MUNICIPAL COURT OF PRIZREN
P no. 955/10
3 June 2011

IN THE NAME OF THE PEOPLE

The municipal court of Prizren, in a three-judge panel, EULEX judge Dean Pineles as presiding judge and EULEX judge Witold Jakimko and local judge Skender Cocaj as panel members, assisted by court recorder Vlora Johnston, in the criminal case against:

Sh.Sh., born on in in the father's name , mother's name , currently residing accomplished law faculty, former judge of the municipal court of Prishtina, of an average financial situation, Albanian, citizen of the Republic of Kosovo, charged pursuant to the indictment PP.no.1122/10 filed on 06.09.2010, as follows:

Sh. *on 04.05.2006, in the capacity of presiding judge with the municipal court of Prishtina, in the civil case of the claimants G.K and M.K both from Prishtina, with the intent to obtain an unlawful material benefit for herself or another person, thereby issues an unlawful decision in holding that according to the assertion of the representative of the respondent party KNI " R.S " from Prishtina, issues Ruling C.no.802/2004 and C.no.812/2004, without the presence of claimant in the main trial, affirms that the claimants G.K and M.K have purchased business premises no.55, consisting of 22.82 m2 surface area and the other business premise, no. 54 consisting of 22.82m2 surface area, each business premise in the amount of 57.050.00 DM (fifty seven thousands fifty DM), those business premises are situated in the trade business centre in the quarter "Dardania" in Prishtina, south zone, level B. Additionally, regardless her duty to affirm and corroborate the facts as given below she failed to perform the following; to present any evidence or fact in order to affirm the genuine owner of the subject to sale premises, to confirm the right of ownership over the social and public ownership in Kosova, to ascertain as to the person who was in possession of those business facilities at the moment of sale, to confirm about concluded contracts between parties in order to affirm if they were valid and legitimate, to consider the fact whether the social or public ownership are to be alienated or to be sold to the natural persons;*

After having held the public main trial on 2nd and 3rd of June 2011 in the presence of the public prosecutor Ariana Shajkovici, the defendant Sh.Sh. and her defense counsel Zait Xhemakli, issues the following judgment:

REPUBLIKA KOSOVO * KOSOVA CUMHURIYETI * REPUBLIKA E KOSOVES * OPŠTINSKI SUD PRIZREN * BELEDIYE MAHKEMESI PRIZREN * GJYKATA KOMUNALE PRIZREN

JUDGMENT

The defendant Sh.Sh. is hereby AQUITTED because it is not proven that she committed the act with which she has been charged pursuant to Article 390 paragraph 3 of the Criminal Procedure Code of Kosovo,

Pursuant to article 103 paragraph 1, read in conjunction with article 99 paragraph 2, subparagraphs 1 through 5 of the KCCP, all necessary expenditures of Sh.Sh. shall be paid from the Kosovo budgetary resources.

REASONING

I. PROCEDURAL BACKGROUND

On November 11, 2009 the District Public Prosecution office of Prishtina issued a ruling on initiation of investigation against Sh.Sh. Q.F and E.D

On January 28, 2010 the District Public Prosecution office of Prishtina issued a ruling on termination of investigations against Sh. regarding the criminal offence of Abusing official position or authority.

On January 29, 2010 the District Public Prosecution office of Prishtina filed indictment PP no. 192/09 to the District Court of Prizren. The indictment was never confirmed.

On March 30, 2010 the case was taken over by the EULEX following the request of Sh. . At the same time Sh. case was separated from F and D case.

On September 6, 2010 the indictment dated September 2, 2010 was filed in to the Municipal Court of Prizren and on September 27, 2010 the Municipal Court of Prizren confirmed the indictment.

On October 27, 2010 Sh. filed to the Supreme Court of Kosovo a request for the protection of legality. On January 14, 2011 the Supreme Court issued a ruling in which it rejected Sh. request.

