

SUPREME COURT OF KOSOVO

PML.-KZZ. No. 26/2015

18 March 2015

Prishtine/Pristina

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Elka Filcheva-Ermenkova as Presiding Judge and as members of the panel EULEX Judge Willem Brouwer and Supreme Court Judge Emine Mustafa with EULEX Legal Officer Holger Engelmann, acting in the capacity of recording clerk,

In the criminal case against:

M.I., born on xxx in the village xxx, Municipality of Istog/Istok, father's name xxx, Mother's name xxx, residing in xxx at xxx Street xxx, engineer, xxx, xxx with three children, Serbian nationality;

Charged by the Indictment PP. No. 48/2008, filed on 12 June 2012, amended on 15 August 2012 with having committed the criminal offences of:

1. **Unlawful Occupation of Real Property** in violation of Article 259 paragraph 1 of the Provisional Criminal Code of Kosovo¹ (henceforth: PCCK);
2. **Call to Resistance** in violation of Article 319 of the PCCK;
3. **Obstructing Official Persons in Performing Official Duties** in violation of Article 316 paragraph 3 of the PCCK;
4. **Participating in a Crowd Committing a Criminal Offence** in violation of Article 320 paragraph 1 of the PCCK, and
5. **Endangering United Nations and Associated Personnel** in violation of Article 142 paragraph 3 of the PCCK;

All charges were related to events that took place on the 14 and 17 March 2008 in the area around the court house in Mitrovica/Mitrovice North.

The confirmation judge, by decision KA. No. 207/2012, dated 19 October 2012, dismissed the charge of **Unlawful Occupation of Real Property** in violation of Article 259 paragraph 1 of the PCCK against the defendant **M.I.**

During the main trial session on 21 March 2013 before the Basic Court of Mitrovica/Mitrovice the prosecution submitted a document labelled as 'Modification of Indictment', charging the defendant M.I. with the following criminal offences:

1. **Participating in a Group Obstructing Official Persons in Performing Official Duties** in violation of Article 318 paragraph 1 of the Criminal Code of Kosovo (CCK) in relation to his actions of 14 March 2008;

¹ Issued as 'Provisional Criminal Code of Kosovo', promulgated as UNMIK Regulation 2003/25, dated 6 July 2003, later renamed and amended by the Law No. 03/L-002, in force until 31 December 2012

2. Obstructing Official Persons in Performing Official Duties in violation of Article 316 paragraph 3 of the CCK in relation to actions of 17 March 2008;

3. Participating in a Crowd Committing a Criminal Offence in violation of Article 320 paragraph 1 of the CCK in relation to his actions of 17 March 2008 and

4. Endangering United Nations and Associated Personnel in violation of Article 142 paragraph 3 of the CCK in relation to his actions of 17 March 2008.

The criminal offence of **Call to Resistance** in violation of Article 319 of the PCCK was not mentioned in the application for modification of the indictment. Clarification as to the meaning of the 'Modification of Indictment' in relation to the charges confirmed by the Confirmation Ruling KA. No. 207/2012, dated 19 October 2012, was provided orally by the prosecutor during the session on 21 March 2013. (See below under 'Procedural Background'.)

By the first instance Judgment P.-K. No. 50/2012 of the Basic Court of Mitrovica/Mitrovice, dated 28 March 2013, the defendant **M.I.** was found guilty of having committed the criminal offences of:

Obstructing Official Persons in Performing Official Duties in violation of Article 316 paragraph 3 of the CCK;

Participating in a Group Obstructing Official Persons in Performing Official Duties in

violation of Article 318 paragraph 1 of the CCK (for the actions on 17 March 2008);

Participating in a Crowd Committing a Criminal Offence in violation of Article 320 paragraph 1 of the CCK and

Endangering United Nations and Associated Personnel in violation of Article 142 paragraph 2 of the CCK

And sentenced as follows:

