

COURT OF APPEALS

Case number: PAKR 336/16

Date: 13 December 2016

Basic Court of Mitrovica: P. nr. 51/2014

The Court of Appeals, in the Panel composed of EULEX Judge Piotr Bojarczuk / presiding and reporting, Kosovo Court of Appeals Judge Fillim Skoro and EULEX Judge Roman Raab as panel members, assisted by Vjollca Kroci-Gerxhaliu, EULEX legal advisor, acting in the capacity of a recording officer,

in the criminal case concerning the accused:

M.Z., father's name xxx, xxx, born on xxx, Municipality xxx, resides at xxx, Kosovar nationality, xxx, average economic status;

charged with the Indictment PPS no. 90/13 dated 23 April 2014 for the criminal offences of:

- Under count one: **Violating the secrecy of proceedings** contrary to Article 400 (2) in conjunction with Article 31 of the CCK;
- Under count two: **Attempted Obstruction of evidence or official proceedings** contrary to Article 28 and 394 (1) 1.7) of the CCK;

found not guilty in both counts by the Judgment P. nr. 51/2014 dated 12 February 2016 of the Basic Court of Mitrovica;

seized by the appeal of the Special Prosecution Office of the Republic of Kosovo filed on 24 May 2016 with the Basic Court of Mitrovica 2016, against the aforementioned Judgment;

having considered the response of the defence counsel of **M.Z.** to the appeal, filed on 9 June 2016;

having considered the motion of the Appellate State Prosecutor filed with the Court of Appeals (hereinafter: CoA) on 9 August 2016;

after having held a public session of the CoA on 30 November 2016;

having deliberated and voted pursuant to Article 471 and 472 of CPC on 1 and 13 December 2016;

acting pursuant to Articles 389, 390, 394, 398 Paragraph (1) point 1.2, Article 401 and 403 of the Criminal Procedure Code of Republic of Kosovo (hereinafter: CPC),

renders the following:

JUDGEMENT

- **The Appeal of the Special Prosecution Office of the Republic of Kosovo filed against the Judgment P. nr. 51/2014 dated 12 February 2016 of the Basic Court of Mitrovica, is Rejected as Unfounded;**
- **The Judgment P. nr. 51/2014 dated 12 February 2016 of the Basic Court of Mitrovica is hereby affirmed.**

REASONING

I. PROCEDURAL BACKGROUND

On 8 November 2013 a Ruling on Initiation of Investigation dated 6 November 2013, was issued against the defendant. On 23 April 2014, the Prosecutor filed with the Basic Court of Mitrovica the indictment PP no. 90/13 dated 23 April 2014 against **M.Z.** and **Rr.R.**.

On 15 May 2014 an Initial hearing was held. During the hearing, the defendants pleaded not guilty. Objections to the evidence presented in the Indictment and a Request for Dismissal were filed by the defence counsel Gafur Elshani on behalf of **M.Z.** On 30 July 2014, the presiding trial Judge issued a Ruling P. 51/14 partially granting the Objection to the admissibility of evidence and rejecting the Defence Request to dismiss the Indictment, thereby sending the case for main trial. The Ruling was upheld by the Court of Appeals on 25 September 2014¹.

The public main trial hearings were held on 13, 14 and 15 October 2015, on 08, 09, and 10 December 2015 and on 02, 03, and 10 February 2016, and partially closed to the public on 02 February 2016. After having held the main trial sessions, the Judgment was pronounced on 12 February 2016. During the session of 10 February 2016, the prosecutor submitted in court a notice of withdrawal of charges against the defendant **Rr.R.** pursuant to Article 52 of the CPC.

¹ Ruling of the CoA PN 475/2014

The judgment was pronounced on 12 February 2016. The written judgment was served to defendant **M.Z.** and to his defence counsel Gafur Elshani on 10 May 2016. The judgment was served to the SPRK on 10 May 2016. The appeal was filed by the SPRK on 24 May 2016 and served on defence for response on 30 May 2016. The response to the appeal was filed by the defence counsel of **M.Z.**, on 9 June 2016.

The case was transferred to the CoA on 15 June 2016. On the same day the case was sent to the Appellate prosecution office and returned to the CoA on 10 August 2016.

