

SUPREME COURT OF KOSOVO

Pkl.-Kzz. 136/12

19 February 2013

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, with Kosovo Supreme Court Judges Nesrin Lushta and Avdi Dinaj as members of the panel, and in the presence of EULEX Legal Officer Holger Engelmann as recording clerk, in the criminal case Pkl.-Kzz. no. 136/12 of the Supreme Court of Kosovo against the defendants:

A [REDACTED] H [REDACTED] nickname H [REDACTED] name of father [REDACTED] maiden name of mother [REDACTED], place of birth and last residence village of [REDACTED] in Skenderaj/Srbica, date of birth [REDACTED] Kosovar, student, single, no children, completed high school, of average financial situation, in detention and house arrest since 12 April 2007,

Convicted by the District Court of Pristina for **two counts of Attempted Aggravated Murder in co-perpetration** pursuant to Article 147 paragraph 1 item 4 as read with Article 20 and 23 of the Criminal Code of Kosovo (CCK) and **Unauthorized Ownership, Control, Possession or Use of Weapons** pursuant to Article 328 paragraph 2 of the CCK, sentenced by the court of first instance to an aggregate sentence of 16 years of imprisonment,

Upon appeal the conviction was affirmed by final Judgment of the Supreme Court of Kosovo while the sentence was modified, resulting in a punishment for the first count of Attempted Aggravated Murder on 28.2.2007 of 10 years, for the second count of Attempted Aggravated Murder on 12.4.2007 of 11 years and for the third count of Unauthorized Ownership, Control, Possession or Use of Weapons of 1 year imprisonment with an aggregate sentence of 14 years of imprisonment,

and

D [REDACTED] S [REDACTED], name of father [REDACTED], maiden name of mother [REDACTED], place of birth [REDACTED] last residence in [REDACTED] date of birth [REDACTED], Kosovar, worker, single, no children, completed high school, of poor financial situation, in detention since 12 April 2007,

Convicted by the District Court of Pristina for **one count of Attempted Aggravated Murder in co-perpetration** pursuant to Article 147 paragraph 1 item 4 as read with Article 20 and 23 of the CCK and **Unauthorized Ownership, Control, Possession or Use of Weapons** pursuant to Article 328 paragraph 2 of the CCK, sentenced by the court of first instance to an aggregate sentence of 15 years and 6 months of imprisonment,

Upon appeal the conviction was affirmed by final Judgment of the Supreme Court of Kosovo while the sentence was modified, resulting in a punishment for the criminal offence of Attempted Aggravated Murder on 12.4.2007 of 11 years and for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons 6 months with an aggregate sentence of 11 years and 4 months imprisonment;

Deciding upon the Request for Protection of Legality filed on 23 December 2011 by Defense Counsel [REDACTED] on behalf of the defendant [REDACTED] and the Request for Protection of Legality filed on 24 January 2012 by Defense Counsel M [REDACTED] H [REDACTED] on behalf of the defendant A [REDACTED] H [REDACTED] against the Judgment of the Supreme Court of Kosovo AP.-KŽ. 323/2010, dated 24 August 2011, affirming and amending the Judgment of the District Court of Prishtinë/Priština P. 429/2007, dated 20 November 2009, while also taking into account the Reply of the Office of the State Prosecutor of the Republic of Kosovo (OSPK) filed on 4 September 2012, D.S.

