SUPREME COURT OF KOSOVO

Pkl-Kzz 135/2009

22 February 2011

In the Name of the People

JUDGMENT

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, with Kosovo Judges Emine Mustafa and Marije Ademi of Supreme Court as members of the panel, and in the presence of Senior Legal Advisor Edita Kusari as recording clerk, in the criminal case Pkl-Kzz nr 135/2009 of the Supreme Court of Kosovo

against the defendant [redacted], born on [redacted]

Convicted in the first instance by the verdict of the Municipal Court of Prizren, dated 23 April 2009, P. No. 99/09 for having committed the criminal act of **Accepting Bribes**, contrary to 343 paragraph 2 of the Criminal Code of Kosovo (CCK)

And sentenced to a term of four (4) months of imprisonment,

As affirmed by the judgment of the second instance, District Court of Prizren (Ap-Kz 97/2009), dated 23 October 2009,

Acting upon the Request for Protection of Legality filed by the Defence Counsel on behalf of the defendant, dated 20 November 2009, directed against the Judgment of the Municipal Court of Prizren (P. no. 99/09), dated 23 April 2009, and the Judgment of the District Court of Prizren (Ap-Kz 97/2009), dated 26 October 2009,

Issues the following

VERDICT

The Request for Protection of Legality of the defendant as filed by the Defence dated 20 November 2009 against the Judgment of the Municipal Court of Prizren (P. no. 99/09) dated 23 April 2009 and of the District Court of Prizren (Ap.no. 97/2009) dated 26 October 2009 is

Rejected as unfounded

Therefore, also the request to postpone the execution of imprisonment as filed by the Defence in the context of the Request for Protection of Legality on 20 November 2009 and by the defendant on 13 January 2011 is rejected as unfounded.

REASONING

I. Procedural Background

(1) Dated 23 September 2008 the Office of the Special Prosecutor of Kosovo (SPRK) in Prishtine/Pristina filed a summary indictment against the defendant (PP. no. 1130/08) for the criminal offense of Accepting Bribes as per Article 343 paragraph 2 of the CCK, claiming that in November 2006 in Ferizaj/Urosevac the defendant, acting in his capacity as a Judge of the Municipal Court of Ferizaj/Urosevac and thus as an official person, had invited [redacted] who was a party in the civil case Nd. Nr. 179/05, to the restaurant "Ujvara" and – before entering the restaurant – asked 5000,- € from [redacted] in order to perform the official duty with his legal authorizations in the respective case. According to the indictment, the defendant allegedly had said: "This job can not be finished without giving 5000,-€, because it is a difficult case, many documents must be issued, the procedure must be delayed and even the job may not be finished". K.S.

(2) The Municipal Court of Prizren by Judgment dated 23 April 2009 found the defendant guilty of the criminal offense of Accepting Bribes and sentenced him with an imprisonment term as lined out before.

(3) After the defendant had timely appealed the Judgment, the District Court of Prizren by Judgment dated 20 November 2009 rejected the appeal of the defendant as unfounded and affirmed the Judgment of the Municipal Court of Prizren as pointed out before.

(4) Dated 20 November 2009, the Defence Counsel of the defendant filed a request for Protection of Legality against both, the Judgment of the Municipal Court of Prizren and the one of the District Court of Prizren, thus challenging both of them for essential violations of the criminal procedure as per Article 403 paragraph 1 of the Kosovo Code of Criminal Procedure (KCCP) and other violations of the provisions of criminal procedure, and for violation of the criminal law.

(5) Therefore, the Defence proposes to grant the Request for Protection of Legality by amending the final decision by announcing an acquitting Judgment on the accused, namely to quash the judgment and return the criminal matter for retrial to the First Instance Court.

(6) Also in November 2009 the defendant submitted a supplement Request for Protection of Legality, thus challenging both Judgments for essential violation of the provisions of the Law on Criminal Procedure and on violations of the Criminal Law and proposing to either quash both Judgments or amend then in the favor of the defendant.

(7) With his Request for Protection of Legality the Defence proposed pursuant to Article 454 paragraph 4 of the KCCP to suspend the execution of the final Judgment of the Municipal Court of Prizren, until the Request for Protection of Legality would be decided upon. The latter was repeated by the defendant through written request dated 13 January 2011.

