SUPREME COURT OF KOSOVO Ap-Kz.
307/2012 28 September 2012

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a juvenile panel composed of Francesco Floriti as Presiding Judge, and Supreme Court Judges Nesrin Lushta, Emine Mustafa and Salih Toplica and EULEX Judge Dr Horst Proetel as panel members, assisted by Legal Advisor Lendita Berisha acting in the capacity of recording clerk,

In the criminal case against the defendants:

I.I., son of R. and A., born on xxx, in village xxx, municipality of Kamemce/a, currently residing in the same address, married, father of xxx children, salesman, completed secondary school, of average financial situation,
Convicted on 11 January 2011 for the criminal offences of *Trafficking in Persons* contrary to Article 139, paragraph 2 as read in conjunction with paragraph 1 of the Criminal Code of Kosovo (CCK) and Article 23 of the CCK, and sentenced to 1 (one) year of imprisonment, the time spend in detention on remand from 7 January 2011 until 3 April 2011 and in house detention from 3 April 2011 until 13 May 2011 is counted in the punishment;

R.K., son of S. and Gj., born on xxx, in village xxx, municipality of Kamenice/a, currently residing in the same address, married, father of xxx children, welder, of average financial situation,
Convicted on 11 January 2011 for the criminal offences of *Trafficking in Persons* contrary to Article 139, paragraph 2 as read in conjunction with paragraph 1 of the CCK and Article 23 of the CCK, and sentenced to 1 (one) year of imprisonment.;

M.K., son of S. and Gj., born on 15 November 1948, in village xxx, municipality of Kamenice/a, currently residing in the same address, married, father of xxx children, owner of restaurant, of poor financial situation,
Convicted on 11 January 2011 for the criminal offences of *Trafficking in Persons* contrary to Article 139, paragraph 2 as read in conjunction with paragraph 1 and Article 23 of the Criminal Code of Kosovo (CCK), and of *Violation of Rights in Labour Relations* contrary to Article 182 of CCK and imposed an aggregate punishment of 1 (one) year and 1 (one) month of imprisonment;

Sh.G., nickname P., son of I.and F., born on xxx in village B., municipality of Prizren, currently residing in the same address, married, father of xxx, owner of restaurant, completed elementary school, of poor financial situation. Convicted on 11 January 2011 for the criminal offences of *Trafficking in Persons* contrary to Article 139, paragraph 2 as read in conjunction with paragraph 1 of the CCK and Article 23 of the CCK, of *Unlawful Deprivation of Liberty*, contrary to Article 162 paragraph 1 and 4 of the CCK, and of *Violation of Rights in Labour Relations* contrary to Article 182 of CCK, and imposed an aggregate punishment of 4 (four) year and 1 (one) month of imprisonment. The time spend in detention on remand from 6 January 2011 until 11 January 2012 is counted in the punishment;

V.M., son of B. and G., born on xxx in xxx, currently residing in xxx, single, driver, completed secondary school, of poor financial situation,
Convicted on 11 January 2011 for the criminal offences of *Negligently Facilitating Trafficking in Persons* contrary to Article 139, paragraph 4 of the CCK, and sentenced to 7 (seven) months of imprisonment, the time spend in detention on remand from 5 January 2011 until 3 April 2011 and in house detention from 3 April 2011 until 13 May 2011 is counted in the punishment;

S.B.. nickname C., con of I. and H., born on xxx, currently residing in xxx, single, worker, completed elementary school, poor financial situation,
Convicted on 11 January 2011 for the criminal offences of *Trafficking in Persons* contrary to Article 139, paragraph 2 as read in conjunction with paragraph 1 of the CCK and Article 23 of the CCK, and of *Sexual Abuse of Person under the age of 16* contrary to Article 198 paragraph 1 of CCK, and imposed an aggregate

punishment of 1 (one) year and 1 (one) month of imprisonment. The time spend in detention on remand from 6 January 2011 until 11 November 2011 is counted in the punishment;

