District Court of Prishtina

AP. No. 395/10
9 December 2010

IN THE NAME OF THE PEOPLE

The District Court of Prishtina, in the trial panel composed of the EULEX Judge Gianfranco Gallo as Presiding Judge, the EULEX Judge Karen Asphaug and the Kosovan Judge Fllanza Kadiu as panel members, assisted by the court recorder Nexhmije Mejzini, in the criminal case against
T. G
, with the current address
, who was found guilty of the criminal offence of Attacking Official Person Performing Official Duties, contrary to Art.317, par. 2 in relation to par. 1 of the CCK by the judgment of the Municipal Court of Pristina n. P 514/09, dated 28 May 2009;

after receiving the duly filed appeal of the defendant on 30 September 2010;

after the session held at the District Court of Prishtina on 7 December 2010 and following the voting and deliberation held on 8 December 2010;

pursuant to Art. 420, par. 1, item 2 of the KCCP, issues the following

VERDICT

T. G

I. **The appeal of the defendant is rejected as UNFOUNDED.**

II. **The Judgment of the first Instance P. No. 514/09, dated 28 May 2010 is AFFIRMED.**

REASONING

1. Procedural History

T. G

On 19 January 2007 the Public Prosecutor filed an indictment charging with the criminal offence of Attacking Official Persons Performing Official Duties, contrary to Art. 317, par. 1 and 2 of the CCK.

The indictment was confirmed by the decision of the Confirmation Judge on 10 March 2008, after the confirmation hearing.

With the request dated 19 March 2009, the President of the Municipal Court of Pristina, asked the President of the District Court of Pristina that the trial against the accused be transferred to a different Court. The request was based on the argument that one of the accused, Mr. T. G , of the Municipal Court of Pristina. To avoid any risk of bias, the request suggested the change of the venue of the trial.

With the decision dated 27 April 2009, the President of the District Court of Pristina delegated the Municipal Court of Ferizaj to try the case.

On 26 June 2010, the President of the Municipal Court of Ferizaj requested the President of the Assembly of EULEX Judges to appoint EULEX judges to the case, stating that, because of the position of Mr. T G to the office of the Prime Minister, the proper administration of justice suggested that the case was tried by international judges.

With the decision dated 17 September 2009, following the hearing foreseen by Article 4 of the Law on the jurisdiction, case allocation and case selection of EULEX judges and prosecutors in Kosovo (L. N. 03/ L-053), the President of the Assembly of EULEX judges assigned the case to a panel composed of EULEX judges.

The main trial against the accused started on 14 May 2010. After the initial formalities and the reading of the indictment by the prosecutor, the examination of the witnesses started.

The trial was adjourned to 25, 27 and 28 of May 2010 for the further examination of the witnesses and of the accused.

Before the beginning of the final speech the Prosecutor asked the Court the permission to amend the indictment as follows: *"I would like to make an amendment for the qualification of the criminal offence Attacking Official Persons Performing Official Duties as per Article 317 paragraph 2 in relation with paragraph 1 of the PCCK. I would like to add paragraph 4".*

T. G
On 28 May 2010 was found guilty by the Municipal Court of Pristina for the criminal act of Attacking Official Person Performing Official Duties, contrary to Art.317, par. 2 in relation to par. 1 of the CCK, with the exclusion of the circumstance of par. 4 of the above Article and convicted to six months of imprisonment.
Pursuant to Articles 43 and 44 of the CCK the punishment was suspended.

On 23 September 2010, the judgment was served on the defendant who, on 30 September 2010 filed an appeal against the above decision, asking the second instance Court to grant the appeal and to acquit the defendant form the charge.

On 7 December 2010 the appeal session was held at the premises of the District Court of Pristina in the presence of the defendant and, on 9 December after the voting and deliberation, the verdict was issued.

