Pkl-Kzz 114/09
12 April 2010

IN THE NAME OF THE PEOPLE

SUPREME COURT OF KOSOVO

in the panel composed of

Maria Giuliana Civinini EULEX judge Supreme Court Judge and Presiding Judge,

Gerrit Marc Sprenger EULEX judge Supreme Court Judge - panel member

Enver Peci, Supreme Court Judge - panel member

Valdete Daka, Supreme Court Judge - panel member

Avdi Dinaj Supreme Court Judge - panel member

assited by Edita Kusari as court recorder in the criminal case against the defendant:

[redacted] born in on , father's name ,

mother's maiden name , residing in Str. in

. Kosovo Albanian, economist, married, with three children, completed university in economics, average economic status;

For the criminal offence of **Abusing Official Position and Authority** as a co-perpetrator with other suspects against whom a separate indictment has been filed contrary to Art.25 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY) and Art. 210 par.1 and 4 of the Criminal Law of Kosovo (CLK) and **Entering into Harmful Contract** contrary to Art. 109 par.1 and 2 of the CLK;

REPUBLIKA E KOSOVES * GJYKATA SUPREME E KOSOVES-PRISHTINE * VRHOVNI SUD KOSOVA-PRIŠTINA * REPUBLIKA KOSOVO

Acting upon the request for protection of legality filed by the defence counsel Tomë Gashi in favour of the defendant L. XH. directed against the verdict of the District Court of Prishtina P.nr. 826/06 dated on 09.05.2008 and against the verdict of the Supreme Court of Kosovo Ap. Kz. Nr. 435/2008 dated on 22 June 2009 in the session held on 12 April 2009 after deliberation and voting;

Issues the following:

JUDGMENT

To reject the request of the defense counsel Tomë Gashi for Protection of Legality filed against the final verdict of the District Court of Prishtina P.nr. 826/06 dated on 09.05.2008 and the verdict of the Supreme Court of Kosovo Ap.Kz Nr. 435/2008 dated on 22 June 2009

REASONING

I. Procedural history

On 9 May 2008 the District Court of Prishtinë/Priština found L. XH. guilty as a co-perpetrator with other suspects against whom a separate indictment had been filed of the criminal offence of Abusing Official Position and Authority, contrary to Article 23 of the CCSFRY and Article 210 paragraphs (1) and (4) of the CLK, and [illegible] of the

criminal act of Entering into Harmful Contract, contrary to Article 109 paragraphs (1) and (2) of the CLK. L. XH. received an aggregated punishment of 4 years of imprisonment.

Within the legal timeframe, defense counsel Tomë Gashi filed an appeal in favor of defendant Leme Xhema on 6 August 2008.

On 22 June 2009 the Supreme Court of Kosovo partially granted the appeal of the defense counsel filed in favor of L. XH. and partially affirmed the verdict of the District Court of Prishtinë/Priština. By the judgment of the Supreme Court the defendant L. XH. was sentenced to a punishment of three (3) years of imprisonment and the legal qualification of the facts was modified to be solely in Count 2 as Supreme Court found that the crime foreseen in Count 2 absorbs and includes the facts of "Abusing of Official Position or authority" foreseen in Count 1.

On 23 October 2009 the request for protection of legality was duly filed by the defense counsel Tome Gashi, on favor of the defendant, against the judgment of the DC Prishtina P.no. 826/06 dated 09.05.2008 and the judgment of the SC of Kosovo Ap.Kz no.435/2008 dated 22.06.2009.

On 10 November 2009 the State Prosecutor filed a motion proposing that the request for protection of legality against the verdicts be rejected as ungrounded.

On 16 March 2010 defense counsel Bejtush Isufi filed to the Supreme Court of Kosovo Supplemental brief for petition for protection of legality.

II. Reasoning

Lawfulness of the first instance and second instance enacting clauses

The defense counsel affirms that both the first and the second instance verdicts contain essential violations of the procedural rules; in particular the enacting clause of the two verdicts would be incomprehensible, contradictory in its content with the reasons of the judgment.

With reference to the enacting clause of the judgment of the District Court of Prishtinë/Priština , dated 9 May 2008, defense Counsel presents that in the enacting clause the verdict finds that L. X. as General Director of the Post and Telecom of Kosovo (PTK) on 28 February 2003 ordered a payment of €300,000.00 to be paid to Norway Invest to cover the alleged expenses for founding the joint company called ARTET. Whilst in the reasoning, the verdict states that this amount was paid for services that in fact were not delivered and despite the fact that PTK was not obliged to pay such amount. Further the enacting clause states that this amount was paid without the authorization of Kosovo Trust Agency (KTA) which contradicts – according to the counsel – with another statement in the enacting clause saying that L. X. acted in complicity with Roger Reynolds who was the manager of KTA responsible for the PTK sector. Regarding the verdict's inconsistency with its reasoning, counsel adds that while in the enacting clause that panel found that L. X. acted jointly with Roger

Reynolds, in the reasoning part the verdict shows that [redacted] was not obliged to act according to Reynolds's orders as these orders were unlawful.