II. ADMINISTERED EVIDENCE

During the trial sessions on June 2 and 3, 2011 the following persons were heard:
- Witness A.H. , legal officer of the Kosovo Trust Agency (KTA)
- The Defendant Sh.Sh

Pursuant to Article 368 paragraph 1, subparagraph 3 of the Kosovo Code of Criminal Procedure (KCCP) and with the agreement of the parties the following statements were considered as read out to the records:

- Records of examination of G.K on 8.10.2009 before the police
- Records of examination of G.K on 2.12.2009 before the prosecutor
- Records of examination of M.K on 8.10.2009 before the police
- Records of examination of M.K on 2.12.2009 before the prosecutor
- Records of examination of SH.Sh. on 4.11.2009 before the police
- Records of examination of Sh.Sh on 3.12.2009 before the prosecutor

Written exhibits:

1. Municipal Court of Prishtina, judgment 2.12.2005, C.nr. 3056/2004
2. Municipal Court of Prishtina, judgment 22.3.2005, C.nr. 202/2005
3. Municipal Court of Prishtina, judgment 9.3.2006, C.nr. 2062/04
4. Municipal Court of Prishtina, judgment 4.10.2005, C.nr. 101/2005
5. Municipal Court of Prishtina, judgment 27.6.2006, C.nr. 9/2004
6. Municipal Court of Prishtina, judgment 20.2.2006, C.nr. 976/2005
7. Municipal Court of Prishtina, judgment 27.4.2006, C.nr. 2386/04
8. Municipal Court of Prishtina, ruling 27.10.2009, C.nr. 2422/2008
9. Municipal Court of Prishtina, ruling 29.5.2007, C1.nr. 22/07
10. Municipal Court of Prishtina, ruling 25.1.2005, C1.nr. 82/04
11. Municipal Court of Prishtina, ruling 2.7.2009, C1.nr. 332/2007
12. Municipal Court of Prishtina, ruling 25.6.2009, C.nr. 622/2006
13. Municipal Court of Prishtina, ruling 5.3.2007, C.nr. 1822/2003
14. Municipal Court of Prishtina, ruling 31.3.2005, C.nr. 2742/2004
15. G.K claim (C-802/4) filed to Municipal Court of Prishtina
16. M.K claim (C-812/04) filed to Municipal Court of Prishtina
17. Letter from the KTA to the R.S, 9.8.2002
18. Letter from the KTA to director of the R.S, 4.9.2002
19. Letter from the KTA to director of the R.S, 21.10.2002
20. Letter from the KTA to director of the R.S, 7.3.2003
21. Letter from the KTA to director of the R.S, 7.3.2003
22. Letter from the KTA to F.Zh., 25.8.2003
23. Letter from the KTA to the R.S, 6.1.2004
24. Letter from the R.S to KTA/Prishtina, 6.1.2004
25. Letter from the Ramiz Sadiku to KTA/Prishtina, 7.1.2004
26. Letter from the KTA to the director of the Cadastral office of Prishtina, 26.2.2003
27. Minutes of the meeting of election commission/the R.S, 30.12.2003
28. Financial statement from the KTA to the R.S, 21.3.2004

III. STATEMENT OF GROUNDS AND REASONING

In the indictment, the defendant Sh.Sh was charged with issuing two unlawful judicial decisions, both on May 4, 2006, as described in the introductory part of this decision. The main trial was held on June 2-3, 2011.

The critical facts in the case are undisputed. What is disputed is the conclusion to be drawn from the facts: whether the defendant Sh.Sh committed a violation of Article 346, issuing unlawful judicial decisions. (In the remainder of this decision the court will simply use the last name of the defendant.)

The position of the Public Prosecutor is that the defendant is criminally liable for the two decisions in question because they were unlawful. The defendant and her defense counsel argue vehemently that her judgments were not unlawful, and in addition that she had no intent to obtain an unlawful material benefit.

Prior to the war, during the 1990s, the Socially Owned Enterprise now known as R.S , was under Serbian management and control and known as G.G . It was in the construction business, and constructed a building, including commercial premises, in the Dardania section of Pristina. After the war, the enterprise reverted to Albanian management and control, and resumed its former name of R.S .

The building at issue had been damaged by vandalism and needed substantial repair. The enterprise then constructed additional commercial premises at the same location with the intention of selling them on the open market. The proceeds from the sales would be used to pay the employees and complete the repair work.