D.B., son of N. and Sh., born on xxx, currently residing in xxx, single, manager, of poor financial situation, Convicted on 11 January 2011 for the criminal offences of *Trafficking in Persons* contrary to Article 139, paragraph 2 as read in conjunction with paragraph 1 of the CCK and Article 23 of the CCK, of *Sexual Abuse of Person under the age of 16* contrary to Article 198 paragraph 1 of CCK, and of *Violation of Rights in Labour Relations* contrary to Article 182 of CCK, and imposed an aggregate punishment of 2 (two) years of imprisonment. The time spend in detention on remand from 7 January 2011 until 11 November 2011 is counted in the punishment;

E.K.. son of R. and M., born on xxx, in xxx, currently residing in "xxx" street, xxx, married, owner of hotel, of average financial situation,
Convicted on 11 January 2011 for the criminal offences of *Trafficking in Persons* contrary to Article 139, paragraph 2 as read in conjunction with paragraph 1 and Article 23 of the Criminal Code of Kosovo (CCK), and of *Violation of Rights in Labour Relations* contrary to Article 182 of CCK, and imposed an aggregate punishment of 1 (one) year and 3 (three) months of imprisonment. The time spend in detention on remand from 5 January 2011 until 22 March 2011 is counted in the punishment;

Acting upon the Appeal filed by the District Prosecution Office in Prizren, the Appeals filed by the Defence Counsels H.K.(defendant I.I.), B.B.(defendant R.K.), H.S.(defendant Sh.G.), B.S.(defendant V.M.), R.K. (defendant D.B.), H.M.(defendant E.K.), against the Judgment P no. 184/11 of the District court of Prizren dated 11 January 2011, and considering the Opinion of the Office of the State Prosecutor of Kosovo (OSPK) filed on 23 August 2012,

After having held a public session on 28 August 2012 in the presence of the defendants R.K., Sh.G., V.M., S.B., D.B., E.K. and the Defence Counsels H.S., B.S., R.K. and H.M., in the presence of the State Prosecutor Laura Pula, having deliberated and voted on the same day;

Pursuant to Articles 420 and following of the Kosovo Code of Criminal Procedure (KCCP), issues the following

JUDGMENT

The Judgment P no. 184/11 of the District court of Prizren dated 11 January 2011 is modified as follows:

I. The appeal of **the District Prosecutor of Prizren is partially granted, in relation to the punishments imposed on I.I., Sh.G., S.B.**

and D.B.. Therefore the mentioned defendants are convicted as follows:
a) I.I.
- pursuant to Article 139, paragraph 1 and 2 and 23 of the CCK, in conjunction with art. 66.2 and art.67 para 1, subpara 2 CCK the defendant is sentenced to imprisonment of 2 years;
b) Sh.G.
- pursuant to Article 139, paragraph I and 2 and 23 of the CCK the defendant is sentenced to imprisonment of 3 years;
- pursuant to Article 162, paragraph 1 and 4 of the CCK the defendant is sentenced to imprisonment of 1 year;
- pursuant to Article 182 CCK the defendant is sentenced to imprisonment of 6 months;
- based on art. 71 paragraph I and 2, n.2 of the CCK the defendant Sh.G. shall serve imprisonment of 4 years and one month.
c) S.B.
- pursuant to Article 139, paragraph 1 and 2 and 23 of the CCK, in conjunction with art.66 para 2 and art.67 para 1, subpara 2 CCK the defendant is sentenced to imprisonment of I years;
- pursuant to Article 198 para 1 CCK the defendant is sentenced to imprisonment of 1 year;
- based on art. 71 paragraph 1 and 2, n.2 of the CCK the defendant S.B. shall serve imprisonment of 1 year and 6 month.
d) D.B.
- pursuant to Article 139, paragraph 1 and 2 and 23 of the CCK, in conjunction with art.66 para 2 and art.67 para 1, subpara 2 CCK the defendant is sentenced to imprisonment of 1 years;
- pursuant to Article 198 para 1 CCK the defendant is sentenced to imprisonment of 1 year;
- pursuant to Article 182 CCK the defendant is sentenced to imprisonment of 6 months;
- based on art. 71 paragraph 1 and 2, n.2 of the CCK the defendant D.B shall serve imprisonment of 2 years and four months.

II. The appeal of the Defence Counsel B.B. is granted. The judgment is herby modified and the defendant R.K. is acquitted pursuant to Article 390 paragraph 3 of KCCP because it has not been proven that the accused has committed the acts with which he has been charged.

