

DISTRICT COURT OF MITROVICĚ/A

P Nr. 29/2009

23 March 2010

IN THE NAME OF THE PEOPLE

THE DISTRICT COURT OF MITROVICĚ/A, in the trial panel composed of EULEX Judges Hajnalka Veronika Karpati as Presiding Judge, and EULEX Judges Charles Smith and Nikolay Entchev as panel members, with the participation of Zane Ratniece EULEX Legal Officer as Recording Officer, in the criminal case against:

K.V. , charged, according to the Indictment of the District Public Prosecutor PP. Nr. 236/09 dated and filed with the Registry of the District Court of Mitrovica on 10 July 2009, with Rape contrary to Article 193 Paragraph (3) Item 6, read in conjunction with Paragraph (2) Items 1) and 2) of the Criminal Code of Kosovo (CCK);

After having held the main trial hearing closed to the public on 10 and 26 February, 18 and 23 March 2010, all in the presence of the accused **K.V.** , his Defence Counsel Nexhat Beqiri, Legal Representative of the Injured Party Ljubomir Pantovic and EULEX Public Prosecutor Maria Bamieh, after the trial panel's deliberation and voting held on 23 March 2010, pursuant to Article 392 Paragraph (1) of the PCPCK pronounced in public and in the presence of the Accused, his Defence Counsel, the Legal Representative of the Injured Party and the EULEX Public Prosecutor the following:

VERDICT

The accused **K.V.** , son of **K.R.** and **R.L.** , born on , in , Republic of Serbia, of **R.** ethnicity and Serbian citizenship, last known residence at Street, , Republic of Serbia, married, with children, no education, illiterate, unemployed, no regular income, living in poverty, no known previous conviction, in detention since ;

Is

FOUND NOT GUILTY

because it was not proven that the accused on _____ at around _____, in the village of _____, Municipality of _____, upon entering the house of the Injured Party N _____ S _____ subjected her into sexual act by using force, threat or exploitation, knowing that she was mentally disabled.

THEREFORE, the accused **K.V.** _____ is

ACQUITTED

Of the charge of committing the criminal offence of Rape under Article 193 Paragraph (2) Items 1) and 2) and Paragraph (3) Item 6 of the Criminal Code of Kosovo (CCK), pursuant to Article 390 Item 3) of the PCPCK.

Pursuant to Article 103 Paragraph (1) of the PCPCK the costs of criminal proceedings under Article 99 Paragraph (2) Subparagraphs 1 through 5 of the PCPCK, the necessary expenses of the defendant and the remuneration and necessary expenditures of defence counsel, as well as the costs of interpretation and translation shall be paid from budgetary resources.

REASONING

I. PROCEDURAL HISTORY

1.1. *Indictment*

On 10 July 2009, the District Public Prosecutor for Mitrovicë/Mitrovica Ismet Ujkani filed the Indictment PP. No. 236/09, dated 10 July 2009, with the Registry of the District Court of Mitrovicë/Mitrovica.

According to the Indictment PP. No. 236/09, the Accused **K.V.** has been charged with the criminal offence of Rape, under Article 193 Paragraph (3) Item 6), read in conjunction with Paragraph (2) Items 1) and 2) of the CCK.

The charge of Rape against the Accused has been based upon the following factual allegations:

‘On _____, around _____, in the village of _____, Municipality of _____, the Accused entered the house of the Injured Party N S and, despite being aware that she was mentally ill, the Accused forced her into having a sexual intercourse with him.’¹

1.2. *Confirmation of Indictment*

On 22 December 2009, a confirmation of indictment hearing was held in the District Court of Mitrovicë/Mitrovica. According to the Ruling of EULEX Judge Klaus Jung, acting as Confirmation Judge, dated 22 December 2009, the Indictment PP. No. 236/09 was confirmed.

II. JURISDICTION OF THE COURT

2.1. *Subject Matter and Territorial Jurisdiction*

According to Article 23 Paragraph (1) of the Provisional Criminal Procedure Code of Kosovo (PCPCK), a district court shall have jurisdiction to adjudicate at first instance a criminal offence punishable by imprisonment of at least five years or by long-term imprisonment.