(8) Dated 22 December 2011, the Office of the State Prosecutor of Kosovo (OSPK) filed an opinion (142/2009), thus proposing to reject the entire Request for Protection of Legality as unfounded.

(9) The Defence, together with his Request for Protection of Legality and the defendant again on 13 January 2011 filed a request to postpone the execution of punishment pursuant to Article 454 paragraph 4 of the KCCP.

(10) Afterwards the President of the Assembly of EULEX Judges (PEJ), upon the request of the defendant and after the hearing held on 28 April 2010 had issued a decision on 29 April 2010, thus taking over the case by EULEX Judges. The Supreme Court of Kosovo held a closed session on 22 February 2011.

II. Supreme Court Findings

The Supreme Court of Kosovo finds the following:

1. Admissibility of the Request for Protection of Legality

The Request for Protection of Legality is admissible. It was filed with the competent court pursuant to Article 453 of the KCCP and within the deadline of Article 452 paragraph 3 of the KCCP.

2. Procedures followed by the Supreme Court

The Supreme Court panel has decided in a session as described by Article 454 paragraph 1 of the KCCP. Parties have not been notified of the session, since according to Article 451 through 460 of the KCCP there is no obligation for the Supreme Court to notify the parties.

3. **On the merits of the Request for Protection of Legality**

The Request for Protection of Legality is unfounded.

a. **Essential violations of the Criminal Procedure**

aa. Alleged violations of Article 403 paragraph 1 of the KCCP

The Defence as well as the defendant have challenged that the enacting clauses of both Judgments, the one of the Municipal Court as well as the one of the District Court of Prizren, would be in contradiction with the respective reasoning. Also, the reasons given in the Judgments would be unclear and contradictory in themselves. Moreover, the appealed Judgments would not present reasons for decisive facts and in addition in this regard would be contradictory to the contents of the case files and the evidence administered in the case. The latter moreover had not been fully and properly assessed.

(a) Alleged insufficiencies of the reasoning

In particular, the 1st Instance Court had found the defendant guilty of the criminal offense of Accepting Bribes as per Article 343 paragraph 2 of the CCK, but would not give any reasoning concerning the intent to commit such crime, as required by the law. Moreover, the findings of the enacting clause concerning an invitation of the injured party [redacted] by the defendant to the restaurant "Ujvara" and the defendant's question for 5000,- € would not be reflected in the reasoning, which the latter would not provide any evidence on the respective issue. According to the enacting clause the 1st Instance Court had found that the time of commission of the criminal offense of Accepting Bribes as per Article 343 paragraph 2 of the CCK was in November 2006, whereas it would not have been considered in the reasoning that the civil case referred to (Nd.nr.179/05) already had been finalized with a site inspection on 14 September 2006 with the consequence that a request for bribes would have been senseless. Last but not least the 1st Instance Court had exceeded the scope of the indictment proposal, since in "Ujvara" Restaurant it had been never established the demanding of a bribe, while in "Te Goga" Restaurant the defendant was just joking. Taking the latter for serious would violate Article 359 of the KCCP, thus taking into consideration that the defendant had pleaded not guilty. Finally, according to both the Defence and the defendant, the 1st Instance Court has violated Article 157 of the KCCP, since it had decided to trust only one piece of evidence, which would be the statement of the injured party, thus not being corroborated by any other evidence. In this context, also Article 231 paragraph 2 item 5 of the KCCP would be concerned, since the 1st Instance Court had not taken into consideration all the statements given by the defendant to the Public Prosecutor.

The Supreme Court of Kosovo finds that in this regard there is no violation of the Criminal Procedure, neither of Articles 157, 231, 359 nor of Article 403 paragraph 1 of the KCCP.

Particularly, the 1st Instance Court has assessed and evaluated all the proposed evidence based on the indictment, as there are the interrogation of the witnesses [redacted], the examination of the transaction contract on real estate dated 29 December 2004 between [redacted] and [redacted] as well as of the proposal for settling the boundaries, filed by [redacted] to the Municipal Court of Ferizaj/Urosevac on 07 July 2005. Moreover, the ruling of the same Municipal Court in the case Nd.nr.179/05 dated 14 September 2006 and of the District Court of Prishtine/Pristina (Ac.nr. 982/06) dated 19 March 2007 were examined *(p.2 of the Municipal Court Judgment in the English version).*

Therefore the Supreme Court of Kosovo finds that **no violation of Article 359 of the KCCP can be established**, since after the defendant has pleaded not guilty the 1st Instance Court has assessed all relevant evidence.