1. For Obstructing Official Persons in Performing Official Duties, pursuant to Article 316 paragraph 3 of the CCK, to six (6) months imprisonment,

2. For Participation in a Group Obstructing Official Persons in Performing Official Duties, pursuant to Article 318 paragraph 1 of the CCK, to four (4) months imprisonment,

3. For Participating in a Crowd Committing a Criminal Offense, pursuant to Article 320 paragraph 1 of the CCK, to six (6) months imprisonment and

4. For Endangering United Nations and Associated Personnel, pursuant to Article 142 paragraph 2 of the CCK, to one (1) year and six (6) months imprisonment;

The **aggregate sentence** was determined as **one (1) year and ten (10) months imprisonment**.

He was found not guilty of the criminal offences of:

Participating in a Group Obstructing Official Persons in Performing Official Duties in violation of Article 318 paragraph 1 of the CCK (for the actions on 14 March 2008);

Call to Resistance in violation of Article 319 of the CCK and

Endangering United Nations and Associated Personnel in violation of Article 142 paragraph 3 of the CCK.

Upon appeals filed by the prosecutor and on behalf of the defendant **M.I.** and one co-defendant, the Court of Appeals as court of second instance by Judgment PAKR. No. 513/2013, dated 28 May 2014, dismissed the appeal filed by the prosecutor as belated while rejecting the appeals filed by the defendant and by one co-defendant as unfounded, affirming the impugned judgment.

Deciding upon the Request for Protection of Legality filed on 9 December 2014 by the Defence Counsel Lj. P. on behalf of the defendant **M.I.** against the Judgment P.-K. No. 50/2012 of the Basic Court of Mitrovica/Mitrovice, dated 28 March 2013, and the Judgment PAKR. No. 513/2013 of the Court of Appeals, dated 28 May 2014, while also taking into account the Response to the Request filed on 12 February 2015 by the Office of the Chief State Prosecutor (OSPK);

Issues the following:

JUDGMENT

The Request for Protection of Legality filed on behalf of the defendant M.I. against the Judgment P.-K. No. 50/2012 of the Basic Court of Mitrovica/Mitrovice, dated 28 March 2013, and the Judgment PAKR. No. 513/2013 of the Court of Appeals, dated 28 May 2014, is hereby REJECTED AS UNFOUNDED.

REASONING

I. Procedural Background

- 1) The criminal investigation against the defendant **M.I.** and three other suspects was initiated by UNMIK prosecution by the Ruling PP. 48/08 on 6 June 2008.
- 2) A criminal investigation against three (3) other suspects was initiated by a ruling dated 15 September 2011.
- 3) By decision JC/EJU/OPEJ/0615/mgc/09 of the President of the Assembly of EULEX Judges, dated 28 April 2009, the case was assigned to a EULEX pre-trial judge.
- 4) On 12 June 2012 the District Prosecutor filed with the District Court of Mitrovica the Indictment against the defendant and six (6) co-defendants. The Indictment was amended on 15 August 2012 and later modified during the main trial session on 21 March 2013.
- 5) On 19 October 2012 the EULEX confirmation judge of the District Court of Mitrovica/Mitrovice issued the Ruling KA. No. 207/2012 on confirmation of the Indictment. One of the charges against the defendant was dismissed while four (4) charges were confirmed.
- 6) The main trial proceedings were opened on 26 February 2013 before a panel composed of EULEX judges of the Basic Court of Mitrovica/Mitrovice.
- 7) During the main trial session of 21 March 2013 the prosecutor submitted to the court a document titled 'Modification of Indictment' with the charges and factual circumstances described as mentioned above. Upon inquiry by the presiding judge, the prosecutor explained that all previous documents related to the charges remain intact and that the document describes the factual situation where it has changed. The modified indictment shall consist of the initially confirmed indictment together with the modifications submitted.
- 8) The main trial continued through a total of fourteen (14) public hearing sessions including the one on 28 March 2013 when the Judgment P.-K. No. 50/2012 was announced.
- 9) On 13 August 2013 the prosecutor filed an appeal against the aforementioned Judgment.
- 10) On 5 and 28 August 2013 two (2) appeals were filed by defence counsels on behalf of the defendant **M.I.**. Another co-defendant filed an appeal too.
- 11) After having held a public session, on 28 May 2014 the Court of Appeals issued the Judgment PAKR No. 513/2013, dismissing the appeal filed by the prosecution as belated and rejecting the defence appeals as unfounded, affirming the impugned first instance judgment.