III. The appeal of the Defence Counsel H.M. is partially granted. Therefore the punishment imposed on the defendant E.K. is modified as follows:
- pursuant to Article 139, paragraph 1 and 2 and 23 of the CCK, in conjunction with art.66 para 2 and art.67 para 1, subpara 2 CCK the defendant is sentenced to imprisonment of 1 years;
- pursuant to Article 182 CCK the defendant is sentenced to imprisonment of 2 months;
- based on art. 71 paragraph 1 and 2, n.2 of the CCK the defendant E.K. shall serve the imprisonment of 1 year and 1 month.

The appeals of the defence Counsels H.K., H.S., B.S. and R.K. are rejected as ungrounded.

IV. The criminal proceedings against M.K. are dismissed pursuant to Article 145 of KCCP.
The Judgment P no. 184/11 of the District court of Prizren dated 11 January 2011 is confirmed in the remaining part.

Reasoning

I. Procedural background

On 17 May 2011 the District Public Prosecutor of Prizren filed the indictment PP.nr.3/2011 against the defendants. The indictment was confirmed with the rulings KA. no. 109/11 of 28 July 2011 and 2 September 2011

In the present case, the criminal activities of the defendants mainly consist of Trafficking in Person and consequent/corollary criminal offences perpetrated in the period between late November/early December 2010 till mid January 2011. The injured party of the criminal activities of the defendants is A.K., minor of the age of 15 (fifteen). On an unknown date in late November/ early December 2010, F.T., from xxx, Republic of Albania, in illegal way brought the injured party in Kosovo. F.T. afterwards has contacted I.I., with whom he transported the minor injured party from Shtime to Gjilan. On subsequent date both of them, I.I. and F.T.transferred the injured party to the co-defendants R.K. and M.K., manager and owner of the restaurant "xxx" in xxx, in which, she was forced to remain and work as a dancer during the night for at least three days. Afterwards, F.T. took the injured party and transferred her to Sh.G. the owner of the restaurant "xxx" in xxx village, municipality of Prizren, where she was forced to remain and work as a dancer during the night for at least five days. The defendant Sh.G. locked the injured party in the room at the top floor of the restaurant and then when she was trying to escape from the room the defendant assisted by his employees forcibly returned her to the restaurant where she stayed for three days. On an unknown date in mid December 2010 the injured party managed to escape from the restaurant of Sh.G. and subsequently she met co-defendants V.M. and S.B.. On the request of S.B., V.M. transported the injured party in his car to motel "xxx" in xxx, paid for her room and gave her S.B.'s telephone number. On the coming days, S.B. had a sexual intercourse with the minor victim in the house of V.M.'s uncle's son in law and in his house located at "xxx" street, in xxx. On 24 December 2010 he transferred the injured party to D.B. the manager of "xxx" where she was employed as a waitress at night. During the period from 24 till 31 December 2010 D.B. also abused the injured party by having sexual intercourses with her in different locations. On 5 January 2011 the minor injured party was transferred by two unknown people to E.K. the owner of the restaurant "xxx. The owner hired her to work as the dancer during the night.

On 8 November 2011 the Main Trial started in front of the District Court of Prizren and continued through seven sessions on 9 and 10 November, 6, 7, 15 and 21 December 2011 and on 10 January 2012. The defendants as well as numerous witnesses (including the injured party) were examined; and typed report of incoming and outgoing SMSs for phone numbers mentioned in the indictment and transcripts of records of phone conversations of defendant V.M. with unknown person on 5 January 2011 have been examined.

The indictment concerning charges for commission of criminal offence of Trafficking in Person under Article 139 paragraph 2 as read in conjunction with paragraph 1 of CCK was confirmed only against the defendant S.B. and D.B. (confirmation ruling KA.no. 109'11 of 28 July 2011).
Upon appeal of the EULEX Prosecutor the three judge panel of District Court of Prizren confirmed the indictment filed against I.I, R.K., M.K., Sh.B. and E.K. for said criminal offence. With the same ruling the indictment was confirmed also against the defendant V.B. for criminal offence of Trafficking in person in violation of Article 139 paragraph 4 of CCK (ruling KA.no. 109/11 of 2 September 2011).

On 11 January 2011, the District Court announced the verdict and found the defendant guilty of the criminal offences listed above.