The charged criminal offence of Rape, under Article 193 Paragraph (3) Item 6), read in conjunction with Paragraph (2) Items 1) and 2) of the CCK, allows imprisonment of at least five years.

Therefore, the District Court of Mitrovicë/Mitrovica has subject matter jurisdiction over the case.

The charged criminal offence of Rape was allegedly committed in the village of _____, Municipality of _____.²

Therefore, pursuant to Article 27 Paragraph (1) of the PCPCK, the District Court of Mitrovicë/Mitrovica has also territorial jurisdiction over the case.

¹ See Indictment PP. No. 236/09, dated 10 July 2009, p. 1

² *ibid*

2.2. *Jurisdiction of EULEX judges*

The criminal offence of Rape falls within the scope of Article 3 Paragraph 3 of the Law No.03/L-053 'On the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo', which provides for the subsidiary competence of EULEX judges. Article 3 Paragraph 3 of the said Law on Jurisdiction states that in cases of subsidiary competence, EULEX judges can take over a case upon appointment by the President of the Assembly of EULEX judges. On 18 November 2009, the President of the Assembly of EULEX judges, upon the petition of the EULEX Prosecutor, decided to assign to the case EULEX judges of Mitrovicë/Mitrovica District Court.

III. APPLICABLE SUBSTANTIVE LAW

The charged criminal offence of Rape was allegedly committed on . The substantive law applicable to the case is the one in force at the time, when the criminal offence was committed.

The Accused pursuant to the Indictment PP. No. 236/09 has been charged according to the Criminal Code of Kosovo (CCK). The Criminal Code of Kosovo entered into force on 06 January 2009. It is noted that criminal offence of Rape in the CCK is identical to the criminal offence of Rape in the Provisional Criminal Code of Kosovo, adopted with the UNMIK Regulation 2003/25, which entered into force on 06 April 2004 (PCCK). Under both Codes the alleged act constitutes the same criminal offence. Further, there has not entered into force any subsequent law, which would be more favourable.

IV. SUMMARY OF THE EVIDENCE PRESENTED

4.1. The following persons were examined as witnesses during the course of the main trial:

- 1) K.M. , on ;
- 2) The Injured Party N. S. , on , and .

4.2. The following statements of witnesses were presented by the EULEX Public Prosecutor during the course of the main trial:

- 1) Statement of K.M. , given on , at the Police Station in Leposaviq/Leposavic;

2) Statement of the Injured Party N. S. , given on , at the Police Station in .

4.3. The following documents were put forward to be used as evidence by the EULEX Public Prosecutor, and have been considered as read out based on agreement by the parties:

- 1) The Psychiatric Expertise for the Injured Party N. S. , dated , by Dr. R. J. and the documents used in preparation of the Psychiatric Expertise;
- 2) Report of the Gynaecologist, dated , Health Center , Medical File - Protocol No. ;
- 3) Discharge List from the Doctor, dated , Health Prevention Institute of the Republic of Serbia, Pediatric Department, Department No. , Case No. ;
- 4) Criminal Report, by the Investigative Police Officer of Police, dated , Reference No. ;
- 5) Officer's Report, by the Officer of Police, dated , Case No. ;
- 6) Initial / Incident Report, dated , Case No. ;
- 7) Passport copy of the Accused V. K. , Passport issued by the Republic of Serbia, ;
- 8) Passport copy of the Injured Party N. S. , Passport issued by the Republic of Serbia, ;
- 9) Passport copy of K.M. , Passport issued by the Republic of Serbia, ;
- 10) Photos of the Accused V. K. , Reference No. .

4.4. The following evidence was collected by the trial panel during the course of the main trial:

- 1) The Psychiatric Expertise for the Injured Party N.S. , dated , by Dr. R. J. .

