

SUPREME COURT OF KOSOVO

Ap – Kz 387/11

13th March 2012

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Horst Proetel as Presiding Judge, Supreme Court Judge Avdi Dinaj and EULEX Judge Martti Harsia as panel members, assisted by Legal Officer Chiara Rojek acting in the capacity of recording clerk,

In the criminal case against

M J, nickname **D**, son of **D J** and **S M**, born on **×××** in **×××**, resident of **×××**, **×××**, **×××**, no children, medical high school, unemployed, of poor economic status, previously convicted for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons by final Judgment P no. 28/09 of the District Court of Mitrovica/ë and sentenced to six (6) months of imprisonment, in detention on remand from 9th August 2007 until 30th August 2007 and under house arrest from 31st August 2007 until 28th September 2007,

Charged as per in the Indictment PP no. 232/2007 orally amended by the EULEX Prosecutor during the trial sessions, with the criminal offences of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 3 in conjunction with Articles 20 and 23 of the Provisional Criminal Code of Kosovo (PCCK), and Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of PCCK, Convicted in first instance by Judgment P no. 244/2007 of the District Court of Mitrovica/ë dated 5th May 2011 for the criminal offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 1 of the PCCK and Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of the PCCK, and sentenced to one (1) year of imprisonment and for a fine of fifty (50) Euros and to one (1) year of imprisonment, thus to an aggregate punishment of one (1) year and six (6) months of imprisonment and fifty (50) Euro fine, pursuant to Article 71 Paragraph 1 and Paragraph 2 Item 2 of the PCCK,

Acting upon the Appeal filed by Defence Counsel **Lj P** on behalf of Defendant **M J** on 20th July 2011 and the Appeal filed by Defendant **M J** on 12th September 2011 against the Judgment P no. 244/2007 of the District Court of Mitrovica/ë dated 5th May 2011, and considering the Opinion of the Office of the State Prosecutor of Kosovo (OSPK) filed on 31st October 2011,

After having held a public session on 13th March 2012 in the presence of Defendant Marko Jablanovic and his Defence Counsel Ljubomir Pantovic, having deliberated and voted on the same day,

Pursuant to Articles 420 and following of the Kosovo Code of Criminal Procedure (KCCP), issues the following

JUDGMENT

1. The Appeal of the Defence Counsel Lj. P. on the behalf of Defendant M. J. and the Appeal of Defendant M. J. respectively filed on 20th July 2011 and on 12th September 2011, against the Judgment P no. 244/2007 of the District Court of Mitrovica/ë dated 5th May 2011, are partially **GRANTED**.
2. All the remainders of the mentioned Appeals are **REJECTED** as ungrounded.
3. The Judgment P no. 244/2007 of the District Court of Mitrovica/ë dated 5th May 2011 is **MODIFIED** as follows:

“The Accused M. J. is sentenced to an imprisonment of four (4) months and to a fine of fifty (50) Euros for the criminal offence of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 1 of the CCK.

The time spent in detention on remand from 9th August 2007 until 30th August 2007 and the time spent under house arrest from 31st August 2007 until 28th September 2007 are to be credited pursuant to Article 73 Paragraph 1 of the CCK.

The sentence of imprisonment shall not be carried out if the accused does not commit any other criminal offence for a period of one (1) year according to Article 44 Paragraphs 1, 2 and 4 of the CCK.

The Accused M. J. is sentenced to a fine of four hundred (400) Euros for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of the CCK.”

4. The costs of the criminal proceeding in second instance shall be borne on the budget of Kosovo pursuant to Articles 99, 100 and 103 of the KCCP.

REASONING

I. Procedural background

On 26th September 2007, the Indictment PP. no. 232/2007 was filed by the District Prosecutor, charging M. J. with the criminal offences of Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 4, sub-Paragraph 1 read in conjunction with Paragraph 23 of the PCCK (Count 1) and of Unauthorized Ownership, Control, Possession or Use of Weapons under Article 328 Paragraph 2 of PCCK (Count 2). Two other Defendants were also charged. It was confirmed in its entirety by Ruling Kp no. 244/07 dated 12th November 2007. The case was taken over by EULEX Judges on 2nd December 2010.

The Indictment PP. Nr. 232/2007 was orally amended by the EULEX Prosecutor on the main trial sessions, in respect to Count 1. M. J. was charged with the criminal offences of Unauthorized Purchase, Possession, Distribution and Sale of

Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 3 in conjunction with Articles 20 and 23 of the PCCK.