Issues the following

JUDGMENT

1. **The Request for Protection of Legality filed on behalf of the defendant D [REDACTED] S [REDACTED] against the Judgment of the Supreme Court of Kosovo AP.-KŽ. 323/2010, dated 24 August 2011, affirming and amending the Judgment of the District Court of Prishtinë/Priština P. 429/2007, dated 20 November 2009, is REJECTED AS UNFOUNDED.**
2. **The Request for Protection of Legality filed on behalf of the defendant A [REDACTED] H [REDACTED] against the aforementioned decisions is WELL-FOUNDED. Both decisions are ANNULLED in the part relating to the conviction of A [REDACTED] H [REDACTED] AND the case against him is RETURNED TO THE COURT OF FIRST INSTANCE FOR RETRIAL.**

REASONING

I. Procedural History

The Prosecutor of the Special Prosecution Office of the Republic of Kosovo (SPRK) filed an indictment against the defendants on 31 July 2007. Defendants H [REDACTED] and [REDACTED] were indicted for two counts of the criminal offence of Attempted Aggravated Murder in co-perpetration [Article 147 paragraph 1 item 4 as read with Article 20 and 23 of the Criminal Code of Kosovo (CCK)] and for Unauthorized Ownership, Control, Possession or Use of Weapons [Article 328 paragraph 2 of the CCK] and S [REDACTED] was indicted for an Attempted Aggravated Murder in co-perpetration [Article 147 paragraph 1 item 4 as read with Article 20 and 23 of the Criminal Code of Kosovo (CCK)] and for Unauthorized Ownership, Control, Possession or Use of Weapons [Article 328 paragraph

2 of the CCK]. This indictment was confirmed by the District Court of Pristina on 17 September 2007.

The main trial started on 22 April 2008 but it was adjourned to 15 May 2008 and subsequently to 29 May, 24 June, 11 September, 8 October and 18 November 2008.

On 2 June 2009 the President of the Assembly of the EULEX judges issued a decision assigning the case to EULEX Judges.

The main trial was recommenced and held during October and November 2009. On 20 November 2009 the Judgment was announced whereby the District Court of Pristina found the defendants guilty and sentenced A [REDACTED] H [REDACTED] to an aggregate sentence of 16 years of imprisonment, the defendant M [REDACTED] Q [REDACTED] to an aggregate sentence of 20 years of imprisonment, and the defendant D [REDACTED] S [REDACTED] to an aggregate sentence of 15 years and 6 months of imprisonment.

The Judgment was served to the defendant A [REDACTED] H [REDACTED] personally to Detention Center Dubrava on 16 August 2010. The Defence Counsel H [REDACTED] filed an appeal against the verdict of the District Court on 31 August 2010 and the Defense Counsel V [REDACTED] on 16 August 2010.

The Judgment was served to the defendant D [REDACTED] S [REDACTED] personally to Detention Center Dubrava on 13 August 2010. The Defense Counsel H [REDACTED] filed an appeal against the verdict of the District Court on 17 August 2010 and the defendant himself personally on 24 August 2010.

On 25 February 2011 the Opinion of the State Prosecutor was received by the Supreme Court. The Special Prosecutor had not filed a response to the appeals.

On 24 August 2011 the Supreme Court of Kosovo after holding a session and after deliberation partially granted the appeals of both defendants and their defense and amended the first instance Judgment, as pointed out before.

Dated 08 December 2011 the Defense of D [REDACTED] S [REDACTED] filed a Request for Protection of Legality and challenged both Judgments for alleged essential violation of the provisions of criminal procedure and for alleged violations of substantial rights. It was proposed to annul the Judgment and send the case back to the Court for re-decision or to modify it by acquitting the defendant from all charges.

Dated 23 January 2012 the Defense of A [REDACTED] H [REDACTED] filed a Request for Protection of Legality and challenged both Judgments for alleged violations of the criminal law and – as to the second instance Judgment – essential violations of the criminal procedure as per Article 403 paragraph 1 item 12 of the Kosovo Code of Criminal Procedure (KCCP).

Dated 03 September 2012 the Office of the State Prosecutor of Kosovo (OSPK) issued a reply, thus proposing to reject both requests for protection of legality as unfounded.

II. Supreme Court Findings

1. Admissibility of the Request for Protection of Legality

The Requests for Protection of Legality are admissible. They were filed with the competent court pursuant to Article 453 of the KCCP and within the deadline of Article 452 paragraph 3 of the KCCP.

