

SUPREME COURT

Case number: Pml.Kzz 72/2015
(P. nr. 14/2013 Basic Court of Mitrovica)
(PAKR 55/14 Court of Appeals)

Date: 13 October 2015

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Malcolm Simmons (Presiding and Reporting), and EULEX Judge Rolandus Bruin, and Supreme Court Judge Salih Toplica as Panel members, and EULEX Legal Officer Kerry Moyes as the Recording Officer, in the criminal case number P. nr. 14/2013 before the Basic Court of Mitrovica against;

RG, in detention on remand since 15 November 2012,

et al

charged (with 2 co-accused) in Indictment no. PP. 81/2012 filed on 12 December 2012, as amended on 17 January 2013;

convicted as follows;

Count 1 of the Indictment for the criminal offence of **War Crimes against the Civilian Population** committed in co-perpetration (with 2 co-accused) for the death of **GB**, under Articles 22 and 142 of the CC SFRY, currently under Articles 31 and 152 (2.1) of the CCRK, in violation of Article 3 common to the four Geneva Conventions of 12 August 1949 and of Article 4 of Protocol II of 8th June 1977, additional to the Geneva Conventions. He was sentenced to 12 years' imprisonment, which was modified on appeal to 8 years' imprisonment.

acting upon the Request for Protection of Legality filed at the Basic Court of Mitrovica by defense counsel Mahmut Halimi on behalf of the defendant **RG** on 30 January 2015 against the Judgment of the Basic Court of Mitrovica P. nr. 14/2013 dated 12 September 2013 and the Judgment of the Court of Appeals PAKR 55/14 dated 29 October 2014;

having considered the Reply to the Request by the State Prosecutor KMLP. II - ZZZK.II No. 54/2015 filed on 23 March 2015;

having deliberated and voted on 13 October 2015;

pursuant to Articles 418 and Articles 432-441 of the Criminal Procedure Code (CPC)

renders the following

JUDGMENT

The Request for Protection of Legality filed by defense counsel Mahmut Halimi on behalf of the defendant RG on 30 January 2015 against the Judgment of the Basic Court of Mitrovica P. nr. 14/2013 dated 12 September 2013 and the Judgment of the Court of Appeals PAKR 55/14 dated 29 October 2014 is rejected as unfounded.

REASONING

1. Procedural background

1.1 The criminal investigation into this case was initiated against **RG** and 2 co-accused on 14 August 2012 by the EULEX prosecutor of the Special Prosecution Office of the Republic of Kosovo (SPRK) for one count of the criminal offence of **War Crimes against Civilian Population**. The investigation was expanded by a Ruling dated 10 December 2012 to include a second count. On 12 December 2012 the special prosecutor filed Indictment PP.no 81/2012 dated 11 December 2012, and an amended Indictment was filed on 17 January 2013.

1.2 The Main trial was held between June and August 2013 at the Basic Court of Mitrovica, and on 12 September 2013 the verdict was announced. The written Judgment was served to the parties in early December 2013. All 3 co-accused appealed against their conviction and sentence.

1.3 At the first session of the Appellate Panel on 30 September 2014 the defence filed a request for disqualification of the Appellate Panel. The session was adjourned and the request transferred to the President of the Court of Appeals, who on 9 October 2014 rejected the request as unfounded. A second session was held on 28 October 2014, and the Appellate Panel deliberated and voted on 29 October 2014. The Court of Appeals modified the Judgment of the Basic Court of Mitrovica: the defendant's sentence (and those of the other defendants) was reduced to 8 years' imprisonment. The remaining parts of the defendant's appeal were rejected as unfounded and the Judgment of the Basic Court affirmed. The Judgment of the Court of Appeals was served on the defendant on 5 December 2014.

1.4. A Request for Protection of Legality was filed at the Basic Court of Mitrovica against both Judgments by defense counsel Mahmut Halimi on behalf of the defendant on 30 January

2015. The Request was transferred to the Supreme Court on 16 March 2015. The State Prosecutor filed a reply to the Request for Protection of Legality on 23 March 2015.

2. Submissions by the Parties

2.1. Defense counsel proposes that his Request for Protection of Legality is found to be grounded, and that the defendant is released from the Indictment due to lack of evidence as the offence has not been proven beyond reasonable doubt, or that the Judgments are quashed and the case is returned to the Basic Court for retrial. He claims that both Judgments contain essential violations of the criminal procedures under Article 384 (1) 1.12, and that the trial was not fair and impartial contrary to Article 31 of the Constitution of the Republic of Kosovo, Article 5 of the CPC and Article 6 of the ECHR. He states as follows:

- The conviction is based on the evidence of one witness – **JB** - and this is contrary to Article 262 of the CPC. Defense counsel states that he interprets this provision to mean that a defendant cannot be found guilty solely on the evidence of one witness, regardless of whether or not he or she is a cooperative witness or an anonymous witness.
- The evidence of this witness was incorrectly assessed due to the contradictions within his statements, and due to the contradictions between his evidence and the evidence of the other witnesses.
- The Court of Appeals violated Article 384 of the CPC by failing to properly review the Judgment of the Basic Court.
- The Court of Appeals erred in refusing to hold a hearing pursuant to Article 392 (2) and 393 of the CPC so that **SG** could give his evidence.
- The Court of Appeals did not give an explanation as to why the proposal of defense counsel to hear three more witnesses to verify the alibi of the defendant was refused.