II. Subm issions of the parties:

II. I Appeal filed by District Prosecutor's Office in Prizren on 22 March 2011

The District Prosecutor requested from the Supreme Court to amend the appealed judgment and impose more severe punishment on the defendants.
According to the District Prosecutor the court of first instance when rendering the decision on the punishment failed to assess all the mitigating and aggravating circumstances existing on the side of the defendants and especially failed to assess circumstances of committing of criminal offences by the defendants.
With the imposed punishment it is impossible to achieve the intent of the punishment against the defendants as to prevent perpetrators from committing criminal offences in the future and also influence other people to refrain from committing criminal offences.
DPP suggested the court of second instance to assess the level of criminal liabilities of the defendants, the social danger of the criminal offences committed having into consideration that the injured party in this case was the minor girl of age fifteen who was abused in maximum.

II. 2. Appeals filed by Defence Counsels

In their appeals the Defence Counsels of the defendants alleged substantial violations of the provisions of the procedural law, erroneous or incomplete determination of the factual situation, for violation of the criminal law and on the decision on punishment. In general the Defence Counsels were more focused on contesting the factual reconstruction made by the first instance panel in relation to their own clients, evaluating those elements that could bring to the evaluation of their criminal liability The Defences proposes the Supreme Court of Kosovo to amend the challenged judgment and to acquit the Defendants from charge brought against them; or to annul the judgment and send the case back for re-trial, or to amend the judgment in relation to the determination of the punishment by imposing lenient punishment on them.

III. FINDINGS OF THE COURT

Admissibility od the appeals

The Supreme Court of Kosovo finds that all appeals of the Defence, as well as the one of the District Public Prosecutor of Prizren are timely filed and admissible.

The Supreme Court of Kosovo held its panel session in conformity with provisions of Article 410 of KCCP; the session was attended also by the defendants R.K., Sh.G., V.M., S.B., D.B., E.K. and the Defence Counsels H.S., B.S., R.K. and H.M., and the State Prosecutor Laura Pula. The Defence Counsels H.K.(for I.I.) and B.B.(R.K.) were absent, in spite of being duly invited.
The court decided to hold the session pursuant to Article 410 paragraph 4 of the KCCP without the presence of the defendant I.I., because he failed to report his temporary change of address. Notification sent to the defendant has returned with the remark "undelivered" - and according to his relatives, he is in Switzerland.

During the session, the State Prosecutor proposed the appeal of the Public Prosecutor in Prizren be granted, because it considered that the punishments were too lenient considering the gravity of the criminal offence, the social risk and the consequences suffered by the injured party. Additionally, the OSPK asked the Supreme Court to reject as ungrounded all Defence Counsels' appeals.
The Defense Counsels maintained that they entirely stood by their appeals and the proposals presented in them.

B. Merits of the Appeals

The Supreme Court of Kosovo preliminarily will examine the issue of composition of the panel and the issue related to conduction of the main trial and its closure to the public raised by the Defence Counsel H.K..

Composition of the panel

The Panel of First Instance Court who adjudicated and rendered an appealed judgment was composed of a EULEX judge as a Juvenile Presiding Judge and two other local judges. In the case at hand the injured party is the minor who at the time the crimes occurred was only 15 years old. The derogation from the requirement of the Article 51 paragraphs 1 and 3 of Juvenile Justice Code of Kosovo in relation to the composition of the panel is admissible based on the Article 3.7 of the Law on Jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo, Law no. 03/L-053, which stipulates that the EULEX judges adjudicate the criminal case in mix panels composed of professional judges. Therefore, the Supreme Court finds that there is no violation of the procedural provisions in relation to the composition of the panel.

Publicity of the main trial

As indicated in the appealed judgment the main trial sessions were closed to the public. The injured party was escorted by the social worker from UK during the period she was staying in Kosovo to attend the main trial sessions. She gave her testimony/statement in a room which was separated from the Courtroom. The rooms were divided with a glass, by which the participants present in the hearing were unable to see the injured party. From the minutes of the main trial it is understood that the trial panel allowed one member of the family for each defendants to be present during the sessions, while at the last session three students were allowed to be present. According to the Article 330 of the KCCP the trial panel may grant permission for certain officials, academics, public figures and, on the request of the accused, also the spouse or extra-marital partner of the accused and his or her close relatives to attend a main trial which is not open to the public.