The session of the CoA Panel (hereinafter: Panel) was held on 30 November 2016 in the presence of the Appellate Prosecutor and defence counsel of the defendant, Gafur Elshani. The notification for the session of the Appellate Panel was sent to **M.Z.** in due time as demonstrated by delivery slip but he did not attend. The Panel continued the session pursuant to Article 390 Paragraph 4 of CPC.

The Panel deliberated and voted on 1 and 13 December 2016.

II. SUBMISSIONS OF THE PARTIES

The Special Prosecution Office of the Republic of Kosovo timely filed an appeal on 24 May 2016 with the Basic Court of Mitrovica. The Prosecutor appeals only the acquittal of the defendant in relation to the criminal offence of Violating the secrecy of proceedings². The appeal was filed on the grounds of:

1. Erroneous or incomplete determination of the factual situation
2. Substantial violation of the provisions of criminal procedure

In his appeal, the Prosecutor argues that the trial panel omitted to consider certain fundamental material facts. In doing so, the court reached an erroneous and incomplete determination of the factual situation. As a result, the trial panel wrongly acquitted the accused **M.Z.** of the charge of Violating the secrecy of proceedings. He submits that the material facts amount credible and reliable proof that the accused had knowledge that witness A was a witness in the case GJPP 27/12 (PPS 88/11). The Prosecutor states that the trial panel accepted that witness A was questioned by the accused but concluded that such evidence failed to prove that the accused had revealed the status of the witness. The Prosecutor in his appeal objects the erroneous assessment and determination of the facts and submits that based on material facts as presented during the main trial is proven that the accused through his actions caused the revelation of witness A status.

The Prosecutor also claims that there was no evidence administered during the main trial which proves or even suggests that the accused had been authorised to reveal the content of the protective order. He further submits that the court failed to establish the intention of the accused to violate the Court order.

² Appeal of the SPRK, page 3, point 6 under B, English version of the appeal.

Prosecutor notes that when assessing the evidence of the entire case including the evidence regarding the charge of the criminal offence of Attempted Obstruction of evidence, the trial panel took the view that the various efforts taken by the accused to have witness A admit that he was a witness, did not amount to force or compulsion.

In relation to the substantial violation of the provisions of criminal procedure code, the Prosecutor submits that the judgment was not drawn up in accordance with Article 370 CPC. He claims that the judgment contains the number of contradictions or inconsistencies that leave doubts whether the trial panel exhaustively assessed the evidence.

The Prosecutor proposes the Court of Appeals to modify the judgment of the Basic Court and to convict the accused for the criminal offence of Violating the secrecy of proceedings contrary to Article 400 (2) in conjunction with Article 31 of the CCK. In alternative, the prosecutor proposes to requalify the criminal offence of Violating the secrecy of proceedings or annul the judgment of the Basic Court and send the case for a re-trial and decision as per Article 398 (1) 1,3) of CPC.

Response to the Appeal

The defence counsel of the defendant **M. Z.** filed a response to the appeal on 9 June 2016.

The defence counsel points out that the factual situation in the judgment was established fairly and completely. He further states that in the evidence heard in the main trial was not found any piece of evidence to indicate the implication of defendant **M. Z.** in this criminal case. In relation to the allegation of the Prosecutor that the defendant has breached the court order, defence counsel states that during the main trial, the Prosecutor failed to establish this allegation. There is no part in the Order to mention the journalist for none disclosure of the relevant material and information. Defence counsel further points out that the defendant had no knowledge about the existence of neither the Order nor that the witness A was protected. He finds the judgment well-reasoned and the allegations of the Prosecutor in his appeal as unfounded.

In relation to the substantial violation of the provisions of criminal procedure code, the defence counsel points out that the judgment does not contain any violation of the criminal proceedings. The allegations of the Prosecutor that the first instance court has contradictions are not grounded. He finds the reasoning of the impugned judgment fair and lawful. Defence counsel moves the Court of Appeals to reject Prosecutor's appeal and uphold the entire Judgment of the Basic Court of Mitrovica.