2. The merits.

The appeal raised the following issues:

A) the Court of first instance had committed a first substantial violation of the provision of the criminal procedure (Art. 403, par. 1, item 10 of the CCK), by excluding the application of the par. 4 of Article 317 of the CCK, notwithstanding the addition made by the prosecutor during the last hearing;

B) the Court of first instance had committed a second substantial violation of the provision of the criminal procedure, because the enacting clause was incomprehensible and in contradiction with the judgment (Art. 403, par. 1, item 12 of the CCK);

C) the Court of first instance had committed a third substantial violation of the provision of the criminal procedure, because during the course of the procedure a medical expertise was performed notwithstanding the lack of the requested court order: therefore the court and the prosecutor applied incorrectly a provision of the procedural code (Art. 403, par. 2, item 1 of the CCK). Furthermore the expertise showed that the injures had not been described properly by the report of the Emergency Center.

D) the Court of first instance had committed a fourth substantial violation of the provision of the criminal procedure, because during the course of the procedure the defendant was not allowed to present his defence properly (Art. 403, par. 2, items 1 and 2 of the CCK);

E) some statements (in particular the statements given by the witnesses S.R D.H V.H. P.D K.B) had been read by the court in violation of the provision of Art. 156, par. 2 of the KCCP, since the defence had not had the possibility to cross examine them;

F) the version given by the injured party L.B was unreliable for the following reasons:

- it was suspicious and odd that the injured party went to the hospital to be cured for his injuries after seven hours from the incident; this space of time showed that he staged the scratches, because he had already caused injured to the defendant;
- it was not true that the defendant broke the glasses of the injured party as it could be seen from the pictures in the case file which showed that the victim was wearing undamaged spectacles;
- it was untrue that the defendant hit the victim, as it can be inferred from the fact that the uniform of the police officer was not torn;
- it was untrue that the defendant was under the influence of alcohol and in fact no alcohol test was performed by the police

G) the judgment contained the personal opinion of the Court as to the personality of the defendant without the Court had asked for any expertise on the issue;
H) the Court had forgotten to mention the legal remedy for the right to appeal against the judgment.

In relation to the point A.

The appeal is ungrounded.
It is undisputed that, when a circumstance which might exclude the criminal liability is indicated in the indictment, it is in the power of the court to assess whether or not the above circumstance is existent and, in case of a negative assessment, to exclude the circumstance.
It is exactly what happened in the present case: in fact the prosecutor sustained that the defendant was provoked by the unlawful or brutal action of the victim, but the first instance Court, since this version, supported only by the statements given by ' T. G
and by another codefendant, did not receive any corroboration from the testimonies given by the witnesses (who actually excluded any provocation), legitimately decided to exclude the provision foreseen in Art. 317 par. 4 of the CCK, assessing that there was no evidence of provocation against the appellant (or the other defendants).

It is evident that such assessment has nothing to do with the violation envisaged in Article 403, par 1, item 10 of the KCCP: the above provision is referred to the case in which the judgment goes beyond the charge by adding factual elements, which were not mentioned in the indictment, in detriment of the defendant.
For instance, a typical case of exceeding the scope of the indictment would be the case where the Court, notwithstanding the defendant was just indicted for a theft convicts the defendant for robbery, without the emerging of any circumstance of violence.
On the contrary, it is utterly in the power of the court to decide whether or not a circumstance such as the provocation of the victim actually occurred.
The opposite solution would entail that, in case the indictment indicates a circumstance like the one foreseen in Art. 317 par. 4 of the CCK, the court would be bound by the qualification of the prosecutor and would be unable to assess whether or not such a circumstance exists: a hypothetical situation which clearly conflicts with the provision of Art. 386 of the KCCP.

In relation to the point B.

The appeal is ungrounded.
The affirmation that the enacting clause is incomprehensible is absolutely apodictic, since the appellant does not explain why the enacting clause would be impossible to be understood and in contradiction with the reasoning.
On the contrary, the enacting clause appears to be utterly in compliance with the requirements of Articles 391 and 393 of the KCCP and consistent with the reasoning which gives a detailed and logical explanation of the reasons why ' was found guilty.
T. G

In relation to the point C.