- 12) The Judgment was served on the defendant on the 19 September 2014.
- 13) On 9 December 2014 the Defence Counsel Lj.P. on behalf of the defendant **M.I.** filed a Request for Protection of Legality against the final judgment.
- 14) On 12 February 2015 the Office of the Chief State Prosecutor in Kosovo (OSPK) filed a Reply to the defendant's request.

II. Submissions of the Parties

1. The Request filed by the Defence Counsel Lj.P. on behalf of the defendant on 9 December 2014

- 15) The defendant's Request alleges that the enacting clause of the first instance Judgment is unclear, internally inconsistent and contradictory with the introductory part of the Judgment. The defence claims that the defendant was charged with only five (5) criminal offences and that the court adjudicated seven (7) criminal offences.
- 16) This fact at the same time substantially violates the provisions of criminal procedure in the way that the Judgment exceeds the scope of the indictment. The courts were supposed to only consider the Indictment modified on 21 (in the Request mistakenly: 20th) March 2013, which was intended to substitute the original indictment.
- 17) The defendant further claims to have been convicted and acquitted of the same criminal offence of Endangering United Nations and Associated Personnel, pursuant to Article 142 paragraph 2 of the CCK.
- 18) Another inconsistency in the enacting clause concerns the Serbian language version, where allegedly the criminal offence of Endangering United Nations or Associated Personnel in violation of Article 142 paragraph 3 of the CCK, is mentioned in the convicting part as well as in the acquitting part of the Judgment.
- 19) The defence claims that the video recordings and the photos of the defendant taken during the demonstrations and the events in question are inadmissible because of being intrinsically unreliable, pursuant to Article 259 paragraph 2 of the CPC, due to unknown origin of the evidence and due to the fact that the evidence was not obtained in compliance with the legal provisions regulating covert photographic and video surveillance. It was never determined who recorded the concerned photo and video footage.
- 20) The Request moves the Supreme Court to modify the final Judgment in the part convicting the defendant **M.I.** and find him not guilty of the charges or, alternatively, annul the specified part of the Judgment and return the case for a new decision or retrial to the lower court.

2. The Reply of the Office of the Chief State Prosecutor

- 21) The OSPK in the Reply to the Request moves the Supreme Court to reject the defendant's Request as unfounded and affirm the contested judgments.
- 22) The State Prosecutor observes that most of the Defence Counsel's arguments had already been put forward as grounds for appeals were rejected by the Court of Appeals.
- 23) The claims that the judgments are based on inadmissible evidence and that they exceed the scope of the indictment were already addressed in detail in the Opinion of the Appellate Prosecutor, dated 5 February 2014, which is to be considered integral part of the current prosecution reply.

24) In relation to alleged contradictions in Serbian version of the first instance Judgment, the concerned version of the decision leaves no doubt that the defendant was convicted of the criminal offence described in Article 142 paragraph 2 of the CCK and acquitted of the offence described in Article 142 paragraph 3 of the CCK.

The impugned judgments are clear, without inconsistencies or contradictions between enacting clause and statement of grounds and are based only on admissible evidence.

III. Supreme Court Findings

25) The Request for Protection of Legality filed on behalf of the defendant **M.I.** was timely filed, admissible but unfounded.