Motion of the Appellate Prosecutor

The Appellate Prosecutor in his opinion dated 9 August 2016 filed with the CoA states that he concurs with the reasoning of the EULEX SPRK Prosecutor and the arguments in his appeal. He states that the appeal of the prosecutor is well argued.

Appellate Prosecutor proposes to the Court of Appeals to accept the appeal of the EULEX Special Prosecutor and convict the defendant **M. Z.** for committing the criminal offence of Violating the secrecy of proceedings contrary to Article 400 (2) in conjunction with Article 31 of the CCK. He further points out

that due to the erroneous or incomplete determination of the factual situation as raised in the appeal of the EULEX prosecutor together with the substantial violation of the criminal procedure, the judgment of the Basic Court has to be modified and the accused convicted or the appealed judgment is annulled and the case is returned for retrial.

III. FINDINGS OF THE APPELLATE PANEL

A. Competence of the Panel of the Court of Appeals

No objections to the composition of the panel or to its competence were raised by the parties. Pursuant to Article 472(1) CPC the Panel has reviewed its competence.

Based on Decision of the Kosovo Judicial Council dated 2 July 2014, the case at hand is considered on-going case and shall remain with EULEX Judges. The Panel concludes that EULEX has jurisdiction over the case and that the Panel is competent to decide the respective case in the composition of two EULEX judges and one Kosovo appellate judge.

B. Admissibility of the appeal

The judgment of the first instance court was pronounced on 12 February 2016. The written judgment was served to **M.Z.** and to his defence counsel Gafur Elshani on 10 May 2016. The judgment was served to the SPRK on 10 May 2016. The appeal was filed by the SPRK on 24 May 2016, within the 15-days deadline. The appeal is also admissible as filed by an authorized person, pursuant to Article 380(1) CPC.

C. Findings on the merits

It must be noted that, since the Prosecutor appeals only the acquittal of the defendant in relation to the criminal offence of Violating the secrecy of proceedings, the merits of the case will be focused only on this point.

Allegations raised in the appeal of the SPRK

1. The Prosecutor appeals only the acquittal of the defendant in relation to the criminal offence of Violating the secrecy of proceedings on the grounds of Substantial violation of the provisions of criminal procedure code and Erroneous or incomplete determination of the factual situation

In relation to the substantial violation of the provisions of criminal procedure code, the Prosecutor submits that the judgment was not drawn up in accordance with Article 370 CPC. He claims that the

judgment contains the number of contradictions or inconsistencies that leave doubts whether the trial panel exhaustively assessed the evidence.

The Panel of the CoA does not concur with this allegation. The impugned Judgment is very detailed and contains the elements required by the law in Article 384 (1.12) in relation to Article 370 of CPC. The impugned Judgment provides comprehensive description of the decisive facts that lead the court correctly to acquit the defendant **M.Z.**

Panel of the CoA finds the impugned Judgment comprehensive and sufficiently reasoned. Read together with other evidence in the case file, it creates the clear picture of the events thus supporting the CoA's findings.

Therefore, the Panel of the CoA rejects as unfounded the allegations of the Prosecutor in his appeal.

In relation to the erroneous and incomplete establishment of the facts, the SPRK in his appeal states that the evidentiary material was wrongfully evaluated.

It is submitted by the Prosecutor in the Indictment that **M.Z.**, between 14 July 2013 and 31 October 2013 acting with Rr. R., without authorisation revealed the information as to the identity of witness A who was under protective order in the criminal proceeding GJPP 27/12 and that **M.Z.** arranging and meeting witness A on 29 and 30 October 2013 at restaurant Dibra in Skenderaj demonstrated in the presence of others, that the witness A is a prosecution witness in the case GJPP 27/12, thus **M.Z.** allegedly committed the criminal offence of Violating the secrecy of proceedings contrary to Article 400 (2) in conjunction with Article 31 of the CCK.

The Panel thoroughly examined the evidence and the factual findings in the impugned judgment (English version), and concurs entirely with the findings of the first instance court. The Basic Court in the impugned judgment in detail analysed the evidence administered during the main trial in relation to **M.Z.** In the view of the Panel, the first instance Court comes to the logical conclusions in its assessment of the evidence.