The Supreme Court finds that there was no violation of the procedural code in respect of this issue based on the fact that the session of the main hearing was held only in the presence of the persons, who the law allows to be present.

The Supreme Court will present its findings in relation to each defendant as follows:

*In respect to defendant **I.I.***

Contrary to the arguments put forward by the Defences, the Supreme Court considers that the reasoning of the appealed judgment is complete and it contains the list of all evidences which were analyzed during the main trial and the evaluation of the credibility of the conflicting evidences and the reasons by which the court was guided in establishing the existence of a criminal offence and the criminal liability of the defendant.

In the view of the Supreme Court, the first instance court correctly assessed all the evidences and based on them correctly established the factual situation. It emphasises that the defendant can not deny that he was aware about the age of the injured party. He was the first one who was contacted by **F.T**. after they entered Kosovo and he had witnessed the injured party's miserable situation. Nevertheless together with **F.T**. he transported and transferred the injured party to the restaurant where she was supposed to work as a dancer. His actions are well beyond doing a favour to the co-partner, as he is claiming. Without him it would have been impossible to transport and transfer the injured party to the restaurant xxx. He was the regular client in the said restaurant, so he knew the way how the dancers were treated by the clients. So, it is clear that in this way he

contributed in her exploitation commenced by F.T.. It should be emphasized that his actions contain all elements of the criminal offence he was charged with, such as, transport, transferee and arrangement of her employment for the purpose of the exploitation. Moreover, the law provides that the purpose of trafficking in person is exploitation. But it does not request the perpetrator benefits directly. The fact that the defendant did not have any direct benefit in this entire event does not reflect on his criminal responsibility. The Supreme Court agrees with the assessment of the first instance court that the exploitation is not limited to the situation in which the perpetrator has achieved a benefit for himself.

The Supreme Court finds that the District court judgment does not contain any violation of procedural provisions; the factual situation was properly established; therefore the appeal of the defendant is to be rejected as ungrounded.

The first instance court sentenced the Defendant with punishment of one year of imprisonment considering as a mitigating circumstance the fact that he was perceived by the injured party as the person who helped her. The Supreme Court of Kosovo agrees with the public prosecutor that the punishment imposed on the defendant is very lenient. Having into consideration the actions undertaken by the defendant and the circumstances in which he acted, his commitment and readiness to transport and transfer the injured party being aware of her age and her vulnerable situation, dependency to the narcotics, the fact that she was alone in a foreign country, without any possibility to go back to her home and family, the Supreme Court based on the Article 420 paragraph 4 as read in conjunction with Article 426 paragraph 1 of KCCP modifies the judgment and imposes a more severe punishment.
Pursuant to Article 139, paragraph 1 and 2 and 23 of CCK, in conjunction with Article 66 paragraph 2 and Article 67 paragraph 1, sub paragraph 2 of CCK the Supreme Court of Kosovo determines on the defendant the punishment in the duration of 2 years of imprisonment.

In respect to defendant Sh.G.

The Defence claimed that the appealed judgment by which the defendant is found guilty was based only on the statement of the injured party A.K..
The Supreme Court finds that the court of first instance has taken into consideration the statement of the injured party, testimonies of the witnesses (G.G., B.H. and B.L. confirmed that the injured party worked as a dancer in xxx restaurant; further B.H. testified that on the critical night the injured party was brought back in the restaurant by 4 persons) and the statement of the defendant, as well. In the case of trafficking in person it is important to mention that it is the injured party who is the most reliable person due to the fact that he/she is directly involved as the victim and "knows" the situation better. In the case at hand it is well known how the injured party ended before the rule of law authorities, so, it is clear that she described the situation as it was without having any intentions to harm anyone. Thus, having into consideration this and her young age, her naivety and in particular the situation in which she was found without her will, unprotected, surrounded by unknown people, away from the family, without hope to return home it is more than evident that she told the truth; therefore, it is justified that the court of first instance based its decision mainly on the statements of injured party.

The Defence contested the establishment of the factual situation in relation to criminal offences under count 1 and 2 of the appealed judgment considering that in this incident the only offence committed by the defendant is the violation of the employment right because he employed a young girl without being aware of his age to work in the restaurant in the night tour.

