COURT OF APPEALS

Case number: **PAKR 77/2017**

Date: **14 November 2017**

The Court of Appeals of Kosovo in the Panel composed of Court of Appeals Judge Driton Muharremi as Presiding Judge, EULEX Judge Anna Adamska-Gallant as Reporting Judge, and Court of Appeals Judge Abdullah Ahmeti as Panel member, with the participation of EULEX Legal Officer Kerry Moyes as the Recording Officer, in the criminal proceedings against;

M.S.;

V.T.;

charged under Indictment PPS No 5/2012 filed on 27 December 2013 as follows:

M.S.

Count 1 - Abuse of Official Position in co-perpetration, in violation of Article 339 (1) and (2) in conjunction with Article 23 of the former Criminal Code of Kosovo (CCK), currently penalized under Article 422 in conjunction with Article 31 of the CCK 2013;

Count 2 - Accepting Bribes in co-perpetration, in violation of Article 343 (1) in conjunction with Article 23 of the former CCK, currently penalized under Article 428 in conjunction with Article 31 of the CCK 2013;

Count 3 - Trading in Influence in co-perpetration, in violation of Article 345 (1) in conjunction with Article 23 of the former CCK, currently penalized under Article 431 (1) and Article 31 of the CCK 2013;

Count 4 - Avoiding Payment of Mandatory Customs Fees in co-perpetration**,** in violation of Article 318 (1) and (4) in conjunction with Article 31 of the CCK 2013;

Count 5 - Providing Assistance to Perpetrators after the Commission of the Offence, in violation of Article 388 (1) of the CCK 2013;

Count 6 - Providing Assistance to Perpetrators after the Commission of the Offence in violation of Article 388 (1) and (2) of the CCK 2013;

Count 7 - Failure to Report Criminal Offences or Perpetrators, in violation of Article 386 (1) subparagraph 9 of the CCK 2013;

Count 8 - Unauthorized Ownership, Control or Possession of Weapons, in violation of Article 374 (1), in conjunction with Article 120, item 38 of the CCK 2013;

V.T.

Count 4 - Avoiding Payment of Mandatory Customs Fees in co-perpetration**,** in violation of Article 318 (1) and (4) in conjunction with Article 31 of the CCK 2013;

By the Judgment of the Basic Court of Ferizaj P. 250/2013 of 6 October 2016 the defendant M.S. was convicted of:

Count 1 - Abuse of Official Position,

Count 2 - Accepting Bribes,

Count 3 - Trading in Influence,

Count 6 - Providing Assistance to Perpetrators after the Commission of the Offence and

Count 7 - Failure to Report Criminal Offences or Perpetrators,

and for these criminal offences an aggregate sentence of 7 years of imprisonment was imposed, with the time spent in detention on remand and in house detention being credited, and the defendant was disqualified from holding an official position for the period of 5 years after his release;

he was acquitted of Counts 4, 5 and 8 of the Indictment;

The defendant V.T. was acquitted of Count 4 of the Indictment;

Deciding upon the following appeals against the Judgment of the Basic Court of Ferizaj P. 250/2013 dated 6 October 2016:

a. appeal filed by the defendant M.S. and his Defence Counsel A.R. on 26 January 2017;
b. appeal filed by the Special Prosecutor on 26 January 2017;

having reviewed the response to the appeal of the defendant M.S. filed by the Special Prosecutor on 9 February 2017, and the motion of the Appellate Prosecutor filed on 27 February 2017;

after having held a public session of the Court of Appeals on 29 September 2017;

having deliberated and voted on 11 October and 14 November 2017;

pursuant to Articles 389, 390, 394, 398 and 402 (1) of the Criminal Procedure Code (CPC);

renders the following

RULING

I. The appeal filed by the defendant M.S. and his Defence Counsel A.R. on 26 January 2017 is hereby granted;

II. The Judgment of the Basic Court of Ferizaj P. nr. 250/2013 dated 6 October is hereby annulled and the case is sent for retrial;

III. The appeal filed by the Special Prosecutor on 26 January 2017 is hereby rejected.

REASONING

RELEVANT PROCEDURAL BACKGROUND

1. On 23 March 2013 the Prosecutor issued Decision on Initiation of Investigation, which was expanded on 28 March 2013 upon issuance by the Prosecutor of Decision to Expand the Investigation.

2. On 11 September 2013 the defendant M.S. was arrested and on 12 September 2013 the pre-trial Judge ordered detention on remand against him. He was released into house detention on 28 April 2015. He remained in house detention until this measure was revoked on 6 October 2016 and detention on remand was imposed, and he has been in detention since.

3. On 27 December 2013 the Prosecutor filed Indictment PPS No. 05/2012, charging the defendants M.S., B.S.1., B.V., S.M. and R.A.1. After the initial hearing held on 10 January and 10

February 2014 all applications to have the Indictment and/or evidence dismissed were rejected at first instance and on appeal.

4. The defendant A.M. did not attend either session and on 12 February 2014 the Presiding Judge issued a domestic Arrest Order and applied for an International Arrest Order which was subsequently issued. The case was formally severed and assigned the new reference PKR. Nr. 193/2015.

5. The main trial was held on 19 and 30 May, 2 and 12 June, 10 and 11 July, 4 and 25 August, 8, 16, 19 and 30 September, 13 and 28 October, 13, 14 and 27 November, 5, 8 and 15 December 2014 and 16, 26 and 30 January, 10, 23, 24, 25, 26 February, 3 and 31 March and 2, 21, 23, 27, 28, 29 April, 13, 15 and 27 May, 22 and 29 June, 1, 2, 3, 9, 10, 11, 13, 22, 23 and 24 July, 2, 28, 29 September, 6, 13, 19 and 27 October, 16, 20, 23 and 24 November, 7 and 8 December 2015 and 15 February, 17, 18, 21 and 24 March, 22, 25 and 26 April, 21 July, 2 August, 5, 9 and 26 September and 4 and 6 October 2016.

6. In the main trial session on 2 February 2015 the defendant R.A.1. concluded a guilty plea agreement with the SPRK Prosecutor and on 23 February 2015 the Presiding Judge severed the case against him. In the main trial session on 8 December 2014 counsel for defendants B.V. and S.M. indicated that their clients wished to enter pleas of guilty to the charges. On 15 December 2014 the Presiding Judge issued a Ruling releasing both defendants from detention on remand and into house detention. B.V. subsequently absconded and was extradited from Germany back to Kosovo, and he was sentenced on 4 August 2016. The defendant S.M. also absconded, and on 8 November 2016 the Presiding Judge issued an Order severing his case.

7. With the Judgment of the Basic Court rendered and announced on 6 October 2016, the Trial Panel found M.S. guilty of:

Count 1

Because in June 2012, in Ferizaj, Kosovo and/or elsewhere in Kosovo, the defendant M.S., as an official person, namely a Lieutenant in the Kosovo Police, in co-perpetration with another established official person, also a police officer, and with the intent to obtain an unlawful material benefit, abused their official position, because they acquired money from X.B. and A.S, and by extension other family members of B.S.2. (namely 4,750 Euros), thereby causing financial damage to these individuals, in exchange for promising to secure the release of B.S.2. from

detention, or promising to make sure that he does not serve his sentence. These actions included, among other things, representations to the S. family that the defendants would contact witnesses to have them change their statements against B.S.2., provide gifts to the prosecutors assigned to his case, and withhold certain evidence from the case files provided to the prosecutor's office.