Based on this evidence and in particular the statement of the injured party [redacted], the 1st Instance Court found that "[i]*n November 2006, after examining the scene of occurrence they went together with the accused* [redacted], *the geometer* [redacted] *and* [redacted] *into the restaurant "Ujvara". Prior to entering the restaurant while* [redacted] *and* [redacted] *were walking in front, [...] the accused* [redacted] *told* [redacted]: *"this job can not be finished without giving 5000,-€, because it is a difficult case, many documents must be issued, the procedure must be delayed and even the job may not be finished"* " and after [redacted] had reacted, the "*accused* [redacted] *replied again: "if you give the money the job will be taken care of, if you don't it will not be" (p.3 of the Municipal Court Judgment in the English version).*

The Supreme Court of Kosovo in this regard finds that of course the 1st Instance Judgment does not explicitly mention that the defendant had had **the intension to commit the criminal offense of Accepting Bribes** as required by Article 343 paragraph 2 of the CCK. Nevertheless, it becomes very clear from the factual situation as described and adopted by the 1st Instance Court that such request can not be done without intension.

The Supreme Court of Kosovo moreover finds that the 1st Instance Court has not solely based its Judgment upon the statement of the injured party, which is why also **Article 157 paragraph 1 of the KCCP was not violated.**

From the same passage of the challenged 1st Instance Judgment as quoted before, and in addition from the assessment of corroborating evidence, particularly the witness statements of [redacted] and [redacted], it illuminates that the 1st Instance Court has elaborated in detail on the issue of the alleged request of the defendant to receive a bribe of 5000,-€ from [redacted].

The witness [redacted] has stated that the event in the restaurant "Goga", which the defendant tried to describe as a joke, had happened in the year of 2007, but that on

one of these occasions the defendant again had asked [redacted] for 5000,-€ in order to have the case completed *(p.3 of the Municipal Court Judgment dated 23 April 2009 in the English version)*.

Also the son of [redacted], the witness [redacted] has stated that his father had come home after the site inspection on 14 September 2006 and had informed the family that the defendant had asked for 5000,-€ bribe *(p.3 of the Municipal Court Judgment dated 23 April 2009 in the English version)*.

Finally, full reference is made to the findings of the 2nd Instance Court, which in the respective context of the defendant [redacted] claiming to have made just a joke has pointed out *"[t]hat such request for a gift made by the defendant [redacted] was genuine and not a joke [...]"* and that this *"can also be verified by the facts confirmed during proceedings such as the fact that the defendant [...] as a judge was fully aware and able to understand and assess his verbal statement addressed to the injured party [redacted] for a gift, a request which was made three times by the defendant [...] in order to carry out his official duty [...]" (p.5 of the English version)*.

From the latter it also illuminates that both Courts have taken into consideration the statement of the defendant that he just had made a joke. The question, whether or not the 1st instance Court has considered all the statements of the defendant as given to the Public Prosecutor, is not relevant. Therefore, **no violation of Article 231 paragraph 2 item 5 of the KCCP could be established**.

With reference to the interrogation by the public prosecutor, Article 231 paragraph 2 item 5 of the KCCP stipulates that *"[b]efore any examination, the defendant [...] shall be informed of [...] the fact that his or her statements might be used as evidence before the court"*.

This shows clearly that the Court was not obliged to consider all statements of the defendant as given to the Public Prosecutor. The interpretation of the Law weights even more, since the defendant, having been present during the trial, has had all opportunities to make his position in the case clear. Last but not least it needs to be underlined that the purpose of Article 231 paragraph 2 item 5 of the KCCP is not to have the courts bound to previous statements, but to protect the defendant already during an early stage of proceedings, thus making him aware that whatever s/he states in front of the prosecutor may be used as evidence in the court trial as well.

After all, the 1st Instance Judgment was not based on inadmissible evidence. Therefore, **no violation of Article 403 paragraph 1 sub-paragraph 8 of the KCCP was established** as well.