V. ASSESSMENT OF THE PRESENTED EVIDENCE

5.1. Introduction

The EULEX Public Prosecutor during the course of the main trial proceedings maintained the allegations as set out in the Indictment PP. No. 236/09. The Injured Party's uncle and legal guardian K.M. was called by the Prosecutor to be examined as a witness. K.M. was the only witness, besides the Injured Party herself, examined during evidentiary proceedings. K.M. did not eye witness the alleged act of Rape, however, claimed that the Accused had raped the Injured Party. The Injured Party's testimony was contradictory. Her examination was particularly difficult, due to her mental retardation. Besides, the examination of the Injured Party was not finished. It was interrupted by her , legal guarding K.M. , who took the Injured Party out of the courtroom.³ The Accused plead not guilty and claimed that Injured Party had consented to sexual act with him, and that Accused did not use force or threat and he was not aware of the Injured Party's mental condition.

5.2. Factual Findings

Based on the evidence presented during the course of the main trial, and the Accused's statement, given at the main trial, the Court established that:

On , the Accused V.K. left ; in Serbia. He came to Raška, from where he took the bus to go to Mitrovicë/Mitrovica. The Accused got off the bus in the village of to walk around the houses and ask for help (to collect money / beg). After he had visited some houses, the Accused came to the house of the Injured Party N.S. and her uncle, legal guardian K.M. . The Accused entered the house. In the house was present only the Injured Party N.S. . At that time, her uncle, legal guardian K.M. was visiting at the house of his neighbour S.R. . After having entered the house of the Injured Party N.S. and K.M. , the Accused also went to the neighbouring house of S.R. , where K.M. was visiting. After the Accused V.K. left the house of S.R. , the Injured Party's uncle, legal guardian K.M. decided to go back to his house, where he had left the Injured Party by herself. On the way back, while K.M. was approaching his house, he met the Accused V.K. . The Accused asked K.M. ,

³ Record of the Main Trial, 18 March 2010, p. 5

whether he could pass by his house, which K.M. did not allow. At some point the Injured Party came out of the house and was crying. The Injured Party told K.M. that Accused had 'fucked' her. K.M. ran after the Accused and brought him back to the Injured Party to confront them. Afterwards, the Accused left the village of and took the bus to . K.M. reported to Police Station in that an unknown person of R ethnicity, later identified as Accused, had entered his house and raped his niece N.S. On the same day of , while the Accused was on the bus to , he was identified by the Police, and arrested at hrs.

Based on the evidence presented during the course of the main trial, and the Accused's statement, the Court established that during the time, when K.M. was visiting at the house of his neighbour S.R. , the Accused and the Injured Party had engaged in a sexual act. However, it could not be established by the Court beyond reasonable doubt that Accused subjected the Injured Party to sexual act by using force, threat or exploitation, knowing that she was mentally disabled.

5.3. Evidence Establishing the Factual Findings

Examination of Witnesses

a. **K.M.** was examined during the main trial session on 10 February 2010. K.M. confirmed his Statement, given on , at the Police Station in .⁴ Testimony of K.M. can be summarized as follows:

In the afternoon of , at around p.m., K.M. left the house, where he and the Injured Party live. At the moment, when K.M. was leaving the house, the Injured Party was inside the house watching TV.⁵ After K.M. left the house, he went to the house of his neighbour S.R. . After some time the Accused V.K. came to the S.R.'s house to ask for help (beg). This made K.M. suspicious, so, right after the Accused left, K.M. headed back to his house.⁶ When K.M. was approaching his house, he could hear the Injured Party screaming, and he saw the Accused coming from the direction of the house of the

⁴ Record of the Main Trial, 10 February 2010, p. 8

⁵ *ibid*, p. 11

⁶ *ibid*, pp. 8, 11, 19

neighbour G.P. . The Accused asked the witness K.M. , whether he could pass his house. K.M. did not allow the Accused to pass his house.⁷ When K.M. asked the Injured Party what had happened, the Injured Party replied: 'Uncle, that gypsy fucked me.'⁸ The Injured Party, according to the witness, by her appearance was 'depressed, maltreated, she had suffered pain and fear and it took him a long time to calm her down'. The Injured Party was telling to the witness that she had suffered pain, by pointing to the lower part of her body.⁹ K.M. ran after the Accused and brought him to the Injured Party to confront them. K.M. pointing at the Accused, asked the Injured Party: 'Was it him?' To what Injured Party responded: 'Yes, uncle.'¹⁰

The testimony of K.M. , given at the main trial session on 10 February 2010, was coherent. Also, the Accused V.K. stated that Injured Party had been at home by herself, and during that time K.M. was visiting at his neighbour's house.¹¹ The witness K.M. and the Accused V.K. , both stated that afterwards they had met on the way to K.M.'s house.