2.2. The State Prosecutor moves the Supreme Court to reject the Request as no violations of law exist. She submits as follows:

- Defense counsel only refers to the violation of the provisions of criminal procedure (Article 384 (1) 1.12) in the preface to his request. Otherwise, his submissions are nothing more than objections to the evaluation of evidence which he claims led to an erroneous or incomplete determination of the factual situation.
- Article 432 (2) of the CPC states that a request for Protection of Legality may not be filed on this ground, and therefore the request should be rejected.
- No arguments in support of the alleged violations of the CPC were forwarded, and both Judgments were drafted in accordance with Article 370 of the CPC.
- All arguments in the request were submitted to both the Trial Panel and to the Court of Appeals and rejected.
- Article 262 of the CPC does not apply to the evidence of **JB** and defense counsel's interpretation of this Article is incorrect.

- There was no violation of Article 394 by the Court of Appeals.
- The Court of Appeals properly addressed the issue of the evaluation of the evidence given in the main Trial by reviewing it in accordance with principles stated in the paragraphs entitled ‘Standard of Review’.
- Regarding Article 392 (2) of the CPC, neither defense counsels for **SG** or for **RG** motioned the court for a hearing to take the evidence of **SG**. It is agreed that the appellate Panel did not ex officio open a hearing, but this is within the discretion of the Court of Appeals. Otherwise, the statement of **SG** was considered in the Judgment.
- The Court of Appeals also addressed the motion on the proposed alibi witnesses in the Judgment.

3. Findings of the Panel

3.1. The Request for Protection of Legality by defense counsel and the reply by the State Prosecutor are admissible and timely filed.

3.2. The Supreme Court finds that most of the content of the Request for Protection of Legality relates to the evaluation of the evidence by the Basic Court in the Main Trial, particularly that of the witness **JB**. A Request for Protection of Legality may be filed on the ground of a violation of the criminal law, on the ground of certain substantial violations of the provisions of the criminal procedure, or if there is any other violation of the provisions of the criminal procedure that has affected the lawfulness of the judicial decision. A Request may not be filed on the ground of an erroneous or incomplete determination of the factual situation (Article 432 of the CPC). It is clear that defense counsel does not agree with how the evidence was evaluated by the Trial Panel, nor the determination which was reached as a result. However, the CPC is clear in that a request for Protection of Legality cannot be used as a mechanism to invite the Supreme Court to review and assess, at a distance, the credibility of the evidence given in the Main Trial. Such a review would be a prohibited assessment whether there is an erroneous or incomplete determination of the factual situation.

3.3. Defense counsel states that the meaning of Article 262 paragraphs 1 and 2 of the CPC is that a conviction cannot be based on the evidence of a single witness. The Supreme Court disagrees. Defense counsel emphasizes the first part of the sentence of these paragraphs. But it is clear from the wording of the whole that they refer to specific situations. Paragraph 1 to the situation when such evidence cannot be challenged by questioning during the criminal proceedings and, in paragraph 2, when a finding of guilt is based only upon statements given by the defendant to the police or the state prosecutor. Defense counsel had the opportunity in the Main Trial to challenge the evidence of **JB** as per paragraph 1, and it is clear that the defendant was not found guilty based on statements he gave to the police or the state prosecutor. Therefore neither of these provisions apply in this case. **JB** is neither an anonymous witness nor a cooperative witness, and therefore Article 262 paragraphs 3 and 4 do not apply. The Panel concludes that outside of these 4 sets of circumstances, there is no requirement in Kosovo law that evidence must be corroborated by another witness, or other piece of evidence, in order to convict. Otherwise than defence counsel proposes, the principle

of *unus testus nullus testes* is not generally applicable in Kosovo criminal proceedings. As a result, the Panel cannot find a violation of Article 262 or elsewhere in the CPC on this point.

3.4. Defense counsel makes a number of submissions regarding the Court of Appeals sessions and Judgment. He claims that, due to the statement made by **SG** (a co-accused) in the Court of Appeals session on 28 October 2014, the Court of Appeals was obligated to hold a hearing to take evidence from him, and to annul the Judgment of the Basic Court and return the case for retrial. The Supreme Court disagrees. The Appellate Court's discretion in finding a ground to hold a hearing is clearly foreseen in Article 392 paragraph 1, '*...only when it is necessary to take new evidence...*', and a decision to return a case to the Basic Court as one of the options which the Appellate Court may take is foreseen in Article 398 Paragraph 1 (1.3) of the CPC. Defense counsel did not substantiate that the Court of Appeals applied this discretion in violation of the law. Defense counsel also submits that the Court of Appeals did not give an explanation for refusing his motion for the Panel to hear evidence from 3 additional witnesses who, he claimed, could offer an alibi for the defendant. Defense counsel is referred to paragraph 3.6 of the Judgment of the Court of Appeals, which gives full and sufficient reasons for rejecting the motion. The Supreme Court finds no violation by the Court of Appeals in the conduct of the sessions held, nor can any defect be found in the Judgment it rendered. It fully addresses all of the issues raised in the appeal, and gives clear reasons for its decisions.

3.5. The Supreme Court therefore finds no violations of the provisions of the Criminal Code, the Criminal Procedure Code, or international Conventions, and rejects as unfounded the Request for Protection of Legality.

Presiding Judge

Recording Officer

Malcolm Simmons

Kerry Moyes

EULEX Judge

EULEX Legal Officer

Panel members

Rolandus Bruin

Salih Toplica

EULEX Judge

Supreme Court Judge