This count was classified as Abuse of Official Position, in co – perpetration, in violation of Article 339, paragraph 2, in connection with paragraph 1, in conjunction with Article 23 of the former CCK, currently penalized under Article 442 in conjunction with Article 31 of the CCK 2013.

For this count, the Trial Panel imposed a sentence of three years of imprisonment.

Count 2

Because in June 2012, in Ferizaj, Kosovo and/or elsewhere in Kosovo, the defendant M.S., as an official person, namely a Lieutenant in the Kosovo Police, in co-perpetration with another established official person, also a police officer, solicited and accepted a gift or some other benefit for themselves (namely, monetary payment totaling approximately 4750 euro) to perform within the scope of their authority an official or other act which he or she should not perform or to fail to perform an official or other act which they should or could have performed, so as to either secure the release of B.S.2. from detention, or make sure he will not be convicted and/or make sure that he does not serve his sentence. These actions included, among other things, representations to the S. family that the defendants would contact witnesses to have them change their statements against B.S.2., provide gifts to the prosecutors assigned to his case, and withhold certain evidence from the case files provided to the prosecutor's office.

This count was classified as Accepting Bribes, in co – perpetration, in violation of Article 343, paragraph 1, in conjunction with Article 23 of the former CCK, currently penalized under Article 428 in conjunction with Article 31 of the CCK 2013.

For this count, the Trial Panel imposed a sentence of five years of imprisonment.

Count 3

Because in June 2012, in Ferizaj, Kosovo and/or elsewhere in Kosovo, the defendant M.S., in co-perpetration with another established official person, requested and received an offer (namely monetary payment totaling approximately 4750 euro) of any undue advantage for themselves in consideration of the exertion of an improper influence by the perpetrator over the decision –

making of an official person so as to either secure the release of B.S.2. from detention, or make sure he will not be convicted and/or make sure that he does not serve his sentence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

This count was classified as Trading in Influence, in co – perpetration, in violation of Article 345, paragraph 1, in conjunction with Article 23 of the former CCK, currently penalized under Article 431, paragraph 1, in conjunction with Article 31 of the CCK 2013.

For this count, the Trial Panel imposed a sentence of two years of imprisonment.

Count 6

Because on 29 May 2013, in Ferizaj, Kosovo or elsewhere in Kosovo, the defendant M.S. was informed that R.A.1. had shot a car near a restaurant called "*International"* and not only M.S. did not report this incident but he actively intervened to persuade the victim(s) not to report the incident to the police. By doing so, M.S. aided R.A.1. as the perpetrator of a crime (namely, violations of Article 365 (1) "causing general danger" and Article 375 (2) "use of weapon or dangerous instrument" of the CCK 2013, which are offences under Chapter XXX – Weapon Offences of the CCK 2013) to elude discovery or arrest, and took steps towards frustrating the arrest, execution and punishment of R.A.1. by ensuring that R.A.1. would not be reported for a criminal offence he had committed.

This count was classified as Providing Assistance to Perpetrators after the Commission of the Offence in violation of Article 388, paragraphs 1 and 2 of the CCK 2013.

For this count, the Trial Panel imposed a sentence of one year of imprisonment.

Count 7

Because on 29 May 2013, in Ferizaj, Kosovo or elsewhere in Kosovo, the defendant M.S. was informed that R.A.1. had shot a car near a restaurant called "*International"* and M.S. subsequently did not report this incident which constitutes a criminal offence (namely, violations of Article 365 (1) "Causing General Danger" and Article 375 (2) "Use of Weapon or Dangerous Instrument" of the CCK 2013, which are offences under Chapter XXX – Weapon Offences of the CCK 2013).

This count was classified as Failure to Report Criminal Offences or Perpetrators in violation of Article 386, paragraph 1, subparagraph 1.9 of the CCK 2013.

For this count, the Trial Panel imposed a sentence of one year of imprisonment.

Pursuant to Article 80 (1) of the CCK the Court imposed and aggregate sentence of 7 (seven) years of imprisonment.

Pursuant to Article 83 (1) of the CCK time served in detention by M.S. was included in the punishment of imprisonment.

Pursuant to Articles 42 paragraph 1 and 65 paragraph 1 of the CCK M.S. is disqualified from holding any official position for a period of five years.

Pursuant to Articles 41 (1.3), 62 (2.2) and 64 (1) and (2) of the CCRK M.S. was ordered to make restitution to the S. family for the loss of 4750 euro. M.S. is jointly and severally liable with the co – accused B.S.1. who pleaded guilty for the return of this sum, which is to be refunded by 31 December 2020.

Other claims filed by the S. family shall be decided in separate civil proceedings.

Counts 4 and 5

With the same Judgment the Trial Panel found M.S. and V.T. not guilty of count 4 (Avoiding Payment of Mandatory Customs Fees, in co – perpetration, in violation of Article 318, paragraphs 1 and 4, in connection with Article 31 of the CCK 2013).

The Trial Panel also acquitted M.S. of Count 5 (Providing Assistance to Perpetrators after the Commission of the Offence (Article 388 paragraph 1 of the CCK).

Count 8

M.S. was acquitted of the count of unauthorized ownership, control, or possession of weapons contrary to Article 374 (1) of the CCK because there are circumstances which excluded criminal liability. The offence, which M.S. was charged with, was covered by the *Law on Amnesty* No. 04/L-209. There were no allegations or evidence of any violence or threat of violence involving the use of weapons or otherwise by M.S.

Costs of the proceedings

Pursuant to Article 450 of the CPC the costs of the proceedings in the amount of 500 euro will be reimbursed by the Defendant.

In the written judgment, the Trial Panel ordered also the permanent seizure of the ammunition seized from the Defendant's residence.

8. The Judgment was served on the Prosecution on 12 January 2017, and an appeal was filed by the Special Prosecutor on 26 January 2017. The Judgment was served on the defendant M.S. on 18 January 2017, and an appeal was filed by the defendant and his Defence Counsel A.R. on 26 January 2017. The appeal of the defendant M.S. was served on the Prosecution on 1 February 2017, and a response to the appeal was filed by the Special Prosecutor on 9 February 2017. The Court of Appeals has not received a response to the appeal filed by the Special Prosecutor from either defendant.

9. The case was transferred to the Court of Appeals on 21 February 2017. On 27 February 2017 the Appellate State Prosecutor filed a motion.

10. The session of the Court of Appeals Panel was held on 29 September 2017 in the presence of the defendant M.S. and his Defence Counsel A.R., A.S. - the Defence Counsel of defendant V.T., the Injured Party B.S.2 and his Defence Counsel B.S.3, and the Appellate Prosecutor E.K.

11. The Court of Appeals deliberated and voted on 11 October and 14 November 2017

SUBMISSIONS OF THE PARTIES

The appeal filed by M.S. and his Defence Counsel A.R.

12. The appeal is on the grounds of: substantial violation of the provisions of criminal procedure, violation of criminal law, erroneous and incomplete factual situation; and against the decision on punishment, criminal sanction and compensation in the amount of 4,750 Euros.