With reference to the enacting clause of the judgment of the Supreme Court dated 22 June 2009, the defence argues that it contains essential violations of criminal procedure provisions foreseen by Art. 403 par.1 point 12 of Criminal Procedure Code of Kosovo (CPCK) since the judgment is incomprehensible, contradictory in its content and with the reasoning. In the reasoning (page 6 of the Albanian version) it is understood that the judgment of the District Court is modified and the defendant is found guilty only for point 2 of the judgment of DC Prishtina (entering into harmful contracts) whereas it is not mentioned how SC decided for the criminal offence under point 1 for abuse of the official function or authority.

It is the opinion of the Supreme Court that the general legal requirements of enacting clauses as a part of the judgment have to be clarified:

a) The first instance judgment shall be composed by: an introduction, the enacting clause and a statement of grounds (art. 396, par. 1 CPCK); the enacting clause shall include the personal data, the decision (condemnation or acquittal) and in case of conviction: the act of which the defendant has been found guilty with indication of the relevant criminal offense and the essential fact and circumstances and the punishment (art. 396 par. 3 and 4 in connection with art. 391 CPCK); the statement of grounds shall present factual and legal base of the decision, evaluation of evidences, circumstances that are relevant to the punishment (art. 396 par. 6 to 10).

b) The appealed judgment has the same structure of the first instance one (introduction, enacting clause and statement of grounds); the enacting clause includes the personal data

and the decision (appeal dismissing or rejecting, annulment or modification of the first instance judgment - art. 420 CPCK).

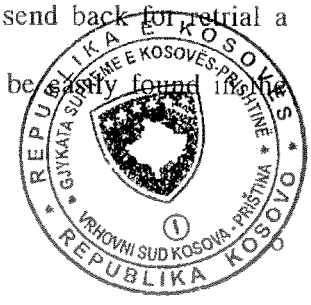
c) The judgment is considered as a unique by art. 402 and 403 CPCK on "ground on which the judgment may be challenged".

d) Based on art. 403 par 1 point 12, a judgment can be challenged on the ground of a substantial violation of the provision of criminal procedure if "the enacting clause of the judgment was incomprehensible or internally inconsistent or inconsistent with the grounds for the judgment ...".

e) Taking in consideration that the enacting clause is an integral part of the judgment it has to be read and interpreted in connection with the other parts of the judgment especially with the statement on grounds

f) Based on the general principle that an act is to be interpreted in the way in which it has a meaning and not in the way in which it has no meaning, the enacting clause and the statement of grounds have to be read together (the law prescribes that they have to be consistent with each other); only if the enacting clause remains incomprehensible or inconsistent after having been read in connection with the statement of grounds, it can be declared unlawful and the judgment can be annulled.

g) The conclusion is based also on the principle of judicial economy which has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute". In assessing the allegation of legal error, it has to be considered if all the required by the law judgment's elements are present in the challenged decision. To annul and send back for retrial a judgment that doesn't contain elements or information that can be easily found in the



statement of grounds, it would be against the above mentioned principle.

Applying these principles to under exam the case, the Supreme Court opines:

1) The enacting clause of the judgment of the court of the first instance is clear, well written and fully understandable; furthermore it contains all the elements and indications prescribed by the law and it is internally consistence.

The defense counsel tries to demonstrate the inconsistence of the enacting clause with the statement of grounds, with reference to the description of payment and to the role of Roger Reynolds. It is said in the enacting clause and it is well explained in the reasoning on the base of a correct assessment of the evidences that the payment of 300.000,00 euro was authorized by the defendant against the invoice 301001 of the Norwegian Company Norway Invest R&O AS to PTK covering "ARTET business Development & Setup total from June 1 2002 to 10 March 2003", ARTET being a company (not established at the date of the trial) supposed to become a joint company between PTK and Norway Invest SA with the aim of introducing a TETRA communication service in Kosovo (see Memorandum of Understanding 0n 20.11.2002 between PTK and Norway Invest SA). The money was transferred from a PTK account to a PTK-ARTET sub account created by the defendant herself and administered by Reynolds as manager of the ARTET planned joint venture. No evidence has been given about the services that the invoice refers to and that can be affirmed as inexistent. With reference to Reynolds role, there is no contradiction between his role of manager KTA, his function of supervising PTK and his role of co-perpetrator for the illegal nature of the action and of the agreement among [redacted] and Reynolds. What is written in the enacting clause ("She acted together with Roger Reynolds who signed the transfer order in a double capacity [redacted] KTA

representative and ARTET chairman.") is mirrored in the statement of grounds where it is explained on the base of evidences that the money transfer order from PTK account to PTK-ARTET account was signed (without having the relevant legal authority) by L. XH. and by Reynolds for creating the appearance of legality of the operation and persuading the PTK Finance Director E. K. to sign the order in the absence of the original of the invoice.

