namely Article 370 (7) *ibid*. She states:
- a. In violation of Articles 361 (1) and 370 (7) of the CPC, the challenged Judgments are in contradiction with the case file documents, namely the opinions provided by the expert witnesses.
 - b. The challenged Judgments are in violation of the instructions given in Ruling PAKR no. 146/2015 dated 25 July 2013. Despite the remarks made by the Court of Appeals, the courts have relied completely on the District Court's Judgment of 2011. The courts have not taken into consideration that the rights of S.B. were violated when giving statements during the period between 2000 and 2009. In none of these statements was S.B. notified of his right to read the statements and make necessary adjustments. This means that the interrogations were conducted in violation of Articles 80 and 87 of the CPC.
 - c. The challenged Judgments do not contain any reasoning on what evidence the courts relied on when they concluded that S.M.1 has "given" food to S.B. During the main trial S.B. stated that S.M.1 had *sold* him food items from the military kitchen where he worked. This conflicting fact has not been justified by the courts.

The Reply filed by defence counsel D.V.

11. The defence counsel D.V. moves the Supreme Court to reject the Request as unfounded. He stands by his closing statement and refers to the reasoning of the challenged Judgments.

III. Findings of the Supreme Court

Competence of the Supreme Court

12. Pursuant to Articles 21 and 22 of the Law on Courts (Law no. 03/L-199), the Supreme Court is the competent court to adjudicate upon this matter.
13. In accordance with the Law on Courts and the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo³, the case is considered as an "Ongoing case". Consequently, the Panel is composed of a majority of local judges and presided by a local judge.

Applicable Procedural Law

³ Law 03/L-053 as amended by Laws no. 04/L-273 and 05/L-103.

14. The Request was filed after the CPC entered into force on 1 January 2013. The course of proceedings before the Supreme Court is therefore governed by the CPC (Article 539 of the CPC).
15. The indictment in the criminal proceedings which preceded the rendering of the challenged Judgments was filed and confirmed before the CPC entered into force. Pursuant to Articles 539 and 544 of the CPC, the criminal proceeding of relevance to the merits of the Request was governed by the UNMIK Provisional Criminal Procedure Code of Kosovo (hereafter: PCPC).

Admissibility of the Request

16. The Request is admissible. It was filed by an authorized person as indicated in Article 433 (1) of the CPC, against final judgments pursuant to Article 432 (1) *ibid*, and within the time limit prescribed by Article 433 (2) *ibid*.

Merits of the Request

17. The Prosecutor has proposed that the Supreme Court establishes that the challenged Judgments pursuant to Article 384 (1.12) of the CPC contain substantial violation of criminal procedure, namely Article 370 (7) of the CPC.
18. Article 370 (7) of the CPC, which is identical to Article 396 (7) of the PCPC, regulates the form and content of the written judgment with regards to the court's factual evaluation. It stipulates the minimum requirements of the court's reasoning and provides a guarantee that the court in its judgment gives thorough and clear explanations for its conclusions. Article 370 (7) of the CPC and Article 396 (7) of the PCPC read as follows:

The court shall state clearly and exhaustively which facts it considers proven or not proven, as well as the grounds for this. The court shall also, in particular, make an evaluation of the credibility of conflicting evidence, the grounds for not approving individual motions of the parties, and the reasons by which the court was guided in settling points of law and, in particular, in establishing the existence of a criminal offence and the criminal liability of the accused, as well as in applying specific provisions of criminal law to the accused and his or her act.

19. Initially, the Panel wishes to stress that it is bound to only examine those violations of law which the requesting party alleges in his/her request (Article 436 of the CPC). Because of this, the party who files the request must provide the Panel with sufficient explanations on the alleged violations. This applies in particular when the person who files the request is a lawyer by profession and is even more important when the request is filed by the Prosecutor. Since the Prosecutor's allegations might be to the detriment of the defendant, it is not appropriate for the Panel to make assumptions or guess what the Prosecutor alleges or to *ex officio* invent suitable legal grounds for the claims.