(b) Alleged wrong consideration of the time when the criminal offense was committed:

As far as the Defence claims that the enacting clause would consider November 2006 as the time of commission of the criminal offense, but that the referred civil case had been finalized already after the site inspection on 14 September 2006, the Supreme Court of Kosovo finds that this allegation is without merits.

The 1st Instance Court has reviewed the ruling of the Municipal Court of Ferizaj/Urosevac (Nd.nr. 179/05) dated 14 September 2006 and the ruling of the District Court of Prishtine/Pristina (Ac.nr.982/06) dated 19 March 2007, which both of them refer to the respective civil case. The 1st Instance Court therefore found that *"the ruling Nd. 179/05of the Municipal Court of Ferizaj between 14.09.2006 and 19.03.2006 was not final" (p.4 of the Municipal Court Judgment dated 23 April 2009 in the English version).*

(c) Alleged wrong consideration of the place where the criminal offense was committed:

As far as the alleged place of the commission of the criminal offense of Accepting Bribes is challenged by the Defence as well as by the defendant and also as to the quality of the say of the defendant as being just a joke, reference is made to what already was elaborated before in this Judgment (II. 3. a. aa. p. 4 and 5).

The Supreme Court of Kosovo also does not share the opinion of the Defence that the 1st Instance Court had violated Article 157 of the KCCP, thus considering only one uncorroborated peace of evidence. Reference is made to the evidence taken into consideration by the Court, as pointed out before in this Judgment. The 1st Instance Court, after evaluating each peach of evidence individually, then has made a general evaluation as stipulated at p. 4 and 5 of the Judgment in its English version.

It is also very clear that the 1st Instance Court, based on the evidence taken, was convinced that the defendant has committed the criminal offense of Accepting Bribes pursuant to Article 343 paragraph 2 of the CCK already in the restaurant "Ujvara" in 2006. Therefore, the Judgment is in compliance with the summary indictment, which is why **also Article 403 paragraph 1 sub-paragraph 10 of the KCCP was not violated.**

(d) Alleged negligence of the 1st Instance Court to fully assess all available evidence:

As to the remaining part of the challenges of the Defence, particularly that the 1st Instance Court had been *"negligent to hear important witnesses like geodesy experts, legal officers and other witnesses"* and that it would *"lack [...] detailed evaluation of*

the case files and statements, not providing sufficient time for the defendant to declare as well as violation of the publicity principle - since the prosecutor 30 minutes before the main trial session started entered the judges office for consultation and did not come out until the hearing started, etc.", the Supreme Court of Kosovo finds that this part of the Defence Counsel's presentation is not substantiated at all and therefore can not be taken into further consideration.

b. Violation of the Criminal Law

The Defence moreover has stressed that the challenged Judgments would violate the criminal law to the detriment of the defendant. Particularly Article 404 paragraph 1 sub-paragraph 2 of the KCCP would be violated, since circumstances and evidence, which exclude the criminal liability of the defendant, had not been taken into consideration. The latter would refer in particular to the lack of intent of the defendant to commit the crime. Also, both Courts had not taken sufficiently into consideration that according to the defendant he only had made a joke, which moreover was done after the 14 September 2006, when the civil case was already completed.

The Defence and the defendant both have stressed that the 1st Instance Court in addition had violated Article 1 paragraph 3 of the CCK in conjunction with Articles 11, 14 and 15 of the CCK, which had been to the detriment of the defendant due to the absence of any causal link between the actions of the defendant and the consequences of the charged offense. The fact that the injured party as a Police Officer and the defendant as a Judge both had been official persons, thus cooperating with each other and meeting each other permanently as well as that the defendant was just making a joke would lead to the result that no causal link can be established between the behavior of the defendant and any criminal result.

Moreover, the 2nd Instance Court had had misinterpreted the law, when it took the opinion that the defendant has committed the criminal offense of Accepting Bribes in continuity.

Last but not least both Courts had not considered the fact that the defendant had been investigated along with his cases by the Kosovo Judicial Council and the Judicial Inspection, which had not established any misconduct committed by the defendant.