On the point of the contract, raised by the defense counsel affirming that nothing is said in the reasoning about its conclusion, it is clearly affirmed in the decision (page 28-29 of the English version) that: "A contract is concluded upon contracting parties' agreement on crucial constituents of the contract. The will to conclude a contract can be expressed by any type of behavior from which it can be concluded beyond doubt that the will exist. An offer is considered accepted when the price is paid. (...) When Norway Invest SA sent an invoice on 15.01.2003 .... it therefore made an offer concerning the sale of services. By paying this bill L. XH. actually accepted the offer thereby concluding a contract."

2) The enacting clause of the Supreme Court judgment is clear and understandable; it is true that it doesn't contain a reasoning or the reasons related to decisive facts are not presented" but the CPCK is clear affirming that the reasons of the decision have to be given in the statement on grounds and not in the enacting clause. In the reasoning it is said (point 4): "The Supreme Court finds that the facts, as determined by the first instance Court and confirmed in appeal, should be legally qualified and identified, solely and only, in Count 2, because the crime foresees in Count 2 absorbs and includes the facts of "Abusing Official Position or Authority" foreseen in Count 1" (the legal and factual explanation follows). The non-mention in the enacting clause of the absorbed Count

under count 2 is not relevant.

The legality of evidences

The defense argues that the judgment of DC Prishtina contains essential violations of provisions of criminal procedure as to Art. 403 par.1 point 8 of CPCK as the judgment is based on inadmissible evidence as the copy of MoU presented during the main trial, no original invoice of 300.000 Euro was presented during the main trial, in the eleventh page of the judgment of DC Prishtina in the Albanian language the evidences that were not read at all in the main trial is considered as minutes of the main trial.

The copies of the Memorandum of understanding agreed between PTK and Norway Invest SA and of the invoice has been regularly delivered by the Prosecutor as documentary evidences, used for questioning witnesses during the main trial and the defense counsel or the defendant herself never raised any objection or exception. As for the invoice, it is been clear during the trial (and reported in the judgment) that the original of the invoice disappeared after having been sent to [illegible] by the Finance Director [illegible]

All the documents communicated by the Prosecutor to the defendant were considered read into the records at the Court's session of 14 April 2008.

The request of financial expertise and witnesses.

The defense argues that refusal of the court without any prior justification on the request of the defense to engage financial experts to establish the alleged amount of the caused damage represents violation of Art. 403 par.2 point 2 of CPCK. The [illegible] number of

witnesses that defense proposes to be heard for the purpose of clarifying the business issue which according to the defense is considered unfairly as criminal offence to the detriment of [redacted].

There was no need for a financial expertise to establish the amount of damages caused to PTK. It is evident that the damage is at least equal to the amount of money paid without consideration. The decision on the authority of [redacted] to sign the transfer of money doesn't need the evaluation of an expert in the presence of a document indicating that the defendant as Director General of PTK for the contracts above 25.000 euro required the approval and signature of the General Director after consent of UNMIK DIA/C (Directorate of Infrastructure Affairs/ Communications), and consent later had to be given by KTA.

Taking into consideration the limited facts that are relevant for the criminal offense for which the defendant is charged, the witnesses requested by the defense counsel were irrelevant.

The supplemental brief for petition for protection of legality

In the supplemental brief for petition defense counsel Bejtush Isufi in favor of the defendant asks for the dismissal of charges or alternatively if not then for the case to be returned to the DC for a new trial. The defense argues that SC by its judgment violated Art. 451 par.1 point 1 and 2, Art. 458 and Art. 403 par.1 of CPCK. The defense further elaborated that it was not proven that defendant acted "with the intent to obtain an unlawful material benefit" as required for the criminal offence of abusing official position or authority nor that "she knows to be harmful for the business" as required for the

criminal offence of entering into harmful contracts since she was operating under the supervision of Roger Reynolds who was at that time the manager of PTT in KTA and who was her supervisor. Although the defendant admitted to have exceeded her authorization for transfer of money (her limit for transfer was 25.000 Euro and she transferred 300.000 Euro) she believed that since she was acting under Reynolds she was acting correctly). Further the defendant asks for the sentence to be suspended until it is decided about the request.

The supplemental brief has been delivered when the dead-line for requesting the protection of legality was already expired and the reasons raised with it have not to be taken into consideration.

In conclusion, the allegation of legal errors in the challenged Judgment of the Supreme Court is ungrounded and the request has to be rejected.

SUPREME COURT OF KOSOVO

On 12 April 2010, Pkl-Kzz 114/09

Recording Clerk,
Edita Kusari

Panel members

Gerrit Marc Sprenger

Enver Peci

Presiding Judge,
Maria Giuliana Civinini

Avdi Dinaj

Valdete Daka,

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