The main trial was held in May 2011. At the opening of the trial, the Defendant pleaded not guilty for Count 1 and guilty for Count 2. On 5th May 2011, the District Court of Mitrovica/ë issued the Judgment P no. 244/2007 by which M: J was found guilty for Unauthorized Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances contrary to Article 229 Paragraph 1 of the PCCK “because on 09 August 2007 at about 15:00 hours, near the railway bridge at the Roma Camp in Mitrovica, without authorization to purchase narcotic substances, he bought 6 plastic bags containing Marijuana (Cannabis) with an approximate net weight of 25,5 gram from K S. He intended to use the drug himself and distribute it among his friends.” (Count 1). He was further convicted for Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of the PCCK “because during an unknown period of time until 09 August 2007, without authorization he was in possession of 364 bullets of calibre 7,62 and a tear pot type M-3F containing chemicals called ‘CS’, that were found in his car without registration number on 09 August 2007.” (Count 2). He was sentenced to one (1) year of imprisonment and for a fine of fifty (50) Euros for Count 1 and to one (1) year of imprisonment for Count 2. An aggregate punishment of one (1) year and six (6) months of imprisonment and 50 Euro fine was imposed onto him.¹ The second Defendant has as well been sentenced. The third one was acquitted.

II. Submissions of the parties

A. Appeal of the Defendant M J

The Defendant filed an Appeal for substantial violations of the provisions of the procedural law, erroneous or incomplete determination of the factual situation, for violation of the criminal law and on the decision on criminal sanctions. He proposes to the Supreme Court of Kosovo to amend the challenged Judgment as to acquit him; or to annul the Judgment and send the case back for re-trial.

He alleges a violation of the provisions of the KCCP as the First Instance Panel was not properly constituted.

He puts forward that the drug he obtained was only for his personal use. The fact that he mentioned his intention to distribute the marihuana to his friends is improvident, since the quantity was rather small. The First Instance Court should not have treated differently M J who was found guilty and the third Defendant who was acquitted of the same charge. He alleges that the First Instance Court should have considered that the ammunition seized by the police was not fit for use any longer.

He again contends the difference of treatment between the second Defendant who distributed two times greater quantity of drugs and was imposed a suspended sentence, and himself sentenced to effective imprisonment for a lesser serious act under Article 328

¹ The District Court, in its Judgment, also ordered that the time spent in detention on remand from 9th August 2007 until 30th August 2007 and the time spent under house arrest from 31st August 2007 until 28th September 2007 are to be credited pursuant to Article 73 Paragraph 1 of the PCCK.

Paragraph 2 of the CCK. Finally, the First Instance Court wrongfully took into consideration his previous conviction as aggravating circumstance, although the criminal offence having been the basis of the prior conviction was committed in 2009, long after the commission of drug and weapon offences, which occurred in August 2007.

B. Appeal of Defence Counsel Lj P

Defence Counsel submits that the challenged Judgment contains an incomplete determination of the factual situation and a violation of the criminal law. He also contends the decision on criminal sanctions. He requests the Supreme Court of Kosovo to reverse the contested Judgment as to acquit the Defendant, or to annul it and return the case to the First Instance Court for re-trial.

As to the drug charge, the First Instance Court did not fully determine the facts in the instance. In most of the European countries, the presence of THC (tetrahydrocannabinol) contained in the marijuana has to be higher than 0,30%, to be considered as illicit drug. The examination report does not contain any information in this respect.

As to the weapon charge, the Defence Counsel mentions the bad condition of the ammunition seized, due to corrosion and raises the issue of whether such ammunition can be considered as a weapon under Article 107 Item 28 of the CCK. The Court shall act in favour of the Defendant as prescribed in Article 3 Paragraph 2 of the KCCP.

Consequently, the First Instance Court committed a violation of criminal law.

The Defence Counsel claims that the punishment imposed onto the Defendant is too harsh. There are numerous circumstances in favour of the Defendant, and only one aggravating circumstance: the Defendant was previously convicted for a weapon charge but he was released for the charge of Attempted Murder, since he acted in self-defense.

C. Opinion of the Office of the State Prosecutor of Kosovo

The State Prosecutor proposes to the Supreme Court of Kosovo to reject both Appeals as unfounded, and to affirm the First Instance Judgment.

The OSPK refers to Article 4 Paragraph 7 of the Law on jurisdiction to determine that the trial panel was properly composed.

The State Prosecutor claims that the seized marihuana containing THC is a narcotic substance in the sense of the definition of 'dangerous narcotics and psychotropic substances' under Article 107 Item 29 of the CCK. He is of the opinion that the term 'weapon' under Article 107 Item 28 of the CCK also includes all kinds of ammunition, irrespective whether it is still functional or not.

The First Instance Court rightly determined the factual situation and properly applied the criminal law.