Substantial violation of the provisions of criminal procedure

13. The appeal states that the Judgment is in substantial violation of the provisions of criminal procedure pursuant to Article 384 (1) item 1.12 in conjunction with Article 370 (2), (3), (4) and (5) of the CPC as it does not contain the form and content that every Judgment must have. Specifically, the first page does not record whether he is married, whether he is a family person, who are members of his family, whether he has children or not and their ages, and what education he has, and so on. The appeal states that on pages 4 to 8 of the Judgment, which the enacting clause is, the defendant is found guilty of 8 criminal offences. The enacting clause did not stipulate the punishments for each of these criminal offences separately. Towards the end of the Judgment, beginning at paragraph 929, the defendant is found guilty of 5 criminal offences, and an aggregate sentence of imprisonment of 7 years is imposed. Further, the enacting clause is contradictory in itself as reasons on decisive facts are not presented, and those presented are vague and contrary to the content of the evidence. Also the enacting clause does not state the time and place of the commission of the criminal offences, and the sum of 4,750 Euros is sometimes referred to as an approximate amount.

14. The appeal submits that the Judgment is contradictory and unclear in a large part. A large part of the text is copied extracts from the records of the main trial sessions. There is no analysis of the credibility of the statements of the witnesses or other material evidence. In particular, it does not reflect on the credibility of the statements presented by the defendant.

15. The appeal submits that the first instance court did not decide in relation to the expansion of the Indictment against the defendant in the main trial (violation of Article 384 (1.7) of the CPC). Therefore, the appealed Judgment is incomplete, inaccurate and inconsistent in itself and incomprehensible, in violation of the CPC.

16. The appeal submits that the rights of the defence were violated by the Basic Court's disqualification of Defence Counsel A.I., and that the Judgment gives no valid reason for this

decision, which affected the defence of the defendant as A.I. had been engaged with the case from the beginning of the proceedings (violation of Article 126 (1) of the CPC – Defence Counsel as a privileged witness; Article 56 – disqualification of the defence)

As a result, the Court violated the rights of the defense; and this influenced or might have influenced the rendering of a lawful and fair judgment (Article 384 (2.2) of the CPC).

Substantial violation of the criminal law

17. The appeal states that the defendant was convicted of the criminal offence of Abuse of Official Position, but his actions are qualified by 2 alternative legal provisions: Article 339 of the Provisional Criminal Law and Article 422 of the current Criminal Code. The new Criminal Code should be applied only if it is more favorable to the accused, which is not true in this case, and the legal qualification for one offence is from 2 Criminal Codes. This also applies to the legal provisions for the criminal offences of Accepting Bribes and Trading in Influence. Further, these offences are one offence only in continuation as they were committed against the same victim, the object of the criminal offences is the same, and with the same situations and relations.

Erroneous and incomplete determination of the factual situation

18. Regarding the offences concerning B.S.2., his testimony and that of all other Prosecution witnesses who are friends or members of the S. family are entirely biased and have only the intention of revenge against the defendant, and are therefore not credible. Otherwise, they have no direct knowledge of B.S.1. sharing the money with M.S. or of his involvement in any criminal offences. The defence believes that the testimony of B.S.2. and of all other witnesses should be declared inadmissible.

19. The appeal goes into some detail regarding the testimony of the Prosecution witnesses, and emphasizes that until the occasion involving the perfume box, it was B.S.1. who had himself taken the money. Therefore, the logical explanation of that is that B.S.1. had not given any money to the defendant M.S., and on that last occasion involving M.S. this was done to involve him and to convince the family of B.S.2. that M.S. was taking the money. Further, the defendant did not have any phone calls with X.B., who had a number of phone calls with B.S.1. Finally, B.S.1. was never asked if he shared the money he took from the S. family with the defendant, or

gave any details of this. It can be concluded that all of the money was taken by B.S.1., who kept it to himself.

20. Regarding the incident at the 'International' Restaurant, the evidence given by the witnesses does not support the findings of guilt. The appeal gives some detail as to M.S.'s account of the events in question, and concludes that it represents the real factual situation. The Defence Counsel submits it was not assessed in the challenged Judgment and therefore the factual situation was not established fairly and completely in violation of Article 386.

21. The appeal concludes that the Judgment has violated the criminal law to the detriment of the defendant because it has violated essential provisions of criminal procedure due to the erroneous and incomplete determination of the factual situation. It is also unclear which criminal law has been applied to the criminal offences under Counts 1, 2 and 3. Defence Counsel proposes that the Court of Appeals annul the Judgment of the Basic Court and returns the case for retrial.

The response to the appeal by the Special Prosecutor

22. The response to the defendant M.S.'s appeal was filed by the Special Prosecutor on 9 February 2017.

23. Regarding the defence submission that the Judgment was not written in compliance with Article 370 of the CPC, the Special Prosecutor submits that all information as required by this Article is present in the Judgment. The requirements of Article 370 paragraph 3 of the CPC regarding personal data were sufficiently met to identify the defendant, and the sum total of which clearly indicates his unique identity, and therefore there was no substantial violation of the criminal procedure in this regard.

24. The Special Prosecutor disagrees that the Trial Panel wrongly qualified the criminal acts. The defendant committed the criminal offences in 2012 under the application of the previous Criminal Code and the new Criminal Code came into force in January 2013. Therefore the Indictment correctly indicates both of the Articles qualifying the criminal offences under the previous Criminal Code and under the current Criminal Code. Further, there is virtually no difference between the laws regarding the definitions of the criminal offences in this case.

25. Regarding the amended Indictment not being included in the Judgement, the Basic Court did not address the issue because a decision had already been made in July 2015 in which the Basic Court rejected the Prosecution's request to amend the Indictment. Therefore there was no requirement for the matter to be included in the Judgment.

26. Regarding the disqualification of Defence Counsel A.I., he was disqualified because the Basic Court indicated that he would be summoned as a witness, and he cannot be both in accordance with Article 56 paragraph 2 of the CPC. The Special Prosecutor submits that this was the only prudent thing that the Trial Panel could do in the circumstances. A Defence Counsel can be called as a witness provided that it does not bear on a confidential matter. Otherwise, this took place in 2014, which was early in the case. The Defence Counsel has not submitted any arguments that the defendant suffered as a result of this change of counsel, nor is there any requirement from the Criminal Procedure Code that these details must be included in the Judgment.

27. The Special Prosecutor submits that the Defence Counsel is simply attempting to re-litigate the entire case again by alleging that the credibility of the witnesses was not dealt with and that they did not provide sufficient evidence to support convictions. Rather, the Trial Panel saw and heard the witnesses clearly and reflected its assessment of them in the Judgment.

28. The Special Prosecutor states that there were no significant or undermining inconsistencies in the statements of the Prosecution witnesses, and gives a number of examples to support this submission.

29. The Special Prosecutor disagrees with the defence assertion that witnesses are not credible because they are related to B.S.2., and emphasizes that the total consistency of the evidence and the corroborating evidence all pointed to the guilt of the defendant beyond a reasonable doubt. The Trial Panel found the evidence of these witnesses to be credible, and the Defence Counsel has not cited any new facts or arguments in the appeal. The Trial Panel also rightly found that the defence witnesses and the defendant's individual account lacked credibility.

30. The Special Prosecutor also disagrees with the Defence Counsel's claim that there is no evidence to prove that the defendant took any money and therefore the co-perpetration with B.S.1. is not proved. This is not correct, and proof of this was provided in great detail in the Prosecution case and reflected in the Judgment.

31. The Special Prosecutor submits that the Trial Panel did not rely on B.S.1.'s guilty plea as part of its finding of the guilt of M.S., as claimed by Defence Counsel. This is expressly stated in the Judgment and, further, M.S. was found guilty by relying upon the credible testimonies of the Prosecution witnesses and the corroborating evidence, which was that the two men were working in concert and received money as part of their common plan.