The Supreme Court of Kosovo finds that the allegations addressed by the defendant and his Defence are unfounded.

aa. Time of commission of the criminal offense and closure of the civil case:

As far as the Defence in this context has pointed out his opinion that at the respective time (in 2007) the civil case was already finalized, which the latter had been the case after the site inspection was carried out on 14 September 2006, reference is made to what already was said before in this Judgment. Also the 1st Instance Court has made

clear that *"between 14.09.2006 and 19.03.2007"* [the case] *"was not final" (p.4 of the English version).*

Reference also is made to the commentaries on the old law situation, particularly on Article 254 paragraph 1 of the Criminal Code of the Federal Socialist Republic of Serbia (CC SFRS), which in its relevant parts is almost identical to Article 343 paragraph 1 of the CCK. The commentary stipulates as follows:

"The act exists as such even when the gift is demanded [...] after the official duty was performed or not performed, meaning when between the action and the official person and the demanded [...] bribe is no causal connection. [...] The criminal act is regarded as committed by the act of demanding [...] the gift [...] in connection with the performance or non-performance of official action". (Srzentic Nikolla and Ljubisa Lazarevic, Commentaries to the CC SFRS, 5th edition 1995, "Savremena Administracija", Belgrade, Article 254, p. 1 and 4).

Based on this it is understood that despite the fact that the civil case was still ongoing the criminal offense of Accepting Bribes pursuant to Article 343 paragraph 2 of the CCK was committed by the defendant, when asking the amount of 5000,- € for the finalization of official duties from the injured party.

bb. Alleged violation of Article 1 in conjunction with Articles 11, 14 and 15 of the CCK:

As far as the Defence has stressed that the 1st Instance Court had violated Article 1 paragraph 3 in conjunction with Articles 11, 14 and 15 of the CCK, the Supreme Court of Kosovo arrives to the opinion that this allegation is not substantiated at all.

Article 1 paragraph 3 of the CCK stipulates as follows:

The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted. In case of ambiguity, the definition of a criminal offence shall be interpreted in favor of the person being investigated, prosecuted or convicted.

The Supreme Court of Kosovo finds that in the case at hand there is no room for any interpretation of the criminal law to the detriment or – as required by the law in case of ambiguity - in favor of the defendant. Consequently, the 1st Instance Court has strictly and correctly applied Article 343 paragraph 2 of the CCK and subsumed the case under its requirements.

The Supreme Court of Kosovo, after all does not have any doubts that the defendant, being a Judge, was fully aware of what he was doing and how this would be considered. Therefore, the defendant without doubts was criminally liable in the sense

of Article 11, 14 and 15 of the CCK, which therefore have not been violated by the Courts.

Article 14 of the CCK stipulates as follows:

A person is not criminally liable if there is no causal connection between the action or omission and the consequences or there is no possibility of the realization of the consequences.

The criminal offense of Accepting Bribes as per Article 343 paragraph 2 of the CCK in the version as committed in the case at hand is completed when the perpetrator has demanded the bribe. The law stipulates as follows:

Article 343 CCK

(1)...
(2) An official person who solicits [...] a gift or some other benefit for himself [...] to perform within the scope of his [...] authority an official [...] act which he [...] should have carried out [...] shall be punished by imprisonment of three months to three years.

Reference is made to what was said before on the question of causality (p.9 of this Judgment) *(see also: Srzentic Nikolla and Ljubisa Lazarevic, Commentaries to the CC SFRS, 5th edition 1995, "Savremena Administracija", Belgrade, Article 254, p. 1 and 4).*

The 1st and the 2nd Instance Court both have established that the defendant on several occasions but always in the course of the same case has asked a bribe of 5000,-€ from the injured party [redacted]. Since with these requests the criminal offense of Accepting Bribes pursuant to Article 343 paragraph 2 of the CCK was completed, no causal link between the action and its consequence is missing in the case at hand.

cc. The criminal intent of the defendant:

Article 15 of the CCK deals with the different forms of criminal intent. In this regard, reference is made to what was already said before in this Judgment.