First priority for purchasing these premises was given to employees of the enterprise. G.K was such an employee, and on 9 February 2001, he and R.S entered into a purchase and sale contract whereby he agreed to purchase, and R.S agreed to sell, one of the commercial premises at the Dardania location. A similar contract was entered into by M.K , G's son, and R.S on 26 February 2001.

It turned out to be impossible to legalize the contracts because the construction permit, purportedly issued while the enterprise was under Serbian control, could not be located. Efforts were made by R.S to obtain authorization for the sale of the premises from the appropriate municipal authorities, but these efforts were unsuccessful.

In 2004, G.K filed a Claim for Ownership Confirmation in the Municipal Court of Pristina, C-802/4. M.K filed a similar claim, C-812/04. Each claim identified R.S as the respondent, and each made reference to the contract from 2001. Moreover, each claim asserted that the claimant had fulfilled all of his responsibilities, but that the respondent had failed to provide the necessary documents for confirmation of the contract.

Main trials on these two claims were held before Judge Sh , the defendant, on 4 May 2006. The respondent appeared through an authorized representative, and conceded that the claims were correct. In each case, Judge Sh issued a judgment by acceptance which approved the claim, and confirmed that the claimant, based on the 2001 contract, had purchased the business premises in question, had paid the full purchase price, and had taken possession.

The Court entered its judgments without further examination of evidence because of the agreement of the parties. The Kosovo Trust Agency, with which the SOE R.S was listed at the time, was not named by the claimant as a respondent, nor was it notified of the trials. These facts—no further examination of evidence and the non-involvement of the KTA—ultimately resulted in a police investigation and charges by the Public Prosecutor.

While the constitution of Kosovo provides immunity for judges who act within the scope of their official responsibilities, this immunity does not apply to intentional violations of the law.

> **Article 107 [Immunity]**
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> 1. Judges, including lay-judges, shall be immune from prosecution, civil lawsuit and dismissal for actions taken, decisions made or opinions expressed that are within the scope of their responsibilities as judges.
>
> 2. Judges, including lay-judges, shall not enjoy immunity and may be removed from office if they have committed an intentional violation of the law.

Article 346 of the CCK has been enacted to address certain intentional violations of the law. It reads, in pertinent part, as follows:

> "A judge...who, with the intent to obtain an unlawful material benefit for...herself or another person or cause damage to another person, issues an unlawful decision shall be punished by imprisonment of six months to five years."

The law consists of several elements, each of which must be proven, as follows:

1. The defendant must be a judge;
2. The judge must act with intent to obtain an unlawful material benefit for herself or another, or to cause damage to another; and
3. In furtherance of the intent to obtain an unlawful material benefit or cause damage, the judge must issue an unlawful decision.

There is no dispute that the defendant was a Municipal Court Judge of Pristina at the time of the alleged offense. Thus, the first element of the crime has been easily satisfied. However, proof regarding the other elements is far more problematic.

At the main trial, the Public Prosecutor focused exclusively on the issue of whether the judgments issued by Judge Sh were unlawful, as required by the third element of the crime. As noted above, this was the essence of the Prosecutor's case: the judgments

were unlawful and therefore there was a violation of Article 346. Specifically, the Prosecutor asserted that under applicable UNMIK regulations the Kosovo Trust Agency was a necessary party and that the cases should have been referred to the Special Chamber, so therefore the judgments were unlawful.

The defendant countered with evidence and argument that the judgments were in fact lawful. In essence, she argued that the judgments were declarative rather than constitutive, and that they merely confirmed the relationship between the claimants and the respondent, and did not require any action on the part of the respondent or a third party. Therefore, there was no need to involve the KTA or the Special Chamber.

She offered into evidence other judgments from herself and other judges to make her point, and to show that she knew the difference between the different types of judgments, knew when a case should be referred to the Special Chamber, and issued her judgments accordingly. Her position gained supported from the testimony of the attorney from the KTA, who was called as a fact witness and not as a representative of an injured party, that the defendant's approach to such claims was hardly unusual (nor contrarily was it unusual to refer such cases to the Special Chamber).