However, the witness and the Accused gave different statements as to *when* exactly the Injured Party had started to cry, scream:

The witness K.M. claimed that, on the way back from the neighbour's house, while he was approaching his house, he could hear the Injured Party screaming.

The Accused V.K. claimed that after he had been refused from the witness K.M. to pass by his house, and was walking around the house, the Injured Party and K.M. came out of the house and the Injured Party started to cry.¹² Therefore, the Accused's statement alleged that Injured Party was not screaming or crying, at the time, when the witness and the Accused were on the path to the house; it also alleged that witness had entered the house, before the Injured Party started to cry.

This discrepancy between the statements creates *doubts*, whether the Injured Party's reaction (crying, screaming) can be regarded as reflecting the alleged negative sexual experience inflicted upon her by the Accused. Or, it is also possible that crying, screaming was provoked by the witness after he had entered the house and had realized what had happened, and had expressed his negative attitude to the Injured Party.

⁷ *ibid*, p. 12

⁸ *ibid*, pp. 12, 13

⁹ *ibid*, pp. 13, 14

¹⁰ *ibid*, p. 14

¹¹ Record of the Main Trial, 18 March 2010, pp. 7, 8

¹² *ibid*, p. 8

The Public Prosecutor argued that if it were a pleasant sexual experience, as claimed by the Accused, the Injured Party would not be in such a distressed emotional condition afterwards.¹³ However, the trial panel considers that, in view of aforementioned, the alleged distress of the Injured Party cannot beyond reasonable doubt be considered as indication that Injured Party had been raped by the Accused.

It is also assessed by the trial panel that blood relationship exists between the witness and the Injured Party. The Injured Party is his , and he has been taking care of the Injured Party since year .¹⁴ It is opinion of the trial panel that because of close relationship between the witness and the Injured Party, the witness may feel protective about her. Therefore, the witness may not fully objectively reflect the events of . This is concluded by the trial panel also from comparison of the K.M. 's testimony given at the main trial and at the Police Station in on :

In the statement at the Police Station in on , the witness testified that Injured Party had told him that the Accused had 'raped' her. However, at the trial, on 10 February 2010, the witness testified that Injured Party had told him: ' , that gypsy fucked me'. The terms 'raped' and 'fucked' bear different meanings.

K.M. at the main trial was asked to clarify, which word exactly was used by the Injured Party. To this K.M. replied that the Injured Party had used the word 'fuck', because she does not know the word 'rape', but the witness knows. According to the witness, he concluded that the Injured Party had been raped, 'because she cannot think clearly and her brain is not operating well, because she does not have freedom of will and a person can do with her anything he wants'.¹⁵

With respect to K.M. 's conclusion that the Injured Party had been raped, it is noted by the trial panel, that K.M. *did not eye witness* the alleged act of Rape.¹⁶ Therefore, it is opinion of the trial panel that it is K.M. 's *interpretation* of events of , - that the Accused had raped the Injured Party, which possibly is guided by the close relationship to the Injured Party.

At the same time, it followed from the testimony of the witness K.M. that, after the Accused had allegedly raped the Injured Party, he remained in the neighbourhood. The witness and the Accused¹⁷, both stated that Accused V. K. went to the

¹³ Record of the Main Trial, 23 March 2010, p. 3

¹⁴ Record of the Main Trial, 10 February 2010, pp. 14, 19, 22; Statement of K.M. , given on , at the Police Station in , p.

¹⁵ Record of the Main Trial, 10 February 2010, pp. 12, 13

¹⁶ This was confirmed by K.M. in his Statement, given on , at the Police Station in , p.

¹⁷ Record of the Main Trial, 18 March 2010, pp. 7, 8

house of S. R. , where the witness at that moment was visiting. Later on, according to the statement of K. M. , the Accused was coming from the direction of the house of the neighbour G. P. .