32. Regarding the incident at the 'International' restaurant, the evidence is clear that M.S. was called to help his friend R.A.1. after the shooting took place, and that he went to the scene to prevent the offence being reported and that he did not report it himself.

33. Further, the defence is incorrect in stating that M.S. cannot be guilty of multiple crimes. The evidence presented shows that the criminal offences were perpetrated against multiple victims, and therefore Article 81 does not apply to this case. In this case the elements necessary to commit each of the crimes are different, and require different behaviours – as such they are meant to protect separate public interests. The Special Prosecutor cites three Judgments which support his position. Otherwise, the Basic Court ruled on this issue on several occasions in the proceedings.

34. Finally, the Special Prosecutor disagrees with Defence Counsel regarding the punishment imposed, and states that the aggregate punishment of 7 years of imprisonment is fair. The Defendant abused his position of trust over a lengthy period of time and in different instances, and the extent of the harm caused to the S. family and business was taken into account as being particularly cruel against vulnerable multiple victims. The sentence also serves as a general deterrent that corruption by police officials and those in a position of trust will not be tolerated and will result in severe consequences. However, the Trial Panel also took into account the mitigating factors, which were that M.S. had no prior criminal record, that he had a long history of employment and that his criminal conduct would negatively impact his family. The Special Prosecutor considers that the Trial Panel was, if anything, generous.

35. As to the comparison with the sentence which B.S.1. received, the Special Prosecutor notes that there are a number of significant differences between the two men as individuals, and in the criminal proceedings against them including the charges which they faced, and that these factors are why they were treated differently.

36. Regarding the restitution order, the Special Prosecutor submits that the Basic Court correctly assessed that M.S. and B.S.1. should be jointly and severally liable in the circumstances.

37. Also, the Costs could have been assessed in a much greater sum than 500 Euros in light of the fact that the case took over two and a half years to try and there were some 40 witnesses and 85 trial sessions. The Special Prosecutor requests that the appeal be rejected.

The appeal filed by the Special Prosecutor

38. The Special Prosecutor filed an appeal against the Judgment on 26 January 2017 with reference to Counts 4 and 5, on the grounds of:

    1. erroneous or incomplete determination of the factual situation pursuant to Article 383 paragraph 1.3 in conjunction with Article 386 paragraphs 1, 2 and 3 of the CPC,
    2. violation of the criminal law pursuant to Article 383 paragraph 2 read in conjunction with Article 385 paragraph 1.1 of the CPC, and
    3. violation of the criminal procedure, pursuant to Article 383 paragraph 1.1 in conjunction with Article 384 paragraph 2.1 of the CPC.

    With reference to Count 8:

    1. violation of the criminal law pursuant to Article 383 paragraph 2 read in conjunction with Article 385 paragraph 1.1 of the CPC,

    With reference to the accessory punishment imposed and costs of the criminal proceedings:

    1. improper determination of criminal sanctions pursuant to Article 383 paragraph 1.4 read in conjunction with Article 387 paragraph 1 of the CPC,
    2. incorrect determination of the costs of the criminal proceedings pursuant to Article 383 paragraph 1.4 of the CPC in conjunction with Article 387 paragraph 4 of the CPC.

Erroneous or incomplete determination of the factual situation (Counts 4 and 5)

39. The Special Prosecutor submits that the Basic Court based its decision on the two main witnesses for Counts 4 and 5: Officer N.S. and Officer S.O., and particularly that Officer N.S. had made up his mind about the ticket before he spoke to the defendant M.S. and that both officers believed the account that V.T. gave about the vehicle at the time. The efforts of the defendant M.S. to persuade Officer N.S. to change his mind regarding the ticket was glossed over by the Basic Court, as was its own finding that he and the defendant M.S. were not impressive in their

testimonies overall. Also, the improper conduct of Officer N.S. in this incident was not fully characterized.

40. The Prosecution case was that when V.T. was stopped by the two police Officers he sought the help of the defendant M.S. to obtain the issuance of only a symbolic ticket to avoid the payment of customs fees and the confiscation of the vehicle. A fair and impartial review and analysis of the intercepted telephone conversations, which is objective evidence, makes this clear.

41. The Special Prosecutor reproduces the full telephone conversation in the appeal, and gives some details as to why the evidence of both police officers lacks credibility. He concludes that given the actions on the day, the words spoken, the testimony of the witnesses, the critical telephone call and the disciplinary record of Officer N.S., it is clear that the two police officers had not already made up their mind on what ticket had to be issued before speaking with the defendant M.S. On the contrary, they were improperly influenced by him, who was acting to help his friend avoid the payment of customs fees. Instead, the Basic Court simply concluded that it was bound to give the benefit of the doubt to the defendants in compliance with the principle of *in dubio pro reo*, and this is an erroneous and incomplete establishment of the facts.

Violation of the criminal law (Count 4)

42. The Special Prosecutor submits that the Basic Court's finding that there could be no criminal responsibility due to the ambiguous wording of Article 318 paragraph 1 of the CCK is a violation of the Criminal Law. The intent of the legislature can be understood from the whole text of the Article.

Violation of the criminal procedure (Count 4)

43. The Special Prosecutor also submits that the Basic Court violated the Criminal Procedure Code when rejecting his request to amend the Indictment to add an additional criminal offence relating to this incident pursuant to Article 350 of the CPC, namely Abuse of Official Position by the defendants in co-perpetration (Article 422 of the CCK).

44. The request was made as the evidence presented at the trial indicated that the factual situation regarding the incident had changed. Based on this evidence, the Special Prosecutor submits that it was clearly established that the defendant V.T. requested the improper assistance of the defendant M.S. in order to avoid the payment of customs fees. The Special Prosecutor gives

some details as to the facts which became known during the trial and which led him to make the request for the Indictment to be amended.

Violation of the criminal law (Count 8)

45. The Special Prosecutor disagrees with the Basic Court that this offence is covered by the Law on Amnesty. This law refers only to acts committed before 20 June 2013, pursuant to its Articles 1 and 3 to cover conduct left over from the war, and it is not intended as a cover for wrongful conduct indefinitely. Therefore it did not apply to the defendant M.S.'s unlawful possession, control or ownership of weapons on 11 September 2013.

46. Further, as a law enforcement officer, the defendant was well aware of the applicable law. Neither is his claim that the ammunition came from international target shooting days or other legitimate places relevant as this is not a legal defence, nor is the fact that he did not use or threaten the use of the ammunition relevant to a finding of guilt. It is only the possession which is relevant, and the ammunition was found at his home during the execution of a properly executed Search and Seizure order.

Determination of criminal sanction

47. The Special Prosecutor submits that there has been an improper determination of criminal sanction pursuant to Article 383 paragraph 1.4 in conjunction with Article 387 paragraph 1 of the CPC. He submits that the prohibition from being a police officer for 5 years is wholly inadequate given the circumstances of the case. Article 65 of the Criminal Code limits the prohibition on exercising a public service function for 1 to 5 years after the punishment of imprisonment has been served. However, nothing in this law prohibits a multiple offender from being punished per violation. The Special Prosecutor submits that the defendant should never be involved in police, law enforcement, or anything related, ever again. While the Criminal Code does not directly allow for a life-time ban, there is nothing which prohibits the Court of Appeal from rendering a sentence in this regard which would be a meaningful punishment which is consistent with the purposes of sentencing.