Article 346 does not contain a definition of "unlawful decision." Therefore, the court has consulted the commentary to former Yugoslavian law, Article 243, violation of law by a judge, for guidance. While the former law is worded differently from present Article 346, it would include the same behavior. The commentary discusses the passing of an illegal document as the most typical form of a judge's illegal performance, and defines illegal documents to include, among other things, verdicts and judgments

> "which contradict the Constitution, a law or a self-governing document. The violation of the law should be interpreted as passing any decision contradicting the law."

(Commentary of the Criminal Code of Serbia, 1995, 5th Edition, "Savremena Administracija," Belgrade, Srzentic Nikola and Ljubisa Lazarevic.)

Unfortunately, this commentary is not particularly helpful. It basically states a tautology: to make an illegal decision is to make a decision that contradicts the law. It is also overly broad in its scope; it would appear to encompass any decision that contradicts a law. However, it is a fact of judicial life that many decisions contradict a law, requiring correction by a higher court. Indeed, Article 402 of the KCCP provides that a judgment may be challenged for a substantial violation of the provisions of criminal procedure, and for a violation of the criminal law. Surely, Article 346 should not be interpreted to include every decision that results in reversal on these grounds. If so, there would be very few judges left on the bench.

It is the opinion of this court, therefore, that an unlawful decision under Article 346 must be one that is clearly illegal. That is to say, a decision about which there can be no

debate or question, such as imposing a jail sentence when the law provides only for a fine, or convicting a defendant without a trial.

It is the court's conclusion that the defendant's judgments were not so obviously wrong, if wrong at all, as to be unlawful. It is the court's view that the issuance of these judgments fell within the broad spectrum of acceptable judicial decision-making under all of the circumstances of the case—the chronology of events, the judge's differentiation between cases that need to be referred to the Special Chamber and those that need not, the common practice among Municipal judges, the heavy workload at the court, the testimony of the witness from the KTA, and the nature of the judgments themselves.

The court will now address the element of intent. As noted above, the defendant must have acted with the intent to obtain an unlawful material benefit. The court believes that the intent element of this crime requires the Prosecutor to prove "direct intent" as that term is defined in Article 15 (2) of the CCK: "A person acts with direct intent when he or she is aware of his or her act and desires its commission."

Having carefully reviewed the record in this case, the court is struck by the total lack of evidence from the Prosecutor concerning the defendant's intent to obtain an unlawful material benefit; there was none. Since direct intent is an essential element of the crime, the crime simply cannot be committed in the absence of evidence proving this required level of intent. A conviction could not be obtained here merely by showing an unlawful decision, even if that were the case. An unlawful decision by itself is only one element of the crime; the other elements must be proven as well, or there can be no conviction.

Indeed, the only evidence on the issue of intent came from the defendant, who adamantly and credibly denied any intent to obtain a material benefit, or even having any relationship with, or knowledge of, the parties in these cases apart from their presence in her courtroom.

Also, the court cannot help but note that the Prosecutor did not even make an argument concerning intent during her closing statement. The Prosecutor's position, again, seemed to be that the judgment was unlawful, and therefore, a fortiori, there was a crime. Defense counsel, on the other hand, appreciated the importance of this issue and devoted a portion of his closing statement to point out the absence of any evidence of intent.

It is true, of course, that intent can be proven in many ways, including through logical inferences that can be drawn from other evidence in the case, including circumstantial evidence. For example, if there were evidence of a close personal or financial relationship between a member of the judge's family and the claimants, and evidence of a financial transaction to the benefit of the family member immediately following the judge's rulings, then the court would begin to draw some incriminating inferences and probe more deeply. But here there was no evidence even remotely close to that required for such inferences. For the court to infer intent on defendant's part to obtain a material benefit would be to engage in pure speculation, something the court cannot do.

The court would urge the office of the Public Prosecutor to scrutinize cases of this type very carefully and to refrain from filing charges unless there is evidence which could prove, prima facie, each element of the offense including intent.

For these reasons, the court decides as in the enacting clause.

Dean Vineles
Presiding Judge

Nexhmije Mezini
Court recorder

LEGAL REMEDY: The authorized persons may file an appeal against this Judgment to the District Court of Prizren through the Municipal Court of Prizren within fifteen (15) days of the day a copy of the Judgment has been served to them.