The Accused's behaviour, following the claimed act of Rape, raises a question, if the Accused had indeed committed such a serious criminal offence as Rape, would he remain present in the neighbourhood and continue begging. It is opinion of the trial panel that Accused's behaviour does not indicate of presence of the requisite mental element of guilt, *mens rea*.

b. N. S. , the Injured Party, was examined during the main trial sessions on 26 February 2010, and 18 March 2010. Before examining the Injured Party, the trial panel ordered her psychiatric examination. According to the Psychiatric Expertise by Dr. R. J. .

, dated , the Injured Party could attend the main trial, but simple questions should be posed. Because of the mental condition of the Injured Party, the trial panel decided to apply a protective measure,- to remove the Accused from the courtroom during examination of the Injured Party.¹⁸ The Injured Party's testimony was read out to the Accused, and he was ensured the rights to ask questions to the Injured Party.

Even though, according to the Psychiatric Expertise, dated , the Injured Party's mental condition allows her to discern between reality and imagination, specifically with respect to the alleged criminal offence,¹⁹ at the main trial doubts arose as to ability of N. S. to clearly recall and state the facts from .

With respect to testimony of the Injured Party, the following is noted by the trial panel:

- The Prosecutor read out, sentence by sentence, to the Injured Party her Statement, given on , at the Police Station in . The Injured Party confirmed the sentences read out to her by the Prosecutor from her Statement. In particular, the Injured Party confirmed that:

While she was at home watching TV, the Accused entered her house. The Accused told her to stay quiet, and took off the Injured Party's clothes. The Accused hit her on the head, and she fell. The Injured Party was crying and screaming. The Injured Party stood up and the Accused pushed her on a bed. The Accused took off his pants and jacket and *raped* the Injured Party. The Accused was choking her neck and she tried to defend herself. The Accused put his penis in her mouth before he raped her. The Accused's sperm was on the bed. The Accused put his

¹⁸ Record of the Main Trial, 26 February 2010, p. 4

¹⁹ The Psychiatric Expertise for the Injured Party N. S. , dated , by Dr. R. J. , p.

clothes on and left. The Injured Party stayed in the bed crying until her uncle (K.M. M.) arrived.²⁰

- In the next part of examination, at the sessions on 26 February 2010 and continued on 18 March 2010, the Injured Party considerably contradicted with her previous statement. According to the Injured Party's replies to the questions either put forward by the Defence Counsel or the Presiding Judge:

The Injured Party had kissed the Accused 5 times on the lips not more.²¹ The Injured Party had kissed the Accused on the neck, and she had helped the Accused to take off his trousers. She took her trousers and underwear off herself.²² The Injured Party confirmed that it is true that she had given her consent to whatever happened on the day of . The Injured Party also confirmed that the Accused did not hit her, did not use force and was not violent.²³

While the Injured Party confirmed the act of Rape inflicted upon her by the Accused, she also confirmed consenting to the sexual act with the Accused. With respect to the Injured Party's statement, it is, therefore, opinion of the trial panel, that no concrete conclusion can be made, as to, whether the sexual act occurred with, or without the Injured Party's consent, or whether the Accused had used against the Injured Party the force or threat, or not.

Documentary Evidence

- c. **The Psychiatric Expertise** for the Injured Party N. S. , dated , by Dr. R. J. (the '**Psychiatric Expertise**'), listed the diagnosis and psychologist's findings for the Injured Party from the year , when the Injured Party was treated at the Institute for Mother and Child, Pediatric Clinic, in Belgrade.²⁴ As for the current condition of the Injured Party, the Psychiatric Expertise stated that:

²⁰ Record of the Main Trial, 26 February 2010, pp. 12-15. It is noted by the trial panel that similar statement was given by the Injured Party at the psychiatric examination, performed by Dr.R. J. , on . See The Psychiatric Expertise for the Injured Party N.S. , dated , by Dr. R. J. , p.

²¹ During the Injured Party's examination it was determined that she cannot count. See Record of the Main Trial, 26 February 2010, p. 19

²² Record of the Main Trial, 26 February 2010, pp. 16, 17

²³ Record of the Main Trial, 18 March 2010, pp. 4, 5

²⁴ The Injured Party's diagnosis in year was provided also in the **Discharge List from the Doctor**, dated , Health Prevention Institute of the Republic of Serbia, Pediatric Department, Department No. , Case No.