48. Further, the Special Prosecutor notes that the plea agreement of B.S.1., agreed upon and approved by the Basic Court, included that he is prohibited from being a Police Officer for 20

years, having found that there was nothing in the law that prevented such a finding and agreement.

49. In determining the prohibition, the Basic Court failed to take into account some aggravating factors pursuant to Article 74 of the CCK, particularly the high degree of the defendant's participation, the high degree of his intention and premeditation, the multiple victims involved, and the fact that they were particularly defenseless and vulnerable. Rather, the Basic Court took into account or over-emphasized the mitigating circumstances, and particularly the effect upon his family.

50. The Special Prosecutor submits that there is virtually no redeeming quality or mitigation in his background, behavior or conduct, and requests that the Court of Appeals overrule the decision of the Basic Court concerning the defendant's prohibition of being a Police Officer for only 5 years and increases the number of years accordingly.

Decision on costs of the proceedings

51. Finally, the Special Prosecutor submits that the Basic Court's decision on the matter of the Costs was inadequate in the circumstances. The amount of 500 Euros does not reflect this case, which resulted in a complex and lengthy trial. The Court of Appeals is invited to assess a more realistic figure.

52. The Basic Court also *ex officio* appointed the defendant M.S.'s Defence Counsel. However, the required procedures were not followed, the Legal Aid Office was not consulted and there was no application filed by either the defendant or his Defence Counsel so that counsel paid for by the State could be lawfully obtained. The defendant does not qualify to have State funds expended on his behalf to defend him against criminal charges.

Conclusion

53. The Special Prosecutor requests that the Court of Appeals overturn the conclusion of the Basic Court and find the defendants M.S. and V.T. both guilty of Count 4 of the Indictment and to find the defendant M.S. also guilty of Counts 5 and 8 of the Indictment.

54. The Special Prosecutor also requests that, in addition or alternatively, the Court of Appeals convict the defendant M.S. in co-perpetration with the defendant V.T. of the criminal offence of Abusing Official Position or Authority in violation of Article 422 of the Criminal Code of Kosovo.

55. The Prosecution also requests that the Court of Appeals overrules the decision of the Basic Court concerning the Costs and assesses them appropriately, and that the defendant be ordered to pay back the cost of his *ex officio* attorney's fees.

56. The Court of Appeals has not received a response to the appeal filed by the State Prosecutor from either defendant.

The motion filed by the Appellate Prosecutor

57. The Appellate Prosecutor fully concurs with arguments put forward by the Special Prosecutor in his submissions, and moves the Court of Appeals to grant the appeal of the Special Prosecutor and to reject the appeal filed on behalf of the defendant as ungrounded.

Statements made during the Court of Appeals session held on 11 October 2017

58. The Appellate Prosecutor supported in principle the Prosecutor's appeal and the stance presented in her written submission. Further, she stated that regarding Count 5, which is the criminal offence of providing assistance to the perpetrators after the commission of the offence, she noticed that this is barred from prosecution because of the statutory limitation which expired on 28 May 2015. The Appellate Prosecutor referred to the appeal filed by the SPRK Prosecutor on this point, and stated that the criminal offence should be requalified as the criminal offence of abuse of official position as all of the elements required for this criminal offence are fulfilled. The Appellate Prosecutor motioned the Court of Appeals to grant the appeal filed by the SPRK Prosecutor and to modify the Judgment of the Basic Court of Ferizaj and convict M.S. for the criminal offences under Counts 4 and 8, and to requalify the offence under Court 5, as well as to impose on the defendant an accessory punishment. The Appellate Prosecutor also motioned the Court of Appeals to do an appropriate assessment of the cost of the proceedings.

59. Regarding V.T., the Appellate Prosecutor motioned the Court of Appeals to convict him of Count 4, and argued that to do so did not require the repeating of the evidence or taking of new evidence, as a conviction may be based on the existing merits of the case. Further, the Court of

Appeals is in the same position as the Basic Court was, and may modify the Judgment and not send the case for retrial.

60. To support her stance not to send the case for retrial, the Appellate Prosecutor referred to the Supreme Court Judgment of 25 November 2015 in the case 7/2015 and Number PA 2 KZ 2. The Appellate Prosecutor emphasized again that if the decision is to annul the Judgment and send the case back for retrial, the Court of Appeals also has to reason why it was not possible to proceed as prescribed in Article 403 of the CPC, as a decision to send a case back for retrial should only be taken exceptionally.

61. The Reporting Judge asked the Appellate Prosecutor if there was an application made during the main trial to give the status of cooperative witness to B.S.1, however the Appellate Prosecutor stated that she did not know.

62. Counsel B.S.3., on behalf of the Injured Party B.S.2., stated that regarding the Counts which are related to the Injured Party - Counts 1, 2, 3, 6 and 7 - they agreed with the appeal of the Prosecutor. B.S.3. requested that the Prosecution appeal be confirmed and the appeal of the defence be rejected as ungrounded as there are no essential violations throughout the procedure or in the Judgment. B.S.2., in answer to the question by the Presiding Judge, stated that he stood by what his representative had said.

63. Defence counsel A.S. on behalf of the defendant V.T. stated that they were satisfied with the decision of the Court, and that the actions of the defendant were of a minor administrative nature. Further, the Indictment was filed two months after the customs fees were paid for this vehicle, and the initial hearing was one year after the payment. The defence counsel stated that the defendant's human rights were violated by him being summoned to attend 120 Court sessions when his criminal offence had nothing to do with the S. family. This caused potential damage of 2,500 Euros and the cost of his defence was 12,000 Euros. He moved the Court of Appeals to confirm the Judgment of the Basic Court as it is related to his client.

64. Defence counsel A.R. on behalf of the defendant M.S. stated that he fully stands by the claims in his appeal regarding the essential violations of the criminal law and criminal procedural law to the detriment of the defendant and regarding the decision on punishment. He stated that it is known that the Judgment is the most important act in criminal proceedings, and Article 370 paragraphs and 4 of the CPC stipulates the content and the fashion of the Judgment, while the most important part of the Judgment is the enacting clause. Defence counsel stated that the

Judgment is not as it should be according to these provisions, and that this is in violation of Article 384 and 370 of the CPC. Further, Article 33 paragraph 4 of the Constitution of the Republic of Kosovo stipulates that the defendant can only have imposed on him those punishments that are applicable at the time when the offence was committed, with the exception in the case where the law that is more favourable to the defendant may be applied. In the Judgment regarding the criminal offences in Counts 1, 2 and 3, the incriminating actions of the defendant have been presented with two alternative legal qualifications of the punishment. Those qualifications of the criminal offences cannot stand as this violates the constitutional principle of legality and is a violation of Article 384 of the CPC. In case of ambiguity, interpretation of the legal provisions will go in favor of the defendant, in accordance with Articles 2 and 3 of the CPC. The defence counsel stated that in the enacting clause of the Judgment the defendant was found guilty of all 8 Counts, and in the enacting clause there is nothing about the punishment. The reasoning starts immediately and the Judgment deals with the background of the case until page 233. Then on page 238 the Court imposes the punishment for only five criminal offences and acquits the defendant of three criminal offences. The law provides for the punishment to be indicated in the enacting clause of the Judgment and therefore in his opinion the Judgment must be annulled. The defence counsel stated that regarding the amount of 4,750 Euros, there is no evidence of any witness who states that he or she gave cash to M.S., and there is no evidence that he requested or took any amount of money from anyone. He concluded that the main trial lasted almost three years, and some of this was concerned with dealing with the guilt or innocence of B.S.2. regarding the offence of trafficking in human beings. The defendant has been in detention for 4 years and 18 days, and he was in house arrest for 2 years. When the Judgment was announced his detention was imposed again with on the grounds that he may escape. Defence counsel requested that the Court of Appeals terminate his detention on remand and return the case for retrial.