2. Procedures followed by the Supreme Court

The Supreme Court panel has decided in a session as described by Article 454 paragraph 1 of the KCCP. Parties have not been notified of the session, since according to Articles 451 through 460 of the KCCP there is no obligation for the Supreme Court to notify the parties.

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

The Request for Protection of Legality on behalf of the defendant D [REDACTED] S [REDACTED] is unfounded.

The Request for Protection of Legality filed on behalf of the defendant A [REDACTED] H [REDACTED] is well-founded.

a. Alleged essential violations of the criminal procedure against defendant D [REDACTED] S [REDACTED] as per Article 403 paragraph 1 items 8 and 12 of the KCCP:

The Defense has challenged that the 1st instance Judgment of the District Court and the 2nd instance Judgment of the Supreme Court both allegedly would essentially violate provisions of the criminal procedure, since relevant evidence would not be verified and not justified regarding the criminal matters for which the defendant D [REDACTED] S [REDACTED] is accused. In particular, the defendant had stated in front of the police on 12 April 2007 when no Defense Counsel was present and the Defense had signed these statements 'only formally' one day later. The referred statement moreover was forcefully taken from D [REDACTED] S [REDACTED] against whom torture, physical and psychological pressure was used. D - S -

The Supreme Court finds that the arguments of the Defense are ungrounded and without merits. In particular the challenged verdict of the 2nd instance panel has dealt with the issue of statements, allegedly given in absentia of the Defense Counsel. The challenged 2nd instance Judgment particularly states that '[t]he content of the statement on 13 April 2007 of H [REDACTED] confirms the presence of the Defense Counsel at the interview when it

states that "Q: Can you tell us in the presence of the attorney, what you told us yesterday regarding the attacks on Anton B [redacted]?" [and that] the statement of Q [redacted] repeats the question almost to the word" [Supreme Court of Kosovo, Judgment dated 24 August 2011 (Ap.-Kz. 323/2010), p.10 in its English version].

Of course, there is no explicit mention of the statement of D [redacted] S [redacted] in this regard. However, it is considered far beyond all life experience that in one and the same context only D [redacted] S [redacted] were not asked to confirm his statements in the presence of his Defense.

As to the allegations of the Defense that D [redacted] S [redacted] had given his statements only forcefully and as a consequence of torture, physical and psychological pressure, the Supreme Court finds that despite the fact that already the District Court found 'there are no signs of beating in the wide scale', these accusations are not substantiated at all in the context given.

b. Alleged violations of 'substantial rights' of defendant D [redacted] S [redacted]

The Defense of D [redacted] S [redacted] moreover has stressed that allegedly both challenged Judgments would violate 'substantial rights' of the defendant. It is understood from the context of the written Request on Protection of Legality that the Defense wants to challenge violations of the criminal law as per Article 402 paragraph 1 item 2 of the KCCP, which would result from the alleged essential violations of the criminal procedure. It is moreover understood that the setting up of a punishment is challenged as improper. Last but not least the Defense apparently is of the opinion that the 1st instance Court has missed to establish any intent of the defendant but that instead D [redacted] S [redacted] was caught by coincidence only.

The Supreme Court – despite that a violation of the criminal procedure not necessarily allows concluding that there is also a violation of the material law – finds at first that no essential violation of the criminal procedure was established, which is why the argument of the Defense fails.

As to the punishment imposed against D [redacted] S [redacted] reference is made to the challenged Judgment of the Supreme Court, where all relevant aspects in favor and to the detriment of all the defendants have been carefully re-assessed and a new – in relation to the 1st instance Judgment more lenient – punishment was imposed.

As to the intent of the defendant S [redacted] the Supreme Court finds indeed that it is true that the 1st instance Court was unable to found its Judgment upon a confession of the defendant. Instead and due to the fact that the defendant was found guilty based mainly on the statements of the defendant A [redacted] H [redacted] and many witness statements, the defendant D [redacted] S [redacted] in particular has stated that 'he had simply accompanied Q [redacted] and H [redacted] on the way to Peja, without asking much' [District Court of Prishtine/Pristina,

D.S.