Injured Party is mentally retarded and the degree of mental retardation is moderate/medium degree. The illness occurred in early childhood due to brain damage. The Injured Party was also mentally retarded during commission of the alleged act of Rape.

The Psychiatric Expertise also stated that the Injured Party has significantly deficient intellectual reasoning, and it frequently occurs that such persons accept positions of others in a passive and suggestible manner, without the learned defence models. She is also prone to suggestibility to a great extent / she can be easily persuaded to an action.²⁵ The Psychiatric Expertise also provided that any reasonable observer could notice the Injured Party's mental deficit due to the outward aspect and her reactions, which are noticeable.²⁶

The Prosecutor at the main trial argued that Accused V.K. must have noticed the Injured Party's mental condition, and that Injured Party's mental illness adds to the Accused's guilt.²⁷ In this regard, it is assessed by the trial panel that Psychiatric Expertise did not find that Injured Party is not capable of giving consent to a sexual act. This question was asked to the Dr. R. J. in the Order for Psychiatric Examination, issued by the Court on 10.02.2009. Even if the Injured Party was prone to suggestibility, the evidence presented during the main trial did not prove beyond reasonable doubt that Accused subjected the Injured Party to a sexual act without her consent, and, as alleged, by using force or threat. The fact that Injured Party suffers from mental illness, does not release the Prosecutor from proving the said element of *actus reus*.

The Psychiatric Expertise raised the question, whether the Accused could abuse the Injured Party's mental disability. Based on the Psychiatric Examination it is possible that Injured Party would passively accept the sexual act inflicted upon her. Also the witness K M during examination stated that a person can do with the Injured Party whatever he wants.²⁸ It is assessed by the trial panel that, during examination, the Injured Party had a tendency to agree with the questions / statements put before her. This was also pointed out by the Public Prosecutor in her closing statement. The Prosecutor in this regard referred to Article 197 of CCK Sexual Abuse of Persons with Mental or Emotion Disorders or Disabilities. However, it is noted by the trial panel that under Article 197 of CCK it must be proven beyond reasonable doubt that the perpetrator *exploited* the injured party's disorder or disability. There was no evidence put forward at the main trial that would prove that Accused had exploited the Injured Party's mental disability. Just because the Injured Party suffers from mental illness does not mean that such illness is *per se* exploited.

²⁵ The Psychiatric Expertise for the Injured Party N. S. , dated , by Dr. R. J. , pp. ,

²⁶ *ibid*, p. 3

²⁷ Record of the Main Trial, 23 March 2010, p. 4

²⁸ Record of the Main Trial, 10 February 2010, p. 13

d. **Report of the Gynaecologist**, dated _____, Health Center _____, Medical File - Protocol No. _____ (the 'Report of the Gynaecologist') assessed the Injured Party's condition after commission of the alleged act of Rape.²⁹ According to the Report of the Gynaecologist, there were no visible marks of violence (bruises, scratches etc.) on the Injured Party's external genitals, stomach, legs, hands.

It is opinion of the trial panel that Report of the Gynaecologist corroborated the Injured Party's one of the two contradictory statements regarding the events of _____, that no force was used by the Accused against her.³⁰ The witness K.M. _____ claimed that, because the Injured Party had been pushed by the Accused on a table, her lip was slightly cut and there was a bruise on it.³¹ The Report of the Gynaecologist put into question, whether the Injured Party had actually suffered bodily injury, as claimed by the witness K.M. _____. It is very unlikely that a cut and bruise on the Injured Party's lip could have remained unnoticed by the doctor. The Report of the Gynaecologist did not contain any material evidence linking the Accused to the charged criminal offence of Rape. On the contrary, the Report of the Gynaecologist corroborated the Accused's statement that no force had been used by him against the Injured Party.

e. **Criminal Report**, by the Investigative Police Officer of _____ Police, dated _____, Reference No. _____, described the statements of the witness K.M. _____ and the Injured Party, as given at the Police Station in _____ on _____ (assessed in this judgment above). It also followed from the Criminal Report that a person, whose description fitted to the one of the suspect (later identified as Accused), had been found in one of the buses, at _____.