Unlike the Defence, the Supreme Court considers that the actions of the defendant in relation to the injured party constitute the elements of the criminal offence of Trafficking in Person and
Unlawful Deprivation of Liberty, The defendant received the injured party, from the person who he hardly knew, provided an accommodation to her, with the intension of exploitation, employing her as a dancer. As the manager of the restaurant, it was not hard for him to understand that the injured party was of young age and victim of trafficking. By receiving her from **F.T.,** he undertook control over her and in the period she was working in his restaurant he treated her as his valuable asset. If this does not stand then, why would someone as an employer react in the way how the defendant reacted when the injured party was flirting with the client near to the bathroom door? If she was "only" the employee, why did she lock the injured party in the room at

the top floor of the restaurant after he was informed that she wanted to leave and then, after she escaped from the window, bringing her back and locking her for the next three days?

Thus, the Supreme Court finds that the first instant court correctly established that the defendant committed all three criminal offences he was charged with; therefore it rejects as ungrounded the appeal of Defence.

The first instance court sentenced the Defendant with punishment of four years and one month of imprisonment emphasising that it did not discerned any mitigation circumstances. Considering the degree of criminal liability, the motives for committing the act and the circumstances in which the acts were committed the Supreme Court agrees in principle with the punishment imposed by the first instance court. However the Supreme Court amends the amount/duration of punishment imposed in respect to individual criminal acts, so it punishes the defendant for criminal offence of Trafficking in Person pursuant to Article 139, paragraph 1 and 2 and 23 of the CCK with 3 years of imprisonment, for criminal offence of Unlawful Deprivation of Liberty pursuant to Article 162, paragraphs 1 and 4 of the CCK with 1 year of imprisonment and for violation of employment rights pursuant to Article 182 of the CCK with 6 months imprisonment.
Consequently, the Supreme Court of Kosovo, pursuant to Article 71 paragraphs 1 and 2, n.2 of the CCK determines on the defendant the aggregate punishment in the duration of 4 years and 1 month imprisonment.

*In respect to defendant **S.B**.*

The first instance court sentenced the Defendant with aggregate punishment of one year and one month of imprisonment considering as a mitigating circumstance the fact that he was an intermediary without any decisive power and did not obtain any benefit out of it for himself.

The Supreme Court of Kosovo agrees with standing of the district public prosecutor that the punishment imposed on the defendant is very lenient. Having into consideration his commitment to employ the injured party in the bar in which she was supposed to work during the night shift and the fact that he had sexual intercourse with her, being aware of her age and her vulnerable situation, the Supreme Court based on the Article 420 paragraph 4 as read in conjunction with Article 426 paragraph 1 of KCCP modifies the judgment and imposes on the defendant a more severe punishment.
Pursuant to Article 139, paragraph 1 and 2 and 23 of the CCK, in conjunction with Article.66 paragraph 2 and Article 67 paragraph 1, subparagraph 2 of the CCK the defendant is sentenced to imprisonment of 1 year pursuant to Article 198 paragraph 1 of the CCK the defendant is sentenced to imprisonment of 1 year.
Consequently, the Supreme Court of Kosovo based on Article 71 paragraphs 1 and 2 n.2 of the CCK determines on the defendant the aggregated punishment in the duration of 1 year and 6 months imprisonment.

*In respect to defendant **D.B**.*

In the view of the Supreme Court, it is already established that the injured party was brought to the Restaurant xxx by S.B., The defendant received her despite the fact that he knew that she was under age and employed her as a waitress during the night shift. The actions of the defendant can not be interpreted else then trafficking in person. It should be also emphasized that the trafficking of minors does not involve the use of force or violence, as it was assumed by the Defence. In the case at hand the injured party as a minor, having been transported and transferred from one restaurant to another had no choice in what happened to her. In regard to the criminal offence of Sexual Abuse of Person under the age of 16, the fact that the injured party agreed on having sexual intercourse with the defendant does not justifies his acts. The law foresees conviction even if it is proven that it was done with the permission of injured party. The fact that they got drank and then have had the intercourses may be also interpreted to the prejudice of the defendant, because he was the one who offered her alcohol and brought her in that stage, being aware of her vulnerable position.