As to the applicable procedural law, the Panel concurs with the Court of Appeals that the Kosovo Code of Criminal Procedure² (henceforth: KCCP) applies. The initiation of criminal proceedings as well as the filing and confirmation of the indictment took place when the KCCP was still in force (before the 1 January 2013). In recognition that the provisions of the Transitional Provisions (Chapter XXXVIII, Articles 539 ff.) of the new Criminal Procedure Code of Kosovo³ (henceforth: CPCK) are inconsistent and contradictory⁴, the Panel applies the principle enshrined in Article 545 paragraph 1, 1st sentence of the CPCK: "The determination of whether to use the present code of criminal procedure shall be based on the date of the filing of the indictment." and the basic rule that criminal proceedings initiated under one set of procedural rules should preferably be finalized under the same provisions.

26) The Request claims that the enacting clause of the final Judgment in respect to defendant is unclear, internally inconsistent and contradictory with the introductory part of the Judgment. The Defence claims that the defendant was charged with only five (5) criminal offences and that the court adjudicated seven (7) criminal offences.

The Request alleges that this fact at the same time substantially violates the provisions of criminal procedure in the way that the Judgment exceeds the scope of the indictment.

27) The Supreme Court of Kosovo notes that the same arguments were already used as basis for the defendant's appeal against the judgment of the court of first instance. The Panel finds the described claims unfounded and considers that the Judgment of the Court of Appeals satisfactorily addresses the issue.

There are no contradictions or inconsistencies in the enacting clause, it is clear and comprehensible. The Judgment does not exceed the scope of the Indictment. The modification of the Indictment filed on 21 March

² Issued on 6 July 2003 as Provisional Criminal Procedure Code of Kosovo by UNMIK Regulation 2003/26 and on 6 November 2008 by Law No. 03/L-003 amended and renamed as Kosovo Code of Criminal Procedure.

³ **Law No. 04/L-123, issued on 13 December 2012, promulgated on 21 December 2012, Official Gazette of the Republic of Kosovo No. 37, 28 December 2012**

⁴ The Panel refers to the Opinion No. 56/2013 of the General Session of the Supreme Court of Kosovo, dated 23 January 2013, page 2, paragraph 2.

2013 during the main trial hearing before the Basic Court of Mitrovica/Mitrovice supplemented the previously confirmed Indictment and did not replace it, as claimed by the defence. This is clear from the reasoning of the first instance Judgment (pages 54 to 61) and from the minutes of the public session of 21 March 2013. The Presiding Judge of the Basic Court specifically asked the representative of the prosecution if this was an entirely new indictment or a supplementation. The prosecution replied with a reference to Article 376 KCCP (modification of the factual situation) and clarified that all previous documents remain intact.

The same allegations were raised in the defendant's appeal and the Court of Appeals has on pages 19 and 24 of its Judgment accurately replied to them and rejected them. There was no withdrawal of charges during the proceedings. This was made sufficiently clear to the defendant by the explanation given by the prosecution on 21 March 2013 and by the fact that while the criminal offence of Call to Resistance pursuant to Article 319 was not explicitly mentioned in modification of the indictment, it clearly remained subject of the criminal proceedings and was addressed in the main trial.

Both previous instances changed the legal classification of the criminal act of Endangering United Nations and Associated Personnel pursuant to Article 142 paragraph 3 of the CCK, as described in the Indictment, to the act pursuant to Article 142 paragraph 2 of the CCK. The impression that seemingly there was a larger number of criminal offences adjudicated than mentioned in the indictment results from the fact that the same charges were raised in relation to different acts of the defendant committed at different moments in time. Both judgements of the previous instances have made it very clear that they did not find it proven beyond reasonable doubt that the defendant had, either on 14 or on 17 March 2008, engaged in violent attack upon official premises, private accommodation or the means of transport of United Nations or associated personnel.

28) The Request also claims in paragraph 6 that the Serbian language version of the first instance Judgment contained a mistake in relation to an alleged conviction for the criminal offence of Endangering United Nations and Associated Personnel pursuant to Article 142 paragraph 3 of the CCK.