65. The defendant M.S. stated that he stood by the statement made by his defence counsel. He further stated that he is very innocent, and that what happened to him was revenge because he arrested B.S.2. twice in 2012 for trafficking in human beings, and that B.S.2. had brought him to this situation. He never asked for or received anything from them, but there were some arrangements made behind his back that he was not aware of those.

66. When asked if there was anything that she wished to add, the Appellate Prosecutor stated that regarding the question of detention, the request made by defence counsel A.R. should be rejected as unfounded, since detention on remand is mandatory if the punishment is over 5 years.

FINDINGS OF THE COURT OF APPEALS

Composition of the Panel

58. The Panel of the Appellate Court was composed in accordance with Article 21 (6) of the Law on Courts (Law No. 03/L-199), and Article 3 of the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law no 03/L-053) as amended by the Law no. 04/L-273 (known as Omnibus Law).

Admissibility of the appeal

59. The appeals of the Defence Counsel of M.S. and of the State Prosecutor are admissible. They were filed by the authorized persons, on time.

Merit of the case

Appeal of the Defendant and his Defense Counsel

Violation of Article 384 (1.12) in relation to Article 370 and Article 365 of the CPC

61. The Court of Appeals assessed that the judgment of the Basic Court does not meet the requirements prescribed in Article 384 (1.12) in connection with Article 370 of the CPC.

62. The Court of first instance did not state clearly and exhaustively which facts it considered proven or not proven, neither were the grounds for its findings presented. The appealed judgment does not contain an evaluation of the credibility of conflicting evidence, as it contains only a summary of testimonies given by witnesses during the main trial. There is no justification why some evidentiary motions were rejected by the Trial Panel. The Court did not present the legal reasoning, in particular, while establishing the existence of the criminal offences attributed to the defendants.

63. The enacting clause of the written judgment substantially differs from the one which was announced on 6 October 2017, and is also inconsistent with the subsequent part of the judgment. It indicates that both Defendants were found guilty of all counts, while the Court announced that M.S. was found guilty of Counts 1, 2, 3, 6 and 7, and acquitted of Counts 4, 5 and 8. The same inconsistency applies to V.T. who was acquitted of counts 4 and 5, but the enacting clause of the written judgment indicates that he was found guilty of them.

64. Furthermore, the Court did not present the circumstances which it considered in determining the punishment.

65. The Court of Appeals finds that the judgment of the court of first instance evaluated the evidence provided by the prosecution separately from the other evidence. By doing so, it artificially selected the incriminatory evidence against the defendant M.S., breaching the basic principles of criminal procedure, such as the presumption of innocence and the right to a fair trial. The Court notes that the improper assessment of the evidence by the trial court, and particularly when such evidence relates to the essential elements of the case, can lead to an unfair determination of facts in the particular case. The Court of Appeals does not purport to exhaust all the contradictions and omissions in the judgment of the lower court.

66. Having considered the above, the Court of Appeals, by its majority, finds that there is a substantial violation of the provisions of the criminal procedure, and which cannot be remedied by the modification of the Judgment by the Court of Appeals in the course of the proceedings before it.

Violation of the rights of the Defense

67. The Defence of M.S. argued that the rights of the defendant were violated because of the unjustified disqualification of his previous defense counsel. As a consequence, the new defense counsel was appointed *ex officio.*

68. The impugned judgment does not contain reasoning as to why the Court decided to disqualify the previous defense counsel of M.S., lawyer A.I. From the minutes of the main trial sessions held on 30 September and 28 October 2014, the Court of Appeals concludes that the Basic Court decided to disqualify the defense counsel A.I (and also the defence counsel of B.S.1. – lawyer

R.A.2.) because both lawyers should have been heard in this case in the capacity of witnesses. To support his decision, the Presiding Judge referred to Article 56 (2) of the CPC.

69. The right to defence is one of the most important elements of the right to a fair trial. It can be limited only in very specific situations, clearly determined by the law.

70. Article 56 of the CPC stipulates the instances when a person cannot be a defense counsel in a specific case. Paragraph 2 of this Article, which was applied by the Presiding Judge while deciding upon disqualification of the defense counsel appointed by M.S., provides that any person who has been summoned to the main trial as a witness in principle may not be a defense counsel. There are two exceptions to this general rule:

- the defense counsel has been relieved of duty to testify as a witness and has declared that he or she will not testify as a witness;
- the defense counsel has been examined on matters confided to him or her by the defendant when the defendant requested so (Article 126 (1.2) of the CPC).

71. An analysis of the provision leads to two potential scenarios. In the first one, the starting point is that a person was first proposed to be a witness in the case, and only then a defendant considers appointing him or her as a defence counsel. In such a situation, the appointment will be possible after the person has been relieved from the duty to testify and has declared that he or she will not testify.

72. The second scenario provides that only upon a clear consent of the defendant his defence counsel can be heard as a witness, but his testimony must be limited to matters confided to him or her by the defendant.

73. The analysis of the circumstances of the case leads to the conclusion that neither of the above circumstances existed in the case. A.I., the previous defence counsel of the defendant M.S., was summoned as a witness *ex officio* by the Trial Panel in the course of the main trial. He was heard on the circumstances which did not fall within the scope of the disposition of Article 126 (1.2) of the CPC, and the Defendant did not give his consent for this.

74. Therefore, the Court of Appeals finds that the Basic Court violated provisions of Articles 56 (2) and 126 (1.2) of the CPC by the unlawful disqualification of the defense counsel and hearing him in the capacity of a witness. However, this violation did not influence the rendering of the lawful

and fair judgment because it occurred at the beginning of the trial. The disqualified lawyer was replaced by another one who effectively performed his duties as a defence counsel.

Violation of the criminal law

75. The Court of Appeals agrees with the defence counsel of the defendant M.S. that the Basic Court violated the criminal law by applying the provisions of both criminal codes valid in Kosovo: the Provisional Criminal Code of Kosovo from April 6, 2004, and the Criminal Code of the Republic of Kosovo from April 20, 2012.

76. When deciding in criminal cases, the court always has to take into account the general principles of criminal law which are stipulated in Articles 2 and 3 of the Criminal Code. The first one, is the principle of legality (*Nullum crimen, nulla poena sine lege),* and the second one – the application of the most favorable law.

77. As results from Article 3 (1) of the CCK, in principle the law in effect at the time when a criminal offence was committed shall be applied to the perpetrator. However, in case of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply (paragraph 2).

78. Therefore, in case of changes in the applicable law, the starting point of the analysis of the court must be finding out whether an act in question constitutes a criminal offence under each law which was in force starting from the moment when the act was committed until a final judicial decision is taken. If it occurs that there was even a short period of time of decriminalization of a specific behavior, then the only solution is to acquit the defendant.

79. Having established that the specific behavior constitutes a criminal offence under the applicable law, the court must find out which law is the most favorable for the perpetrator. Such assessment cannot be conducted *in abstracto,* it must be done *in concreto,* in reference to the specific circumstances of each case and to the individual features of the defendant. It means in practice that the Court shall consider what sanctions shall be imposed under both of the codes, and afterwards to compare the results. When the Court decides which law is more favorable, only this one shall be indicated in the classification of the criminal offence and as a ground of punishment. Applying two legal classifications from two different codes to the same criminal offence is not a proper practice.