Judgment dated 20 November 2009 (P.No. 429/07), p.11 in its English version]. Based upon this, as well as upon many pieces of corroborative evidence, the 1st instance Court has arrived to the opinion that D [REDACTED] S [REDACTED] has acted in agreement with the other participants in the crime. The Supreme Court in this regard finds that the assessment of the 1st instance Court not at all erroneous, since the conclusions drawn are well based upon life experience.

c. Alleged violation of the criminal law to the detriment of defendant A [REDACTED] H [REDACTED]

The Defense of defendant A [REDACTED] H [REDACTED] particular alleged that both the District Court of Prishtine/Pristina at 1st instance and the Supreme Court of Kosovo at 2nd instance have violated the criminal law to the detriment of the defendant, in that both Courts had missed to verify the psychological state of the defendant, although in particular the District Court had ordered forensic expert Dr. M [REDACTED] G [REDACTED] to examine the defendant in order to verify his health conditions.

The Supreme Court of Kosovo finds that the allegations of the Defense in the aforementioned regards are well-founded. Pursuant to Article 415 paragraph 1 item 4 as read with Article 404 item 2 of the KCCP, the Court 'shall examine *ex officio* whether the criminal law was violated to the detriment of the accused (Article 404 of the present Code)', which pursuant to Article 404 item 2 of the KCCP is in particular the case when 'circumstances exist which preclude criminal liability' as per Articles 11 and 12 of the CCK.

In the case at hand, the Defense had submitted to the case files a photocopy of a medical report, dated 04 February 2008, and issued by a private clinic, which was based upon medical examinations of the defendant in 2003 and 2005, according to which the defendant at that time was suffering 'Post-traumatic Stress Disorder'.

Although it is considered that only a photocopy of such expertise was provided to the case files and the expertise was apparently not based upon recent medical examination of the defendant, there was sufficient indication already for the 1st instance Court to analyze *ex officio*, whether or not and to which degree the defendant was criminally liable at the time when the crimes were committed.

The Supreme Court is well aware that the authenticity of the referred document is not granted – due to the fact that only a copy exists in the case files – and that the referred 'mental disorder' of the defendant does not necessarily lead to a conclusion for any criminally relevant mental illness. However, it is clearly beyond the expertise of a judge to assess these questions without proper medical expertise.

Since neither the 1st nor the 2nd instance Court have taken these aspects into consideration, both Courts have violated the criminal law accordingly.

d. Alleged essential violation of the criminal procedure to the detriment of defendant A [REDACTED] H [REDACTED] pursuant to Article 403 paragraph 1 item 12 of the KCCP:

The Defense of defendant A [REDACTED] H [REDACTED] moreover has stressed that the 2nd instance Judgment would violate Article 403 paragraph 1 item 12 of the KCCP, saying that '[d]efense counsel in his appeal moves the Supreme Court to annul its Judgment and return the case for retrial at the 1st instance Court', whereas the Defense had proposed for 'annulling of Judgment and returning the matter to the 1st instance Court for retrial'.

The Supreme Court does not take a stand on the issue due to the fact that the argument as such is not understandable, and given that the challenges under point c. of the Judgment are successful and are justification alone for annulling the respective part of the judgments..

III. Conclusion of the Supreme Court of Kosovo

For the abovementioned reasons, the Supreme Court concludes as stated before.

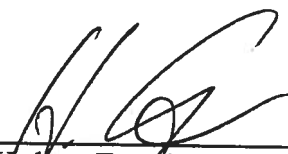
Consequently, the Supreme Court of Kosovo decides on the Requests for Protection of Legality as in the enacting clause, based on Article 456 KCCP.

Presiding Judge



Gerrit-Marc Sprenger
EULEX Judge

Recording Clerk



Holger Engelmann
EULEX Legal Officer

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