Officer's Report, by the Officer of _____ Police, dated _____, Case No. _____, provided that, on _____, when the Police Officers found the witness K.M. _____ in the village of _____, he told that a person of R. _____ ethnicity had entered his house and raped his niece N.S. _____. The Police Officers also contacted their colleagues at _____, who informed that they had found in a bus a person, who matched with that description (later indentified as Accused).

²⁹ At the main trial session on 26 February 2010, the Injured Party confirmed that following commission of the alleged act of Rape, she went to see a doctor. See Record of the Main Trial, 26 February 2010, p. 11

³⁰ Record of the Main Trial, 18 March 2010, p. 5

³¹ Record of the Main Trial, 10 February 2010, p. 14

In the **Initial / Incident Report**, dated _____, Case No. _____, the Accused was identified as a suspect for the Rape of the victim N. S. _____ on _____, in the village of _____.

With respect to aforementioned Reports, it is assessed by the trial panel, that allegations in those Reports that Accused had committed the act of Rape were based on the information provided by the witness K.M. _____, and statement of the Injured Party, given on _____. The Reports did not contain any material evidence linking the Accused to the criminal offence of Rape. As it was already assessed in this judgment before (*see* pages 7-9 above), K.M. _____ did not eye witness the act of Rape. And, after being asked to specify, at the main trial session on 10 February 2010, which word exactly the Injured Party had used to describe the act inflicted upon her by the Accused, the witness testified that Injured Party had told him: '_____, that gypsy *fucked* me'.³² Also, as it was assessed in the judgment (*see* pages 9-11 above),- the Injured Party at the main trial gave *contradictory* statement as to sexual act with the Accused: she confirmed that Accused had raped her; and also agreed that she had consented to the sexual act with the Accused, and that Accused had not been violent towards her. Therefore, the Injured Party's testimony could not be used by the trial panel to make conclusions, whether the act of Rape had been committed by the Accused.

The aforementioned Reports referred to the statements of the witness and the Injured Party, given on _____. Those statements were inconsistent with the subsequent statements of the witness and the Injured Party provided during the course of the main trial. Therefore, the Reports as evidence lost their value. The Reports did not contain any further material evidence, which would link the Accused to the alleged act of Rape.

VI. CONCLUSIONS ON THE LAW AND FACTS

The Indictment PP. No. 236/09, filed with the Mitrovicë/Mitrovica District Court on 10 July 2009, charged the Accused with Rape under Article 193 Paragraph (3) Item 6), read in conjunction with Paragraph (2) Items 1) and 2) of the CCK.

To find the Accused guilty under Article 193 Paragraph (3) Item 6), read in conjunction with Paragraph (2) Items 1) and 2) of the CCK, the Court has to establish beyond reasonable doubt that:

First, the Accused subjected the Injured Party to a sexual act by use of force and (or) threat (Article 193 Paragraph (2) Items 1) and 2) of the CCK);

AND

³² Record of the Main Trial, 10 February 2010, pp. 12, 13

Second, the Accused knew that Injured Party was exceptionally vulnerable, because of her mental disability (Article 193 Paragraph (3) Item 6) of the CCK).

Article 6 Paragraph 2 of the European Convention on Human Rights, provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The right of the Accused to be presumed innocent is also embedded in Article 3 of the PCPCK. The purpose of this right is to minimize the risk that innocent person may be convicted and imprisoned.

The burden of proving beyond reasonable doubt the elements of the charged criminal offence of Rape under Article 193 Paragraph (3) Item 6), read in conjunction with Paragraph (2) Items 1) and 2) of the CCK laid primarily with the prosecution.