80. The Court of Appeals finds it necessary to underline that there is a significant difference in sanctions provided by both Codes with regard to the criminal offence of Abusing Official Position, because Article 339 of the PCCK provides three sanctions depending on the elements of the criminal offence (up to one year, up to three years, and of one to eight years), while Article 422 of the CCK provides the punishment of imprisonment of six months to five years. The same applies to the criminal offence of Accepting Bribes, where the most severe punishment stipulated by the previous Code is five years (Article 343 (2) of the PCCK), when under the current Code the most severe punishment is twelve years of imprisonment (Article 428 (2) of the CCK).

81. What is more, the present Criminal Code provides for punishment of criminal offence in continuation, while this was not foreseen by the Provisional Criminal Code of Kosovo, and which application in specific cases may lead to results more favorable for the defendant (Article 81 of the CCK). In such cases the punishment is imposed only for one criminal offence in continuation, which is constituted of several same or similar offences committed in a certain time period, when at least two conditions prescribed in the law are met (identity of the victim; identical object; taking advantage of the same situation or the same time relationship; the same place or space of commission of the criminal offence, the same intent of the perpetrator).

Erroneous and incomplete determination of the factual situation

82. The Court of Appeals agrees with the Defense Counsel that the Basic Court established erroneously or incompletely the factual situation, however this assessment results from different reasons than those mentioned in the appeal of M.S.

83. The Defense Counsel is right when contesting the factual findings about the alleged involvement of M.S. in the process of inducing the S. family into giving money to B.S.1 in exchange for favorably influencing the course of the criminal proceedings against B.S.2. The basis for such a determination of the situation was the testimonies of members of the S. family, who were directly interested in the outcome of the case. The judgment seems to be quite clear that the main role in this criminal activity was played by B.S.1., the co – defendant who during the main trial concluded a guilty plea agreement and was convicted for his criminal offences with a final judgment, issued in the proceedings severed from the present case.

84. B.S.1. was not heard in the capacity of a witness. None of the parties proposed to hear him, nor was he summoned *ex officio* by the Court, despite the fact that in the plea agreement concluded with the Prosecution he declared that he would "assist the Court and the Prosecution in establishing the true facts and circumstances surrounding the commission of which he now pleads guilty to; as a result the Defendant hereby shows his open and sincere attitude in establishing the truth during the judicial proceedings" (point 9 of the guilty plea agreement dated 21 April 2015). On the other side, the Prosecutor in his closing statement used the guilty plea of B.S.1. as an argument to support his case that M.S. was also involved in this criminal activity.

85. The Court of Appeals, respecting the duty to establish truthfully and completely the facts which are important for rendering a lawful decision, finds it necessary to hear B.S.1 in the capacity of a witness. His testimony is necessary to determine whether M.S. was indeed involved in the criminal offences committed to the detriment of the S. family in connection with the criminal proceedings against B.S.2.

86. The judgment remains silent as to the reasons why the Court of first instance did not consider summoning B.S.1 as a witness in this case. Only on its page 199 it is stated that "the prosecutor obtained allocutions from the defendant, B.S.1. in relation to the Counts in respect of which he as a co-accused together with the defendant, M.S. (i.e. Counts 1, 2 and 3). However, the trial panel ruled these allocutions, made as the main trial was ongoing, elevated the defendant, B.S.1. to the status of a cooperative witness and this was outside the scope of a guilty plea agreement at that stage of the proceedings therefore the allocutions could not be considered as evidence." There is no legal reasoning why the Basic Court decided in this way. Neither can it be found in the minutes of the session when his plea agreement was decided.

87. During the session before the Court of Appeals, the Appellate Prosecutor was not able to answer the question if the prosecution intended to summon B.S.1. as a witness, because obviously she was not involved in the proceedings before the first instance court. Later, she provided the information, which was forwarded to the Defense Counsel of M.S., where she explained the course of proceedings in relation to the potential examination of B.S.1. According to the SPRK Prosecutor's recollection, after checking the available information in the file, there was no (formal) motion made to declare B.S.1. a cooperative witness. The SPRK Prosecutor indicated his desire to use B.S.1. as a witness, without a cooperation agreement, however, the

Presiding Judge of the Basic Court stated that the Court was not going to allow it. When deciding upon B.S.1.'s plea agreement, the Basic Court did not agree to make B.S.1.'s cooperation a condition of the agreement, as the SPRK Prosecutor wished. The Court insisted that this part should be taken out of the agreement and was to be dealt with later. However, during the proceedings it became clear that the Court was not going to let the Prosecution call B.S.1., because the Court perceived that B.S.1. could not be called as such a witness under the CPCK, since he did not meet the requirements for being a cooperative witness. The Court was convinced that the Prosecution was trying to call B.S.1. as a cooperative witness, despite the fact that the Prosecution did not have that intention. The Prosecution did have B.S.1. allocute to what he knew in the plea agreement and in a plea addendum, but this was not admissible in the trial. Therefore B.S.1. (besides his plea) became a non-issue and was not called or attempted to be called as a cooperative witness.

88. From this information it results that the Basic Court found it not possible to hear B.S.1. as a witness in the case against M.S. The Court of Appeals disagrees with such an interpretation of the relevant provisions of the Criminal Procedure Code and opines that B.S.1's testimony, after he was found guilty, appears to be one of the most important pieces of evidence in this case. As results from his plea agreement, which is also corroborated by the testimonies of the members of the S. family, he was a crucial person with whom they had contact, talked about the potential outcome of the case, gave money to, and made arrangements with. They were also assured by B.S.1. that he would talk with M.S. and involve him in the attempt to help B.S.2. to be released from detention, or to influence in another way the course of the proceedings against him.

89. There are no legal impediments to hear B.S.1 as a witness. He was no longer a privileged witness who could not be examined, because after his case was severed he ceased to be a co – defendant in the joint proceedings with M.S. (Article 126 (1.3) of the CPC). Furthermore, such an interpretation is additionally supported by Article 338 (1) of the CPC which allows for the reading of records containing the testimony of the co – accused who have already been convicted.

90. It is true that at this stage of the proceedings, B.S.1. could not have been declared a co – operative witness. Such a possibility was excluded because according to Article 235 (1) of the CPC such status can be granted only to a suspect or a defendant with respect to whom the

indictment has not yet been read. In this case, the indictment against B.S.1. was read already in 2014, while he entered the plea agreement in 2015.

Appeal of the SPRK Prosecutor

Violation of the criminal law (Counts 4 and 8)

91. The Court of Appeals agrees with the Prosecutor's submission that the Basic Court violated the criminal law while deciding upon Count 4 of the Indictment (Avoiding payment of mandatory duty fees) when it concluded that the wording in English of Article 318 (1) of the CCK is so ambiguous that it cannot constitute any criminal offence.

92. The Constitution of Kosovo provides in its Article 5 (1) that the official languages in the territory are Albanian and Serbian. Neither of them prevails over each other in the case of discrepancy. Pursuant to Article 16 of the Law on Jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo, the official language in proceedings in which EULEX judges and prosecutors are involved, is also English.