20. In several parts of the request, the Panel is of the opinion that the Prosecutor has failed to provide the Panel with sufficient explanations on how the courts' actions constitute a violation of law or the legal provisions that might have been violated by the courts. This apply to the claim that the first and second instance judgments are in violation of the instructions given by the Court of Appeals in Ruling PAKR no. 978/12 dated 25 July 2013 and the claim that the courts did not take into consideration that the rights of the injured party were violated when giving statements during the period between 2000 and 2009. The Panel notes that these allegations clearly do not relate to the form and content of the written judgments in relation to Article 370 (7) of the CPC. Since no other clear explanation or legal ground is provided in the Request, the Panel concludes that these allegations are unfounded.
21. Secondly, the Panel will address the Prosecutor's claim that the challenged Judgments are in violation of Article 370 (7) of the CPC because the enacting clause and the reasoning provided by the courts are contradictory to the expert witnesses' opinions. In this regard, the Prosecutor also refers to Article 361 (1) *ibid*, which prescribes that the court shall base its judgment solely on the facts and evidence considered at the main trial. The Panel notes that this allegation clearly questions the factual determination made by the courts. The expert witnesses whose opinions the Prosecutor is referring to were heard at the re-trial. Their opinions and statements have been evaluated by the courts when establishing the credibility of S.B. This establishment has been a crucial step for both courts when evaluating the evidence and thereby determining the factual situation. According to Article 432 (2) of the CPC, a request for protection of legality is not allowed on the ground of an erroneous determination of the factual situation. For that reason, the Panel cannot assess the merits of this allegation.
22. In light of the conclusions above, the Panel concludes that the only part of the Request which the Panel can address with regards to its merits is the general allegation that the first and second instance judgments are not drawn up in accordance with Article 370 (7) of the CPC. The Prosecutor has not provided a clear explanation on how the judgments do not meet the minimum requirements set out in Article 370 (7) *ibid*. However, since the Prosecutor clearly refers to this alleged violation, the Panel has decided that it is obliged to assess this allegation by thoroughly reading the first and second instance judgments and examine if the requirements of Article 370 (7) of the CPC are met. The Panel has thereafter concluded that the Request in this regard is well-founded. In paragraphs 23—26, the Panel will address the deficiencies of the first and second instance judgments.
23. The Panel initially notes that the instructions given by the Court of Appeals in Ruling PAKR no. 978/12 did not steer the Panels in the re-trial to reach a specific outcome. However, in light of the remarks made by the Court of Appeals regarding the deficiencies of the statements of 2000 and 2007, the Panel finds that it was of paramount importance that the courts in the re-trial clearly and exhaustively addressed the issues pointed out by the Court of Appeals and thoroughly explained why the courts came to the same conclusions as during the first trial. This was in particular important since the courts did not fully agree with the expert witnesses appointed by the courts. The Panel fully concurs with the Court of Appeals (see paragraph 4 of the second instance judgment) that the expertise and subsequent statement of the expert witnesses is to be considered as one piece of evidence assessed in the whole context of the

evidence provided within the proceedings. However, when the court does not concur with an expert appointed by the court, the Panel is of the opinion that the court pursuant to Article 370 (7) of the CPC is obliged to thoroughly explain its reasons for that conclusion.

24. In the first instance judgment, the Basic Court addresses the deficiencies of the statements of 2000 and 2007 as follows:
 - a. Statement of 2000: The Basic Court addresses the deficiencies of this statement only as follows (page 23 of the first instance judgment): “The court is aware that this statement has not fulfilled all necessary requirements but definitely was not fabricated. The omission of the names in first statement was justified by S.B. as incorrectness in translation of recording same argumentation was used S.B. also in front this panel”. After these two sentences, the Basic Court moves on to its conclusion that it shares the opinion of the previous first instance panel and quotes the first instance judgment in this part. From the following parts of the Basic Court’s reasoning, it is clear that the statement of 2000 is considered to a considerable extend since it is referred to several times without any reference to its deficiencies.
 - b. Statement of 2007: The Basic Court does not in one single sentence address the deficiencies of this statement. However, from the Basic Court’s reasoning it is clear that also this statement is considered to a considerable extend since it is referred to several times.
25. The Panel concludes that the reasoning of the first instance judgment fails to thoroughly and clearly address the issues raised by the Court of Appeals in PAKR no. 978/12 dated 25 July 2013 and to provide sufficient explanations on how the statements of 2000 and 2007 were to be considered and why the mentioned deficiencies did not affect the outcome of the case. The Panel notes that the second instance judgment addresses the deficiencies of the statements of 2000 and 2007 more thoroughly than in the first instance judgment. However, the Panel is of the opinion that also the second instance judgment fails to thoroughly answer these important questions. Consequently, the Panel concludes that the first and second instance judgments in this regard do not meet the requirements set out in Article 370 (7) of the CPC.
26. In relation to the opinions of the expert witnesses, the Panel finds that the Basic Court also in this regard failed to provide a clear and sufficient explanation on why the Panel did not rely on the expert witnesses’ opinions. It is not clear in the first instance judgment why the Basic Court considered its own understanding of the psychology of “justice after violent conflict” more reliable than the expert’s opinion that S.B.’s motivation “was for justice, not vengeance”. In the second instance judgment, the Court of Appeals clearly addresses the opinions of the expert witnesses and thoroughly elaborates on why it does not share the expert’s opinion (see paragraphs 27—30 of the second instance judgment). For these reasons, the Panel concludes that in this regard only the first instance judgment does not meet the requirements set out in Article 370 (7) of the CPC.

IV. Conclusion

Having considered the above, the Supreme Court of Kosovo decided as in the enacting clause of this Judgment.

THE SUPREME COURT OF KOSOVO

PRISTINA

PML.KZZ 159/2016, dated 5 October 2016

Presiding judge:

Recording officer:

Nesrin Lushta
Supreme Court Judge

Maja Mähl
EULEX Legal Officer

Members of the panel:

Anna Adamska – Gallant
EULEX Judge (Reporting)

Valdete Daka
Supreme Court Judge