

SUPREME COURT OF KOSOVO
PML.-KZZ. No. 62/2013
Prishtinë/Priština
22 May 2013

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of
EULEX Judge Dr. Horst Proetel as Presiding Judge,
Supreme Court Judge Marije Ademi and
Supreme Court Judge Emine Mustafa as members of the panel,
in the criminal case against the defendant:

J. Z.

Charged according to Indictment PP. 2967-3/2009, dated 2 October 2009, as amended in the main trial on 21 October 2010 and 5 April 2011, with having committed several counts of the criminal offences of:

- a) **Sexual Abuse by Abusing Position, Authority or Profession** pursuant to Article 200 paragraph 2 item 1 of the Criminal Code of Kosovo (CCK),
- b) **Accepting Bribes** pursuant to Article 343 paragraph 1 of the CCK,
- c) **Abusing Official Position or Authority** pursuant to Article 339 paragraph 2 in conjunction with paragraph 1 of the CCK and
- d) **Mistreatment in Exercising Duties** pursuant to Article 164 paragraph 1 of the CCK,

By Judgment P. 1960/09, dated 7 April 2011, the Municipal Court of Prishtinë/Priština acquitted the defendant from the charges for the criminal offences of:

Sexual Abuse by Abusing Position, Authority or Profession pursuant to Article 200 paragraph 2 item 1 of the CCK (count 4) and

Accepting Bribes pursuant to Article 343 paragraph 1 of the CCK (count 7) and

Found the defendant guilty of

- a) **Sexual Abuse by Abusing Position, Authority or Profession** pursuant to Article 200 paragraph 2 item 1 of the CCK (count 1) and sentenced him to six (6) months imprisonment and an accessory punishment of prohibition of exercising public administration or public service for three (3) years;

- b) **Attempted Sexual Abuse by Abusing Position, Authority or Profession** pursuant to Article 200 paragraph 2 item 1 in conjunction with Article 20 of the CCK (count 3 reclassified) and sentenced him to four (4) months imprisonment with the accessory punishment of prohibition of exercising public administration or public service for three (3) years;
- c) **Accepting Bribes** pursuant to Article 343 paragraph 1 of the CCK (count 5) and sentenced him to one (1) year and six (6) months imprisonment with the accessory punishment of prohibition of exercising public administration or public service for three (3) years;
- d) **Mistreatment in Exercising Duties** pursuant to Article 164 paragraph 1 of the CCK (count 9 reclassified) and sentenced him to six (6) months imprisonment with the accessory punishment of prohibition of exercising public administration or public service for three (3) years and
- e) **Mistreatment in Exercising Duties** pursuant to Article 164 paragraph 1 of the CCK (count 10) and sentenced him to four (4) months imprisonment with the accessory punishment of prohibition of exercising public administration or public service for three (3) years;

The court pronounced an aggregate punishment of two (2) years and four (4) months imprisonment with the accessory punishment of prohibition of exercising public administration or public service for three (3) years;

Upon appeal of the defendant the District Court of Prishtinë/Priština by Judgment Ap.-Kž. 116/12, dated 3 December 2012, **rejected** the charges for count 1 (**Sexual Abuse by Abusing Position, Authority or Profession** pursuant to Article 200 paragraph 2 item 1 of the CCK),

Modified *ex officio* the conviction for count 3 (**Attempted Sexual Abuse by Abusing Position, Authority or Profession** pursuant to Article 200 paragraph 2 item 1 in conjunction with Article 20 of the CCK) by changing the wording of the enacting clause 'May or June 2008' into 'November or December 2008,

Modified count 9 by reclassifying it as **Abusing Official Position or Authority** pursuant to Article 339 paragraph 1 of the CCK,

Acquitted the defendant from the charges of count 5 (**Accepting Bribes** pursuant to Article 343 paragraph 1 of the CCK) and

Changed the sentence to an aggregate punishment of twelve (12) months imprisonment with credit for the period of time spent in detention and house detention from 27 August 2009 to 5 January 2010 and with an accessory punishment of prohibition of exercising

public administration or public service for two (2) years after the punishment has been served;

Deciding upon the Request for Protection of Legality filed on the 17 April 2013 by the defendant against the final Judgment Ap.-Kž. 116/12 of the District Court of Prishtinë/Priština, dated 3 December 2012,

Issues the following

JUDGMENT

The Request for Protection of Legality filed on the 17 April 2013 by the defendant against the final Judgment Ap.-Kž. 116/12 of the District Court of Prishtinë/Priština, dated 3 December 2012, is REJECTED AS UNFOUNDED.

REASONING

I. Relevant Procedural History

On 27 August 2009 the defendant [REDACTED] was arrested for suspicion of having committed the aforementioned criminal offences. The prosecutor filed a motion to impose detention on remand. The request was rejected by the Municipal Court of Prishtinë/Priština and house detention was imposed.

On 3 September 2009 a summary indictment was filed, which was amended with new criminal offences on 9 September 2009. On 24 September 2009 the confirmation judge returned the indictment with the order to conduct a more thorough investigation. On 2 October 2009 the prosecutor re-filed the indictment charging the defendant with ten (10) counts of different criminal offences.

On 15 October 2009, by Ruling KA. 274/09, the Indictment was confirmed.

