

SUPREME COURT

Prishtinë/Priština

Case number: **Pml-Kzz 42/2017**
(P No. 938/13 Basic Court of Mitrovicë/Mitrovica)
(PAKR No. 445/15 Court of Appeals)

Date: **3 July 2017**

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Krassimir Mazgalov (Presiding and Reporting), EULEX Judge Arnout Louter and Supreme Court Judge Emine Mustafa as Panel members, and EULEX Legal Officer Sandra Gudaityte as the Recording Officer, in the criminal case against, among others, the defendant

S.S., born on..., currently serving his sentence at Dubrava Detention Center;

charged under Indictment PPS 88/11 dated 8 November 2013 (hereinafter “Indictment”) with 7 (seven) counts of War Crimes against the Civilian Population, contrary to Article 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (Official Gazette SFRY No. 44 of 8 October 1976) (hereinafter “CCSFRY”) (currently criminalized under Articles 31 and 152 of the Criminal Code of Kosovo (hereinafter “CCK”) and in violation of common Articles 3 and 4 of the Additional Protocol II, all rules of international law effective at the time of the internal conflict in Kosovo and at all times relevant to the Indictment;

acting upon the request for protection of legality filed by defence counsel G.D.G.S. and C.R. on behalf of defendant S.S. on 13 February 2017, and the additional Request for Evidence to be Received From M.S. which is Directly Relevant to the Merits of His Pending Request for

Protection of legalities Filed from the Appeal in the Judgement of the Court of Appeal in Pristina in Case No. PAKR 455/15 (hereinafter “Request for Evidence”), filed on 15 May 2017;

having considered the replies of the Office of the Chief State Prosecutor (hereinafter “Prosecution”) to the request for protection of legality filed on 7 March 2017, and to the Request for Evidence filed on 31 May 2017;

having deliberated and voted on 19 June 2017;

pursuant to Articles 432, 433 and 435 of the Criminal Procedure Code of Kosovo (hereinafter “CPC”)

renders the following

RULING

The Request for Evidence to be Received From M.S. which is Directly Relevant to the Merits of His Pending Request for Protection of legalities Filed from the Appeal in the Judgement of the Court of Appeal in Pristina in Case No. PAKR 455/15 filed on 15 May 2017 is hereby dismissed as without subject.

REASONING

I. Procedural background

1. On 8 November 2013, the Special Prosecution Office of the Republic of Kosovo (hereinafter “SPRK”) filed the Indictment against S.S. and other defendant charging him with 7 (seven) counts of War Crimes against the Civilian Population, contrary to Article 22 and 142 of the CCSFRY (currently criminalized under Articles 31 and 152 of the CCK) and in violation of common Articles 3 and 4 of the Additional Protocol II, all rules of international law effective at the time of the internal conflict in Kosovo and at all times relevant to the Indictment.

2. The trial commenced on 22 May 2014, and was concluded on 27 May 2015. It consisted of 46 court sessions. On 27 May 2015, the Basic Court of Mitrovicë/Mitrovica rendered its Judgment P 938/13. S.S. was found guilty for the following criminal act: during the internal armed conflict in Kosovo, on several occasions, in August and September 1998, acting as a member of the Kosovo Liberation Army (hereinafter “KLA”), seriously violated Article 3 common to the four Geneva Conventions of 12 August 1949, because he intentionally committed violence, cruel treatment, and torture against Witness A, a Kosovo Albanian civilian detained in the KLA’s detention facility in Likoc/Likovac (Skenderaj/Srbica municipality) who took no active part in hostilities by beating him with punches and slaps inside the detention cell, and this action, pursuant to Article 33(1) of the Constitution of the Republic of Kosovo is classified as a war crime in continuation under Articles 152(1) and (2)(2.1), and 81(1) of the CCK, in violation of Article 4(2)(a) of the Additional Protocol II to the Geneva Conventions (hereinafter will be referred to as “Count II” based on the paragraph number of the enacting clause of the Basic Court Judgement), and sentenced to 6 (six) years imprisonment. The defendant was acquitted of the criminal offences as detailed in the remaining 4 (four) counts.
3. On 7 August 2015 and 10 August 2015, the SPRK and the defence counsel on behalf S.S. filed their appeals against Judgment P 938/13 of the Basic Court of Mitrovicë/Mitrovica.
4. On 15 September 2016, the Court of Appeals rendered Judgement PAKR 455/15. The Court of Appeals granted the appeal of the defence counsel of S.S. and rejected the charge against the defendant as it is described in Count II as it was a material, factual part of a criminal offence in continuation for which the defendant was previously convicted. The Court of Appeals further partially granted the appeal of the SPRK, and modified Judgment P 938/13 of the Basic Court of Mitrovicë/Mitrovica finding defendants S.S. and J.D. guilty for the following criminal act: during the internal armed conflict in Kosovo, on one occasion between the beginning of August and the end of September 1998, acting as member of the KLA and in co-perpetration with each other as it is defined in Article 31 of the CCK, intentionally violated the bodily integrity and the health of an unidentified Albanian male from Shipol area in Mitrovicë/Mitrovica, detained in Likoc/Likovac detention centre by