The Appellate Panel reminds that when the law defines the terms "erroneous determination of the factual situation" and "incomplete determination of the factual situation", it is referring to errors or omissions related to "material facts" that are critical to the verdict reached.³ Only if the Basic Court committed a fundamental mistake while assessing the evidence and determining the facts will the Court of Appeals overturn the judgment.

As a general principle the evaluation of evidence should rely on a direct and immediate examination of oral testimonies and statements by a panel of judges. The reading of the record of the evidence examined in the trial, however faithful and accurate it may be, is always a less reliable instrument for evaluation of evidence. Even the examination of documents and other material evidence is in general more accurate in

³ B. Petric, in: Commentaries of the Articles of the Yugoslav Law on Criminal Procedure, 2nd Edition 1986, Article 366, para. 3.

the trial because often those pieces of evidence have to be supported and consisted with other elements and subject to oral explanations by witnesses or parties. Therefore, as affirmed by this court in other occasions, *“it is a general principle of appellate proceedings that the Court of Appeals must give a margin of deference to the finding of fact reached by the Trial Panel because it is the latter which was best placed to assess the evidence”*. This is in line with the standard applied by the Supreme Court *“to not disturb the trial court’s findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous”*.⁴

With this in mind the Panel has carefully analysed the evidence in this criminal proceeding along with the reasoning of the Basic Court in the impugned judgment. The Panel further has carefully reviewed the arguments presented in the appeal and the motion of the Appellate Prosecutor.

Panel determines that it has not been established by any evidence that **M.Z.** acting with Rr. R., without authorisation revealed the information as to the identity of witness A that was under protective order. It must be noted that during the main trial session of 10 February 2016, the Prosecutor withdrew the charge of Violating the secrecy of proceedings contrary to Article 400 (2) in conjunction with Article 31 of the CCK against the defendant Rr. R. that was accused of sharing confidential document with **M.Z.** that was handed over by the Prosecutor to S. L. defence team regarding witness A.

It is not disputed that **M.Z.** met with witness A on 29 October and 30 October 2013. What matters is whether **M.Z.**, by his actions, revealed the information as to the identity of witness A and that he was under protective Order. As correctly assessed in the first instance court, evidence administered during the main trial does not prove that **M.Z.** revealed the identity of the protected witness A. Firstly, Panel notes that in order to violate the identity of protected witness the perpetrator should have knowledge about the existence of the Order and its content. In relation to this, it has been correctly established that in no case **M.Z.** had knowledge about the existence of the Order before he met with the Prosecutor on 24 October 2013 nor after the meeting, because witness A was not ever discussed between **M.Z.** and the Prosecutor. This was confirmed by the witness Alberto Pasquero in his testimony given before the court on 2 February 2016. Namely, in his testimony he explained in detailed manner the meeting between the Prosecutor and **M.Z.** that took place on 24 October 2013. The witness Alberto Pasquero explained that **M. Z.** was called by the prosecutor to inform him about the existence of the Order for some witnesses, without mentioning witness A. He further states that **M.Z.** was called in the capacity of the witness but the ‘talk was conducted in friendly manner’. The evidence shows that the intention to interview **M.Z.** as a witness is because the prosecution had information that he had interviewed certain persons and that these stories were transmitted in the media and in order to avoid more names to be broadcasted, the prosecutor invited **M.Z.** to inform him about the existence of the order. It should be noted that witness A was not subject of the discussion between **M.Z.** and Prosecutor nor witness A was subject of the TV broadcast. Namely, **M.Z.** never broadcasted something in relation to witness A.

⁴ Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, paragraph 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, paragraph 30.