On 23 November 2009, upon a request from the EULEX Prosecutor supported by the President of the Municipal Court of Prishtinë/Priština, the President of the Assembly of EULEX Judges decided to assign the case to an EULEX Judge as presiding judge.

On 18 October 2010 the main trial commenced before the Municipal Court Prishtinë/Priština. After 16 hearings, on 7 April 2011, the aforementioned Judgment P. No. 1960/2009 was pronounced.

Upon an appeal filed by Defense Counsel [REDACTED] on behalf of the defendant on 9 August 2011, a panel of the District Court of Prishtinë/Priština on 3 December 2012 issued the aforementioned final Judgment Ap.-Kž. 116/12.

On 17 April 2013 the defendant **Senad ZEJDIRI** filed with the Basic Court of Prishtinë/Priština a request for protection of legality against the aforementioned final Judgment of the District Court Prishtinë/Priština Ap.-Kž. 116/12.

On 20 May 2013 the Office of the State Prosecutor of Kosovo (OSPK) filed a response on the defendant's request for protection of legality.

II. Supreme Court Findings

1. Admissibility of the Request for Protection of Legality

The Request for Protection of Legality is admissible.

Pursuant to Article 433 paragraphs 1 and 2 of the CPC, it was filed by an authorized party and within the legal deadline. The contested decision was served upon the defendant on 16 January 2013. Consequently, the request for protection of legality was filed within the deadline of Article 433 paragraph 2 of the CPC of 3 months within service.

The contested decision is final in the sense of Article 432 paragraph 1 of the CPC.

2. Procedures followed by the Supreme Court

The Supreme Court panel has decided in a session as described by Article 435 paragraph 1 of the CPC.

3. On the merits of the Requests for Protection of Legality

The Request for Protection of Legality is unfounded.

The Requester had challenged the mentioned Ruling on the grounds of substantial violations of the provisions of criminal procedure pursuant to Article 432 paragraph 1 item 1.2 in conjunction with Article 384 paragraph 1 items 1.8 and 1.10 and paragraph 2 item 2.1 of the CPC, violations of the criminal Code pursuant to Article 432 paragraph 1 item 1.1 of the CPC and on the grounds of erroneously established facts pursuant to Article 439 of the CPC.

The defense claims that the Municipal Court and the District Court have unlawfully convicted the defendant for an attempt of Sexual Abuse by Abusing of his Position, Authority or Profession pursuant Art. 200, paragraph 2, item 1, and 20 of the CCK related to the female police officer **[REDACTED]** by touching her shoulder and trying to kiss her. Finally, he only afforded to kiss her check. He argues that an attempt requires that the offender intentionally takes an immediate action towards the commission of the

V.G.

offence. Touching of a person for sexual purpose must be manifested by some action commencing the conclusion of such an intention. Here the commencing of the criminal offence was not proven.

The court finds the claim unfounded. Article 200 paragraph 2 of the CPC only requires: "Whoever touches another person for a sexual purpose..." As both judgments clearly reason, the defendant has not only touched the victim at her shoulder but tried to kiss her, and only by the defensive reaction the victim averted being kissed on the mouth. The defendant kissed her cheek instead. Hence the defendant upon the occasion in question did not commit an attempt but completed the offence. However, both, the Municipal Court and the District Court of Prishtinë/Priština, erred in favor of defendant. In line with the restriction of *reformation in peius* (Article 436 paragraph 3 in conjunction with Article 395 CPC) the Supreme Court was prohibited from changing the legal qualification of the criminal offence.

The Appeal also challenges that the defendant had been convicted for attempted Sexual Abuse although the Attempt in this case is not punishable. The court also finds this argument as without basis.

Pursuant to Article 20 paragraph 2 of the CCK only attempts of criminal offences punishable by imprisonment of at least three (3) years are punishable and for other offences only if expressly provided by the law. Article 200 paragraph 2 of the CCK foresees a punishment of imprisonment of up to three (3) years. Consequently, the punishment frame provided for the respective offence includes the three (3) years set as the lowest limit by Article 20 paragraph 2 of the CCK for the punishability of an attempt.

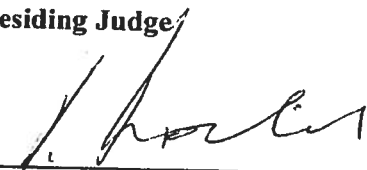
The defendant also contests the Judgment based on erroneous determination of facts. Pursuant to Article 432 paragraph 2 of the CPC, a request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation. Hence, the Supreme Court did not have to examine this alleged violation.

The Requester makes reference to Article 439 of the CPC, which obliges the court to *ex officio* annul a decision and order a retrial if in proceedings on a request for protection of legality considerable doubt arises as to the accuracy of the determination of facts.

The court finds this provision not applicable in the current proceedings. There is no considerable doubt as to the correctness of the determined facts since the District Court in its decision, after having assessed once more the statement of the witness [REDACTED] **V.G.** [REDACTED], has correctly and convincingly reasoned why it changed the time of the commission of the criminal offence from 'May or June' in the first instance Judgment to 'November or December'.

For the aforementioned reasons, the Supreme Court of Kosovo decides on the Request for Protection of Legality as in the enacting clause, based on Article 437 of the CPC.

Presiding Judge



Dr. Horst Proetel
EULEX Judge

Recording Clerk



Hölger Engelmann
EULEX Legal Officer

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