The Panel has reviewed the Serbian language version and concludes that it does not contain such contradictions. The enacting clause as well as the reasoning part is clear and consistent.

Even if the Serbian language version contained such a mistake, it could not provide the basis for a modification of the final Judgment. Since the original English version did not contain such a mistake, it would be qualified as obvious clerical deficiency and would just be corrected as *de minimus error* pursuant to Article 397 KCCP.

29) The defence claims that the video recordings and the photos of the defendant taken during the demonstrations and the events in question are inadmissible, pursuant to Article 259 paragraph 2 of the CPCK, because of being intrinsically unreliable due to unknown origin of the evidence and due to the fact that the evidence was not obtained in compliance with the provisions of Article 256 to 267 of the KCCP.

30) The Panel finds this allegation without merits and concurs with the detailed reasoning related to the subject on pages 17 to 19 of the Judgement of the Court of Appeals.

31) The Supreme Court firstly notes that - as elaborated above under paragraph 26 - the CPCK does not apply in the current case. The KCCP does not contain an identical or similar provision as Article 259 paragraph 2 of the CPCK.

32) Even if Article 259 paragraph 2 of the CPCK would have been in force, it would not apply to the evidence in question.

The term 'intrinsically unreliable' is defined in Article 19 paragraph 1 item 1.29 of the CPCK. Although unknown origin is mentioned as a possibility that could render information 'intrinsically unreliable', in the current case that does not apply. Place and time of the recordings are known and are not disputed. The exact identity of the person who took the recordings is therefore not of relevance for the admissibility of the evidence.

'Intrinsically' as per definition means 'belonging to the essential nature or constitution of a thing' (Merriam-Webster Online Dictionary and Thesaurus). A recording does not become unreliable *by its very nature* just because the exact identity of the recording person is unknown.

The exact identity of the person(s) responsible for the recordings in question might become relevant in relation to the evaluation of the reliability of the evidence. However, that is another systematic legal category different from admissibility of evidence. There were no signs of tampering or manipulation of the recordings that would give raise to doubts about the reliability of the concerned evidence and no such allegations have been raised.

33) The Panel rejects the defence's claim as unfounded that evidence in question was obtained in violation of the provisions of Articles 256 to 267 of the KCCP or any other provision of criminal procedure.

The admissibility of evidence is to be assessed pursuant to Article 153 paragraph 1 of the KCCP (corresponding to Article 205 para. 1, 2 and 4 of the CPCK). Evidence is only inadmissible if obtained in violation of the provisions of the KCCP or other provisions of the law expressly so prescribe.

The Definition in Article 256 paragraph 2 of the KCCP for 'covert photographic and video surveillance' does not apply to the recordings subject to the allegation since, according to the definition, this 'surveillance' has to be a) without the knowledge or consent of at least one of the persons subject to the measure and, b) directed against specific persons, their movements or activities.

The evidence in question was not obtained in a covert way, but by an open observation of a public area. It was neither directed nor focussed on specific persons but was obtained in a public place and aimed at the observation of a public space for the purpose of crime prevention and public safety. Article 8 paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) explicitly permits public surveillance for the purpose of public safety and crime prevention.

34) The Court did not find a violation of the provisions of Article 171 paragraphs 1 or 2 of the CCK either.

The recording was made in a public place. The mentioned provisions only protect against violations of privacy without consent. In public places there is no legally protected right to privacy. The Panel refers once more to Article 8 paragraph 2 of the ECHR.

For the aforementioned reasons, pursuant to Article 456 of the KCCP, the Supreme Court of Kosovo decides on the Requests for Protection of Legality as in the enacting clause.

Presiding Judge:

Elka Filcheva-Ermenkova

EULEX Judge

Members of the panel:

Willem Brower

EULEX Judge

Emine Mustafa

Supreme Court Judge

Recording Clerk:

Holger Engelman

Legal Officer

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