Also, the statement of the defendant that he had made just a joke, when asking the injured party for money, was taken into consideration by the 1st Instance Court, as already pointed out in this Judgment. This can be understood from the fact that the respective Judgment in its reasoning expressively stipulates: *"Also the accused [redacted] declares that in restaurant "Goga" he told [redacted] jokingly: "is the money ready"" (p.2 of the English version).* The 1st Instance Court later again refers to the respective situation, stipulating: *"Whereas in the restaurant "Goga" while [redacted] was sitting in the table with the accused [redacted] which*

was accompanied with [redacted]. The accused [redacted] addressed [redacted] by laughing: "I told you and I am telling you again that without giving me 5000,-€ the case can not be completed"" (p.3 of the English version). The 1st Instance Court then continues with the analysis of the statement of the witness [redacted] concerning the respective situation.

From all this, read together with the evaluation of evidence as carried out by the 1st Instance Court the Supreme Court of Kosovo understands that the 1st Instance Court has very seriously considered the statement of the defendant regarding the situation in the restaurant "Goga" in 2007.

dd. Alleged misinterpretation of the law by the 2nd Instance Court:

According to the Defence, the 2nd Instance Court in its Judgment erroneously concludes that the criminal offense was committed in continuity, while no proof or evidence was administered in relation with the request for bribe at the restaurant "Ujvara", although there were other persons present. The 2nd Instance Court in this regard particularly would confuse the extra contentious procedure with the execution procedure of the respective civil case.

The Supreme Court of Kosovo finds that the Defence refers to the following passage of the challenged Judgment:

"[...] later during 2007 the defendant [redacted] continuously has undertaken incriminatory activities of the offense, so while they were together in the abovementioned restaurant together with the injured party [redacted] for continuous actions of the defendant the authorized Prosecutor did not undertake measures with regards to prosecution, and November 2006 was taken as time of the commission of the criminal offense [...]" (p.3 of the English version).

This may lead to a construction as laid down in Article 48 of the Criminal Code of the Federal Socialist Republic of Yugoslavia (CC SFRY), known as a "prolonged criminal act". According to the respective commentaries, a prolonged criminal act is constituted in cases when the perpetrator commits a number of identical criminal acts in continuity, and which acts, due to the elements connecting them into one entity, appear as one uniform criminal act" (Srzentic Nikolla and Ljubisa Lazarevic, Commentary of the Criminal Code of the FRY, 1982, "Savremena Administracija", Belgrade, Article 48, item 6.b.).

The existence of a prolonged criminal act was considered as a purely factual question.

However, from the quoted passage of the challenged Judgment it illuminates that the 2nd Instance Court has seen the aspect of continuity and maybe has taken this as a legal opinion. Nevertheless, the Court has considered that a continued criminal

offense never was prosecuted. Therefore, this passage of the challenged Judgment did not have any effect on the decision in the case at hand.

ee. Request for the SCK to consider the findings of the Judicial Inspection with the KJC:

As to the last point of the Request for Protection of Legality, the Supreme Court of Kosovo finds that the 1st Instance Court, as confirmed by the 2nd Instance Court, has assessed and evaluated all evidence as duly presented by the prosecutor and in a way both Courts have been obliged to. Based on this evidence, the defendant was found guilty. Therefore, the findings of the Judicial Inspection may be considered as indication or circumstantial evidence. It in this regard is worth mentioning that according to a letter of the Office of the Disciplinary Prosecutor dated 23 February 2010 and addressed to [redacted] the Judicial Inspection found some misconduct of the defendant in the cases 1302/06 and 179/05, which the latter is the relevant civil case at hand. Disciplinary procedures against the defendant have been terminated just on the background that the defendant does not work as a judge anymore, but would be taken into consideration in case he would re-apply. However, the issue of judicial inspection investigations was stressed during the Main Trial, but has not necessarily to be taken into consideration.

As to the proposal of the Defence in this context, that the Supreme Court may request a special report from the Kosovo Judicial Council, the Supreme Court of Kosovo refers to its constant adjudication according to which no evidence is taken at this stage of procedures.

c. <u>Conclusion of the Supreme Court of Kosovo</u>

For the abovementioned reasons, the Supreme Court concludes that the Request for Protection of Legality is unfounded and therefore rejected.

Consequently, the Supreme Court of Kosovo decides on the Request for Protection of Legality as in the enacting clause, based on Article 456 KCCP.

Panel Member

Emine Mustafa

Panel Member

Marije Ademi

Presiding Judge

Gerrit-Marc Sprenger

Recording Clerk

Edita Kusari