First, Article 193 Paragraph (2) Items 1) and 2) of the CCK: during the course of the main trial, it was proven beyond reasonable doubt that Accused had entered the house of the Injured Party and engaged in a sexual act with her. However, the evidence presented by the Prosecutor during the main trial did not prove beyond reasonable doubt that Accused V. K. had subjected the Injured Party N. S. to a sexual act by use of force and (or) threat. Prosecutor argued that many circumstances indicated that Accused had committed the alleged act of Rape, *inter alia*, the Injured Party's mental illness, and her exceptional vulnerability; the distressed emotional condition of the Injured Party following the alleged act of Rape; the immediate report to the Police about the alleged act of Rape by her uncle K. M. ; the inexplicable reasons, why the Accused had entered the house of the Injured Party, in view of the fact that he was in a hurry.³³

However, it is opinion of the trial panel that circumstances adduced by the Prosecutor, and other evidence presented during the main trial were not enough to establish that Accused V. K. had subjected the Injured Party N. S. to sexual act by use of force and (or) threat (as per Article 193 Paragraph (2) Items 1) and 2) of the CCK).

Second, Article 193 Paragraph (3) Item 6) of the CCK: according to Article 193 Paragraph (3) of the CCK, to qualify the act also under Paragraph (3), first offence under Article 193 Paragraphs (1) and/or (2) has to be established. The possible application of Paragraph (3) is dependant upon existence of offence under Paragraph (1) and/or (2) of Article 193.

As mentioned above the Court did not establish the offence under Article 193 Paragraph (2), *i.e.*, the Court did not establish that Accused had subjected the Injured Party to sexual act by

³³ Record of the Main Trial, 23 March 2010, pp. 2, 3

force and (or) threat. Therefore, it was unnecessary for the Court to scrutinize the existence of the alleged circumstance under Paragraph (3) Item 6).

With respect to existence of criminal offence under Article 193 Paragraph (1) of CCK, it was not proven beyond reasonable doubt that Accused V. K. had subjected the Injured Party N. S. to sexual act *without her consent*. For the question of the Injured Party's *consent* the central argument put forward by the Prosecutor was the Injured Party's mental disability, and her suggestibility. However, the Injured Party's mental condition does not *per se* lead to conclusion that sexual act occurred without her consent. It still must be proven beyond reasonable doubt that there was no consent from the side of Injured Party. Because it was not proven, the Court could not find the Accused guilty of committing the act of Rape under Article 193 Paragraph (1).

In view of the mental disability of the Injured Party, Article 197 of the CCK Sexual Abuse of Persons with Mental or Emotion Disorders or Disabilities was put forward by the Prosecutor. However, it was not proven beyond reasonable doubt that the Accused had *exploited* the Injured Party's disorder or disability, as required under Article 197 of the CCK. The fact that Injured Party was mentally retarded and was prone to suggestibility, does not create an obligation on part of the Accused to satisfy the Court that he had not exploited the Injured Party's condition. As per the guarantee of presumption of innocence the burden of proof laid primarily with the prosecution. It was only proven beyond reasonable doubt that Accused and Injured Party had engaged a sexual act, however, the circumstances, in which the sexual act had occurred remained unproven.

Therefore, in view of all aforementioned, the Accused V. K. , pursuant to Article 390 Item 3) of the PCPCK, is acquitted.

COSTS

Because the Accused V. K. was acquitted, pursuant to Article 103 Paragraph (1) of the PCPCK, the costs of criminal proceedings under Article 99 Paragraph (2) Subparagraphs 1 through 5 of the PCPCK, the necessary expenses of the defendant and the remuneration and necessary expenditures of defence counsel, as well as the costs of interpretation and translation shall be paid from budgetary resources.

PROPERTY CLAIM

No property claim was filed by the Injured Party N. S. . However, if property claim had been filed, the Court would be obliged to reject the property claim, because the Accused V. K. has been acquitted.

**District Court of Mitrovicë/Mitrovica
P Nr. 29/2009**

**Presiding Judge
Hajnalka Veronika Karpati**

**Panel Member
Charles Smith**

**Panel Member
Nikolay Entchev**

**Recording Officer
Zane Ratniece**

LEGAL REMEDY: Authorized persons may file an appeal in written form against this judgment to the Supreme Court of Kosovo through the District Court of Mitrovicë/Mitrovica within fifteen (15) days from the date the copy of the judgment has been received, pursuant to Article 398 Paragraph (1) of the PCPCK.