93. This is true that the English translation of Article 318 (1) of the CCK, used by EULEX judges and prosecutors, is not clear as it stipulates:

Whoever, with the intent to enable himself or another person to avoid payment of the customs tax fee or other fees or customs obligations payable for the import or export of goods, or if a false document is presented to customs about the origin, value, quantity, quality, type and other characteristics of the goods, shall be punished by a fine or imprisonment of up to three (3) years.

However, in such a situation it was a duty of the Presiding Judge to refer to the original language versions (Albanian and Serbian) and to obtain a proper translation of the provision in question. This was done by the reporting judge of the Court of Appeals, and Article 318 (1) of the CCK was translated again from both languages into English as follows:

> *Whoever with the intent for himself/herself or the other person enables evasion from payment of custom tax fees or other tariffs of custom obligations which are paid on the case of import or export of goods, or if the customs is presented with a fake document in regards to the origin, value, quantity, quality, type or other features of the goods, is punished with a fine or with imprisonment up to three (3) years.*

94. The elements of the criminal offence specified in Article 318 (1) of the CCK are as follows:

- acting with the intent for himself/herself or the other person, and as a result
- enabling evasion of payment of custom tax fees or other tariffs of custom obligations which are paid on the case of import or export of goods;

or

- presenting the customs with a fake document in regards to the origin, value, quantity, quality, type or other features of the goods.

95. Therefore, the decision of the Basic Court to acquit the defendants M.S. and V.T. from the count of avoiding payment of mandatory customs fees because of the ambiguity of the English wording of this provision was not justified. However, during the retrial, the court of first instance will have to establish if the behavior of the Defendants as presented by the Prosecutor in the indictment fulfills the elements of this criminal offence. To decide on it, the court will have to refer not only to the Criminal Code, but will also be obliged to analyze the relevant provisions of the Customs and Excise Code of Kosovo.

96. The Prosecutor is also right when raising the violation of the Criminal Code in reference to Count 8 (Unauthorized Ownership, Control or Possession of Weapons, in violation of Article 374 (1), in conjunction with Article 120, item 38 of the CCK 2013). The Basic Court acquitted the Defendant M.S. because of the existence of the circumstance which excluded liability, namely that this criminal offence is covered by the Law on Amnesty (No. 04/L-209).

97. Such interpretation of the law constitutes a violation of the criminal law. Article 1 of the Law on Amnesty is clear – it is applied only to criminal offences which were committed before 20 June 2013. Defendant M.S. is charged with possession of weapons which allegedly took place on 11 September 2013, so after the time frame for which the amnesty could have been granted.

98. The Court of Appeals also agrees with the Prosecutor when he pointed out that it is irrelevant for the existence of this criminal offence whether the weapon was used, or whether it caused any danger. These circumstances can be relevant as factors while deciding upon the punishment after it is determined that the Defendant committed a criminal offence. They can also have an impact on the assessment whether the criminal offence can be deemed as an act of minor significance (Article 11 of the CCK).

Erroneous or incomplete determination of the factual situation (Count 5)

99. The Court of Appeals agrees with the arguments of the Prosecutor that the Basic Court incompletely determined the factual situation in relation to count 5. In this context, it must be underlined that it results from the judgment that the Court failed to assess conscientiously each item of evidence, and in relation to other items of the evidence. Such a conclusion results from the fact that only part of the intercepted phone conversation between the Defendants M.S. and V.T. was analyzed, while its relevant elements, presented *in extenso* by the Prosecutor in his appeal, were omitted.

100. Therefore, during the retrial the Basic Court will hear the witnesses again and will analyze all the pieces of admissible evidence in reference to this count.

101. During the session before the Appellate Court, the Prosecutor requested to re-classify Count 5 as Abuse of Official Position in violation of Article 422 of the CCK.

102. The Basic Court will have to analyze the circumstances of the event which was the basis of Count 5 of the indictment, respecting the principle that the judgment may relate only to the act which is the subject of this charge (Article 360 (2) of the CPC). However, it must be remembered that it is for the court to decide on the legal classification of the criminal offence attributed to the defendant. During the retrial, the Basic Court will be obliged to consider if the behavior of the Defendant M.S., in relation to the event with the participation of V.T., constitutes the criminal offence of Abuse of Official Position.

Determination of the criminal sanction

103. The case has been sent for retrial, however the Court of Appeals finds it necessary to address the Prosecutor's motion related to the determination of the criminal sanction. The question is how to determine the accessory punishment of prohibition on exercising public service functions. It is of particular importance in this case, where the same trial panel presented two different approaches to this issue, because in the case of B.S.1. a 20 - year prohibition was imposed, while in the case of M.S. the court found it possible to impose this measure only for 5 years.

104. As results from Article 65 (1) of the CCK, the court shall prohibit a perpetrator from exercising public administration or public service functions for one to five years after the punishment of imprisonment has been served, if such person has abused these functions and has been

punished for it. In case of punishment for concurrent criminal offences, Article 80 (3) of the CCK provides that the court shall impose an accessory punishment if it has been pronounced for at least one of the criminal offences, in accordance with Article 80 (2.4) of the CCK. This last provision regulates the way of punishment in a case where the court has imposed a punishment of a fine for each criminal offence. In such a situation the aggregate punishment of a fine is a total sum of all fines but it may not exceed the amount of 25.000 euro, or 500.000 euro in the case when one or more criminal offences are committed with the intent to obtain a material benefit. A similar provision contained in the previous Code seemed to be less precise, because its Article 71 (2.4), applicable also to accessory punishments, stipulated that in such situations the aggregate punishment of a fine may not exceed respectively the amount of 25.000 euro or 500.000 euro in case when one or more criminal offences are committed with the intent to obtain a material benefit. However, the provision did not mention "a total sum of all fines".

105. Both Codes provide the same limits for fines – 25.000 euro or 500.000 euro in case when one or more criminal offences are committed with the intent to obtain a material benefit (Article 39 (1) of the PCCK and Article 46 (1) of the CCK). It is clear then that the aggregate punishment of a fine cannot exceed the maximums provided by the law for a fine as a principal punishment.

106. Therefore, the Court of Appeals does not concur with the submission of the Prosecutor that there is nothing in the law which prohibits aggregate accessory punishment in the duration of the total sum of all periods imposed. The period of the aggregate accessory punishment of prohibition on exercising public service is the total sum of all periods imposed, but it cannot exceed the legal limits provided for this measure (5 years in accordance with Article 65 (1) of the CCK).

Conclusion

107. During the retrial, the Basic Court shall hear B.S.1. as a witness, and shall repeat examination of the most relevant witnesses who testified during the first trial (B.S.2., X.B., K.S., A.S., S.S., H.B., B.S., H.S., A.X., D.X., V.S., Z.N., N.S. and S.O.). In case of other witnesses, the Basic Court can decide to read their previous statements or consider them as read. If necessary, also new facts may be introduced and new evidence may be presented. The Basic Court shall examine all contentious points indicated in the decision of the Court of Appeals.

108. Having considered the above, the Court of Appeals decided as in the enacting clause.

Done in English, an authorized language. Reasoned Judgment completed on 14.11.2017.

Presiding Judge

_____

Driton Muharremi

Kosovo Court of Appeals Judge

Reporting Judge

_____

Anna Adamska-Gallant

EULEX Judge (*dissenting)*

Panel member

_____

Abdullah Ahmeti

Kosovo Court of Appeals Judge

Recording Officer

_____

Kerry Moyes, EULEX Legal Officer

COURT OF APPEALS OF KOSOVO

PAKR 77/2017