

Dissenting Opinion

in the criminal case PAKR 77/2017 against M.S. and V.T.:

I respectfully disagree with the decision of the majority of the panel to order the retrial of the case at hand. I believe that the Court of Appeals should decide on all challenges brought by the parties in their respective appellate motions and evaluate all the evidence that would be found admissible. Moreover, the Court of Appeal should complete the body of evidence and to hear B.S.1. as a witness in the case.

Although the enacting clause of the first instance judgment does not fully comply with the relevant legal provisions of the Criminal Procedure Code, in my opinion it was not sufficient to justify quashing the judgment and sending the case for retrial. Such a decision shall be taken only exceptionally, i.e. when the Court of Appeals cannot proceed accordingly to Article 403 of the CPC and modify the impugned judgment.

In the case at hand the Court of Appeals should not avoid judicial review of the merits of the case. The Court, acting *ex officio*, could hold a hearing to take new evidence – testimony of B.S.1. heard in a capacity of a witness. Afterwards, I am of the opinion that it would be possible to determine and assess all the material facts of the case in the light of relevant provisions of the Criminal Code.

I see no reason why the Court of Appeals should avoid evaluation of the body of evidence and deciding in this case. The Kosovo Criminal Procedure Code allows for the standard of appellate review and gives appellate judges various instruments to have the evidence collected in a complete way. Sending the case for retrial brings into administration of justice an unnecessary delay as it is highly predictable that the challenged matters would be presented for appellate review again. There are no procedural rules that would prevent the Court of Appeals from amending the impugned judgement and taking decision on guilt or innocence and in case of guilty verdict - on punishment. In general words the Code allows for so called *de novo* review. The appellate court should act as if it were considering the question for the first time, affording no deference to the lower court decision. The Kosovo criminal procedure allows even the accused who was acquitted by the first instance court to be convicted in the second instance. In this latter example, the defendant who was found guilty only by the Court of Appeals has right to appeal against it to the Supreme Court. This is actually the best argument that Kosovo criminal procedure provides for *the novo* appellate standard.

For these reasons I respectfully dissent with the decision of the majority of panel to send the case for retrial.

Anna Adamska – Gallant

EULEX Judge