Referring to the criminal offence of violating the Rights in Labour Relation, it is not contested that the injured party worked in the bar for almost one week as a waitress. As a manager of the bar he should have

know that the law prohibits employment of persons under age of 18 for the work in the night shift The fact that there was no written employment contract as it was stated by the Defence does not release the defendant from his criminal responsibility. In contrary it should be considered as an additional aggravated circumstance toward him.
As regard to the statements of the injured party given to the police on 6 January 2011, then in the prosecutor's office on 11 January 2011 and the last one given during the main trial where she stated *"that the person who mostly helped me in my life was* ***D.B.",*** the Supreme Court interprets as gratefulness of the injured party toward the defendant, possibly for the money that he gave to her (70 Euro for work and 100 Euro to buy cloths) or for the way in which she was treated. However, this gratitude of the victim towards the victimizer is not unknown in criminology as a feature of the distorted perception that a vulnerable victim may have of the reality of facts. In any case, this state of mind does not change the nature of the acts as criminal nor act as a disclaimer or an exculpatory circumstance.

The Supreme Court finds that the District court correctly determined the factual situation in regard to the criminal offences for which the defendant was finally convicted and based on the determined factual situation correctly applied the criminal law; therefore it rejects as ungrounded the appeal of the Defence.

The first instance court sentenced the Defendant with aggregate punishment of two years. The Supreme Court of Kosovo agrees with the district prosecutor that the punishment imposed on the defendant is very lenient. Having into consideration his readiness to employ the injured party in the bar in which she is supposed to work during the night shift and the fact that he had sexual intercourse with her, being aware of her age and her vulnerable situation, the Supreme Court based on the Article 420 paragraph 4 as read in conjunction with Article 426 paragraph 1 of KCCP modifies the judgment and imposes on the defendant a more severe punishment. Pursuant to Article 139, paragraph 1 and 2 and 23 of the CCK, in conjunction with Article 66 paragraph 2 and Article .67 paragraph 1, sub paragraph 2 of the CCK the defendant is sentenced to imprisonment of 1 year; pursuant to Article 198 paragraph 1 of the CCK the defendant is sentenced to imprisonment of 1 year; pursuant to Article 182 of the CCK the defendant is sentenced to imprisonment of 6 months;
The Supreme Court of Kosovo based on art. 71 paragraphs 1 and 2, n.2 of the CCK determines on the defendant the aggregated punishment in the duration of 2 years and 4 months imprisonment.

In respect to defendant ***V.M.***

The Defense argues that the activities of the defendant described in the enacting clause do not have any legal link with the activities enabling the trafficking in person for which he was convicted. Further there is no evidence that would prove that the defendant transported the injured party for the purpose of trafficking as alleged by the prosecution. The administrated evidences proved that the defendant was not involved at all in the prohibited activities.
In is not contested that the defendant transported the injured party with his vehicle to the motel and arranged an accommodation for her. He also left her the phone number of **S.B.,** even that he was aware that **S.B**. was trying to find a job in one of the restaurants around, where she would be required to work during the night shift. He did not hesitate to transport nor to arrange the accommodation for her, even though he knew that she was of young age, her background, the way how she was brought Kosovo and by whom.
In the Supreme Court view without assistance of the defendant the injured party would not have been transferred to another bar and would not have been the victim of further trafficking. It is clear that he did not act with purpose of exploitation; however he did not attempt to resist the requests of **S.B.,** even that he was aware of his intentions.
Therefore, the Supreme Court finds that the first instant correctly determined the factual situation and the criminal liability of the defendant in regard to the criminal offence he was convicted with.

As regard to the decision on punishment, the Supreme Court of Kosovo finds that the evaluation of circumstances, the form and scale of the imposed punishment is correct. Therefore, it rejects the appeal of the Defence as ungrounded.

*In respect to defendant **E.K**.*

In the appeal, the Defense alleges that in the appealed judgment the period in which the defendant was involved in the criminal offence is not mentioned. The Defence wonders if it's possible to commit the criminal offence described in the enacting clause of the appealed judgment during one or two hours. The reference was made also in the enacting clause where it was stated "... on 5 January 2012 being conscious he did not implement labour law and employed a child...".