It has been proven that, when **M.Z.** met with the witness A on 29 October 2013, he had knowledge about the existence of the Order, but, had not knowledge whether witness A was subject of this Order. It has been also established by the first instance court that **M.Z.** was not in possession of the Order and that such an Order was not found during the searches at **M.Z.**'s residence, work and vehicle. Nevertheless, when analysing the behaviour of **M.Z.** with the witness A, it appears that, as concluded in the first instance court, in no event **M.Z.** revealed the identity of witness A to anyone, regardless whether he knew or not the content of the Order. On 29 October he met with witness A to hear his story about what he had experienced during the war and, since one of the questions for the interview would be whether he was the witness in war crime case, **M.Z.** had to clarify with him whether this is true or not. Since witness A denied being the witness in the war crime case, on 30 October 2013 he showed the witness A the improvised paper stating that this is his testimony given in a front of Prosecutor in the war crime case. In relation to this, it is Prosecutor's submission that defendant **M.Z.** was in contact with the evidence in the war crime case and that R. had provided **M.Z.** with such a document. Panel notes that court has never established that the paper shown to the witness A was his statement given to the prosecutor nor the Prosecutor brought sufficient evidence before the first instance court to confirm his allegations in this regard. Even witness A himself stated in the main trial that the document shown to him in the main trial was not the one **M.Z.** showed to him on the second meeting on 30 October 2013. On the second meeting, he was shown the document with EULEX heading, that later came to be confirmed that document shown to witness A on 30 October 2013 was the document improvised by **M.Z.**

As to the submission of the Prosecutor that **M.Z.** revealed the identity of the witness to others or to M.M., the Panel of the CoA strongly rejects this allegation. It has been established by the first instance court that **M.Z.** never disclosed information about witness A to anyone. His identity and possibility of being the witness of the war crime case was never revealed to the public or to any one by **M.Z.**. As to M.M., the Panel notes that first instance court has established that M.M., was the one to have knowledge about the situation of witness A since they were relatives and not that M.Z. disclosed the confidential information to him. As correctly elaborated in the impugned Judgment that *[...it is true that both meetings (between **M.Z.** and witness A on 29 and 30 October 2013) were held in the restaurant and that other people were present. However, no evidence was presented indicating that these people heard their conversation or became aware about the content of the meeting. Both times, a cameraman with the Defendant did not sit at the same table].*

The Panel will not asses the TV Show 'xxx' aired on RTK which took place prior to the meeting between **M.Z.** and the Prosecutor and after this meeting since witness A was not subject of the interviews in these TV Shows. In line with this, first instance court has correctly established that the objective element of the criminal offence of Violating secrecy of the proceeding has not been proven. As provided in the provisions of the CPC, the object of the criminal offence is the mandatory element of the Indictment, that in the case at hand, Prosecutor failed to establish.

As to the eventual intent, as subjective element of the criminal offence of Violating the secrecy of proceedings contrary to Article 400 (2) in conjunction with Article 31 of the CCK, Panel notes that Prosecutor failed to establish this element as well. From the evidence presented in the main trial before the

first instance court, the court could not conclude the existence of this element, since the evidence shows that when **M.Z.** met with witness A on 29 and 30 October 2013, he had not knowledge about the fact that witness A is a protected witness since the protection of witness A or existence of an Order was never discussed specifically in the meeting he had with the Prosecutor on 24 October 2013. Therefore, the Panel concurs entirely with the finding of the first instance court.

Based on what was said above, the Panel of the Court of Appeals entirely concurs with the findings of the first instance court that it has not been established beyond reasonable doubt that **M.Z.** has committed the criminal offence of Violating the secrecy of proceedings contrary to Article 400 (2) in conjunction with Article 31 of the CCK. The Panel finds that the impugned Judgment does not contain an incomplete or erroneous determination of the factual situation since it correctly comes to a logical conclusion in the assessment of each piece of evidence hence justifying the acquittal of the defendant. The appeal of the SPRK is therefore rejected as unfounded on this ground.

For reasons elaborated above, the Court of Appeals rejected the Prosecutor's Appeal as ungrounded and affirmed the impugned judgment.

The Panel of the CoA has not found the *ex officio* violations pursuant to Article 394 of CPC.

As stated above, *acting* pursuant to Articles 389, 390, 394, 398 Paragraph (1) point 1.2, Article 401 and 403 of the CPC, the Court of Appeals decided as in the enacting clause.

The Judgment drafted in English language.

Presiding Judge:

Piotr Bojarczuk, EULEX Judge

Panel Members:

Roman Raab, EULEX Judge

Fillim Skoro, CoA Judge

Recording Officer:

Vjollca Kroçi - Gërxhaliu, EULEX Legal Advisor

KOSOVO COURT OF APPEALS

PAKR no. 336/16