repeatedly beating him up, hereby classified as a war crime under Article 152(1) and (2)(2.1), (2.2) of the CCK and in violation of Article 4(2)(a) of the Additional Protocol II to the Geneva Conventions, in conjunction with Article 33(2) of the Constitution of the Republic of Kosovo (hereinafter will be referred to as “Count IV” based on the paragraph number of the enacting clause of the Basic Court Judgement). The Court of Appeals sentenced S.S. for this criminal offence to 5 (five) years and 3 (three) months of imprisonment. The Court of Appeals further modified Judgment P 938/13 of the Basic Court of Mitrovicë/Mitrovica by finding defendants S.S. and S.L. guilty and acquitting defendant S.J. of the following criminal act: in their capacity as the KLA members and persons exercising control over the Likoc/Likovac detention centre, in co-perpetration with each other as it is defined in Article 31 of the CCK, they violated the bodily integrity and the health of an unidentified number of Albanian civilians detained in such detention centre by keeping them in inappropriate premises with lack of sanitation, inadequate nutrition, suffering frequent beatings, at least during August and September 1998, hereby classified as a war crime under 152(1) and (2)(2.1), (2.2) of the CCK, and in case of S.L., in conjunction with Article 161(1)(1.1) of the CCK, both in violation of Article 4(2)(a) of the Additional Protocol II to the Geneva Conventions, in conjunction with Article 33(2) of the Constitution of the Republic of Kosovo (hereinafter will be referred to as “Count IX” based on the paragraph number of the enacting clause of the Basic Court Judgement). For this criminal offence S.S. was sentenced to 8 (eight) years of imprisonment. Pursuant to Articles 80(1) and (2.2), and 82(1) of the CCK and taking into consideration the punishment imposed in the judgement of the Court of Appeals in case PAKR 456/2015 dated 14 September 2016, S.S. was imposed the aggregate punishment of 10 (ten) years of imprisonment.

5. On 13 February 2017, the defence counsel on behalf of defendant S.S. filed the Request for Protection of Legality requesting the Supreme Court to reverse all contradictions in the impugned judgements and to dismiss all charges against the defendant, or, alternatively, to send the case for the re-trial in relation to all charges.
6. On 7 March 2017, the Prosecution filed its reply to the Request for Protection of Legality filed by the defence counsel on behalf of defendant S.S. in which it moves the Supreme Court to dismiss the request as unfounded.

7. On 15 May 2017, the defence counsel on behalf of defendant S.S. filed the Request for Evidence moving the Supreme Court to contact the appropriate authorities to request the evidence that can be provided by M.S. concerning the claims of judicial irregularities raised in the request for protection of legality filed by the defence counsel on behalf of S.S., to provide the requested evidence to the defence's review and consideration, and to grant the request for the evidentiary hearing.
8. On 31 May 2017, the Prosecution filed its reply to the defence's Request for Evidence moving the Supreme Court to reject the Request for Evidence as inadmissible.

II. Submissions of the parties

Submissions on behalf of S.S.

9. The defence claims that M.S.'s evidence is directly relevant to certain matters which are raised in the Request for Protection of Legality filed by the defence on behalf of S.S. on 13 February 2017. The defence further indicates that they were advised that the appropriate manner to provide this evidence is for the Supreme Court to make a formal request to EULEX Head of Mission for M.S. to make a formal statement.
10. The defence reiterates the claims put forward in the Request for Protection of Legality related to the improper judicial conduct on the part of the Trial Panel. These allegations are based on newly discovered evidence in the form of news reports and emails. The defence claims that M.S.' evidence is directly relevant to the alleged judicial irregularities in the selection and composition of the trial panel(s). Therefore, the defence claims that this statement will assist the Supreme Court in the determination of the need for a full evidentiary hearing on the misconduct allegations.

Submissions of the Prosecution

11. The Prosecution in its reply moves the Supreme Court to dismiss the Request for Evidence. The Prosecution claims that the request to obtain new evidence is without merits because it is a mere repetition of the Request for Protection of Legality dated 20 January 2017.
12. The Prosecution further claims that the CPC does not foresee for the Supreme Court to convene the evidentiary hearings or take any investigative actions in case of protection of legality. The Prosecution also points out that the Trial Panel in the present case was composed of different judges than the one in case Drenica II.

III. Composition of the Panel

13. The Panel established that on 28 March 2017 (KJC No. 90/2017), the Kosovo Judicial Counsel (hereinafter “KJC”) confirmed that the request for protection of legality in the present case shall be adjudicated by a panel composed of a majority of EULEX judges and presided by an EULEX judge.

IV. Findings of the Panel

14. The Supreme Court notes that in the present case, the Request for Protection of Legality filed by the defence counsel on behalf of S.S. on 13 February 2017 was adjudicated on 10 May 2017. In its ruling, the Supreme Court dismissed the Request for Protection of Legality as unpermitted because the requirements for the request for protection of legality set in Article 432(1) of the CPC are not met.
15. The Panel notes that the Request for Evidence is an additional document submitted by the defence which shall be considered as an integral part of the Request of Protection of Legality filed on 13 February 2017. Consequently, taking into consideration that the Request of Protection of Legality was dismissed on 10 May 2017, the Supreme Court considers that there is no longer legal basis to adjudicate the additional request.

16. For this reason, Request for Evidence to be Received From M.S. which is Directly Relevant to the Merits of His Pending Request for Protection of legalities Filed from the Appeal in the Judgement of the Court of Appeal in Pristina in Case No. PAKR 455/15 filed on 15 May 2017 is dismissed as without subject.

For the above it has been decided as in the enacting clause.

Presiding Judge

Recording Officer

Krassimir Mazgalov
EULEX Judge

Sandra Gudaityte
EULEX Legal Officer

Panel members

Arnout Louter
EULEX Judge

Emine Mustafa
Supreme Court Judge