It is not contested that the injured party was received by the defendant by two unknown people. At the moment he received her to work as a dancer in his restaurant for the purpose of expiation she did not possess the documents to prove her identity neither her age.
For the commencement of criminal offence of trafficking in person in which the injured party is minor, the law requires the form of trafficking and purpose. In the case at hand we have both elements as the defendant *received* the injured party for the purpose of *exploitation.* So it s not important how long she was under his control. The fact that two hours after she stated working the restaurant was searched by the police does not effect the commission of the criminal offence or liability for such criminal offence. There is no doubt that the defendant was aware that his actions constitute criminal offences as he advised the injured party to leave the restaurant in case the police had come.
The panel considers that the fact that the exploitation was of limited duration should not diminish the severity of the offence.

Therefore, the Supreme Court finds that the first instance correctly established the factual situation and found the defendant guilty for the criminal offences he was charged for.

As regard to the decision on punishment, having into consideration the short period she was working at the defendant's restaurant the panel decided to modify the judgment in accordance with Article 420 paragraph 4 as read in conjunction with Article 426 paragraph 1 of KCCP by reducing the punishment imposed for the criminal offence of violation of employment rights to two months of imprisonment.
Pursuant to Article 139, paragraph 1 and 2 and 23 of the CCK, in conjunction with Article .66 paragraph 2 and Article.67 paragraph 1, sub paragraph 2 of the CCK the defendant is sentenced to imprisonment of 1 year; pursuant to Article 182 of the CCK the defendant is sentenced to imprisonment of 2 months.

Consequently, the Supreme Court of Kosovo pursuant to Article 71 paragraph 1 and 2, n. 2 of the CCK determines on the defendant the aggregated punishment in the duration of 1 year and 1 month imprisonment.

*In respect to defendant **R.K.***

The Defence claims that the factual situation was confirmed erroneously because the defendant didn't commit at any time or in any manner the criminal offence for which he was found guilty. It is obvious that he was never the manager of the restaurant "xxx", but, because the owner M.K. suffered from serious illness he was only assisting him when there was a need for it. Therefore he had no authority to hire A.K. at the said restaurant. The injured party remembers him only as a figure and this might be verified by her statements given to the Prosecution HP.no.3/2011 dated 11 January 2011 and during the main trial.

The defendant R.K. was convicted for the commission of the criminal offence of the trafficking in person because in capacity of intermediary between the owner of the restaurant on one side and F.T. and I.I. on the other, contributed in receiving the injured party at xxx restaurant.

The defendant was a welder who was performing his activities in a small rented premise in the ground floor of the restaurant xxx. It is not questionable that R.K. assisted the owner in the said restaurant. However he did not have any decision making power or decisive role. In relation to the employment of the injured party he was in fact only passing the massages from M.K. to I.I. and F.T. and vice versa. The fact that he knew I.I. who brought the injured party together with F.T. does not automatically involve him in the crime. I.I. was a regular client in the restaurant, so he would have found a link to contact the owner even without the assistance of the R.K.. On the other side, there is no evidence that during this episode he tried to convince the owner to receive the injured party from the people who brought her or employ for the purpose of exploitation.

The Supreme Court established that the actions undertaken by the defendant does not constitute the elements of the criminal offence he was convicted with. His role in this entire story is of non- relevance at all, so it asserts that the defendant did not cooperated with the co-defendant M.K. for receiving the injured party and did not employ her.
The Supreme Court concludes that it can not establish that the defendant has committed the criminal act for which he is charge.
Considering the above, the Supreme Court acquits the defendant, pursuant to Article 390 paragraph 3 as read in conjunction with Article 420 paragraph 1 sub paragraph 4 and Article 426
of KCCP.

In respect to defendant M.K.

Based on Death certificate issued by the Office of Civil Registry, village xxx, municipality of Kamenice/a, it is confirmed that Mr. M.K. died on xxx. Therefore, pursuant to Article 145 of KCCP, the Supreme Court dismisses the criminal procedures against the late M.K.

Presiding judge:

_____
Francesco Florit

_____
Emine Mustafa,
Supreme Court Judge

_____
Nesrin Lushta,
Supreme Court Judge

Salih Toplica,
Supreme Court Judge

Dr. Horst Proetel,
EULEX Judge

Recording clerk

Lendita Berisha
Legal Advisor

SUPREME COURT OF KOSOVO
Ap - Kz. 307/2012

28 September 2012
Prishtine/Pristina