The appeal is ungrounded.
Unlike what was claimed by the defendant, in the case file there is no expertise as to the injuries suffered by the injured party L. B . The only expertise is the one related to the injuries suffered by A.Z
And in fact in the judgment of the first instance Court there is no reference as to an expertise related to B 's injures.
It appears therefore that the appellant wrongly assumed that such expertise existed.
In any case, Article 237, par. 2 of the KCCP indicates expressly the expert analyses which require a court order: the physical examination, in case it does not entail bodily intrusion, is not enlisted among this category.
Actually, Art. 237 excludes expressly that such a physical examination requires a court order (in fact a simple order of the prosecutor is sufficient, as foreseen by Art. 236 of the KCCP).
So, even if an expertise as to the injures suffered by L.B existed and had been performed on the basis of the simple order of the prosecutor, no violation of the procedure would have occurred.

In relation to the point D.

The appeal is ungrounded.
It is true that from the minutes it appears that sometimes the Presiding Judge was calling the attention of the defendant as to the necessity of making the trial proceed, but this falls entirely within the powers of the Presiding Judge envisaged in Articles 332 – 335 of the KCCP.
On the contrary, from the minutes of the main trial it has emerged that the rights of the defence were not violated and the defendant was given the possibility to ask all the relevant questions.

In relation to the point E.

The appeal is ungrounded.
In the minutes (page 3) of the hearing of 27 May 2010 it is clearly indicated that the parties, pursuant to Art. 368, par.1, item 3 of the KCCP, gave their consent as to the replacement of the examination of the above witnesses by the reading of their previous statements (actually the statements were considered as read on the basis of the consent of the parties).
It is evident that Art. 368 of the KCCP represents an exception to the provision foreseen in Art. 156 par. 2 of the KCCP and that if a statement is acquired in compliance with the conditions envisaged by Art. 368 of the KCCP, it must be considered as admissible evidence.
In the case foreseen by Art. 368, par. 1, item 3 of the KCCP, it is clear that by giving the consent, the defence clearly renounces to the right of cross examining the witness.
Therefore no violation of the procedure was committed by the Court of first instance.

In relation to the point F.

The appeal is ungrounded.
The inference made by the appellant that, since the victim went to the hospital seven hours after the incident, he did not have any injures is undemonstrated and unproven.
On the contrary, the converging testimonies of the police officers intervened on the spot clearly mentioned a proper physical aggression undertaken by against the police officers.
And that had to undertake a fight against the defendant is shown by the pictures in the case file: in fact, unlike what the defendant claimed, the uniform of the police officer is blatantly torn (see the sleeve up to the armpit and the pocket on the chest at page 62/71 of the case file), the spectacles are broken (see the pictures at page 72/71) and there is a light body injury (redness of the skin) on the neck.
Saying that all this was staged by the police officer is just a mere allegation of the defendant and it is disavowed by the fact the victim was actually attacked by
Finally it is evident that police officers can assess whether or not a person is under the influence of alcohol even without an alcohol test: in fact the state of drunkenness can be induced by any symptomatic element of inebriation (some of them have been clearly indicated by the witnesses).

In relation to the point G.

The appeal is ungrounded.
The court of first instance did not make any assessment as to the personality of the defendant, but simply inferred form the behavior held by the defendant during the main trial that an aggression towards the police committed was consistent with the character shown by the defendant throughout the trial.
Even though the wording used by the first instance Court might be questionable, no violation of the procedure can be found.

In relation to the point H.

The appeal is ungrounded.
It is true that the reasoning did not contain any indication of the legal remedy, but on the other hand the only obligation for the presiding judge is to instruct the parties as to their right to appeal (Art. 394, par. 1 of the KCCP). The above instruction was given to the parties as it results from the minutes of 28 May 2010, pag. 4.
Therefore no violation of the procedure was committed by the Court of first instance.

* * *

Finally it must be assessed that the evaluation of evidence made by the first instance Court was equilibrate, fair and that there are no doubt, both in relation to the *actus reus* and to the *mens rea*, as to the culpability of the defendant.
Moreover no substantial violation of the criminal procedure and of the criminal law which should be raised *ex officio* have been found by the second instance court.

It is hereby decided as in the enacting clause.

Presiding Judge
Gianfranco Gallo

Panel Member
Fllanza Kadiu

Panel Member
Karen Asphaug

Court Recorder
Nexhmije Mejzini