III. Findings of the Supreme Court of Kosovo

A. Competence and proceeding before the Supreme Court of Kosovo

The Supreme Court of Kosovo is competent to decide on the Appeals pursuant to Article 26 Paragraph 1 and Articles 398 and following of the KCCP. The Supreme Court Panel

has been constituted in accordance with Article 3 Paragraph 7 of the Law No. 03/L-53 on Jurisdiction. A public session was held on 13th March 2012 to which the parties were invited.

B. Admissibility of the Appeals filed by the Defendant and his Defence Counsel

The Supreme Court finds that both appeals are admissible pursuant to Articles 398 and 399 of the KCCP.

The contested Judgment is dated the 5th May 2011. Defence Counsel Lj P: announced his intention to appeal on the same day. He received the Judgment on 6th July 2011 and sent the Appeal on 20th July. M: J. received the Judgment on 1st September 2011. The Appeal of the Defendant was registered with the Court on 12th September 2011. It was transmitted to the EULEX Prosecutor on 14th September 2011.

The appeals are admissible even if the Defendant has pleaded guilty for the charge of Unauthorized Ownership, Control, Possession or Use of Weapons. The conviction in first instance justifies the grievance. Moreover, the Defendant and his Defence Counsel filed the appeals against the decision on criminal sanctions.

C. Merits of the case

The Supreme Court of Kosovo rejects as ungrounded the part of the appeal related to substantial violations of the provisions of the procedural law. Moreover, the appeals are not grounded in respect to the incomplete or erroneous determination of the factual situation and violation of the criminal law. The First Instance Court rightly determined the factual state and convicted the Defendant for both charges.

The Defence's submission of the incorrect composition of the trial panel lacks of grounds. The First Instance Panel has been properly constituted in accordance with Article 3 Paragraph 7 of the Law on Jurisdiction.

The First Instance Court determined accurately all necessary facts. Therefore, the appeals are not justified based on the ground of erroneous or incomplete determination of the factual situation under Article 403 Paragraph 3 of the KCCP.

In respect to the criminal offence of Unauthorized Purchase, Possession, Distribution and Sale of dangerous narcotic drugs and psychiatric substances contrary Article 229, Paragraph 1 of the CCK, the District Court established that the Defendant has purchased a narcotic stuff which he partially intended to deliver to his friends he wanted to meet in Montenegro.

As correctly stated, the acquired substance aimed to be partly distributed to others as foreseen in Article 229 of the CCK. Article 107 Item 29 of the CCK defines the term "dangerous drugs and psychotropic substances" as the substances listed in the Official Gazette of the Socialist Federal Republic of Yugoslavia Nos. 70/78, 14/81, 39/82, 28/85, 10/87, 53/88, 2/89. This results from the Criminological Report of the Drug Section dated 10th September 2007 expressively stating that the substance contains the illicit drug tetrahydrocannabinol (THC). This item is listed under Cannabis no 69 (Indian Hemp) of the quoted SFRY list of Narcotics.

The Defence wrongfully claims that the District Court failed to ascertain that the seized substance contained more than 0,30 % of THC, which only will have the intoxicating effect of marijuana. It is true that the quantity of THC has significant importance for the product. However, the applicable law does not prescribe a specific percentage of THC as a requirement for a conviction under Article 229 read in conjunction with Article 107 Item 29 of the CCK, only the proof that the substance used contains the listed substance.

As far as the Defendant alleges an unjust differentiation between the acquitted co-Defendant and him, he does not consider that he - contrary to the other - has admitted his intention to share the stuff with friends in Montenegro. Even when the co-Defendant would have wrongfully been acquitted, this had no positive effect for M: J as nobody can claim for equality in injustice.

Finally, it shall be noticed that the Defendant, a habitual user of marijuana, has tasted the marihuana and approved it underlining that he knew the satisfactory quality of the drug.

As to the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of the CCK, the District Court rightfully convicted the Defendant. There was no need for further establishment of the factual state, mainly the clearance of whether the ammunicions found are still functional due to the corroded stage.

Article 107 Item 28 defines what a weapon is in the sense of Article 328 of the CCK. Under this provision, the term 'weapon' means "*an instrument designed, used or usable for inflicting bodily harm. It shall include, but not be limited to, all forms of ammunition, [...]*". The Defendant had 364 bullets of calibre 7,62 and a tear pot type M-3F containing chemicals called 'CS' in his possession. This ammunition has been assigned for inflicting bodily harm. Therefore, it is dispensable to ascertain if it was usable any longer due to the corroded stage. The Defendant was aware of his infringement of the law, when pleading guilty for this charge.

In respect to the decision on criminal sanctions, the appeals are partly founded.

As far as the drug charge is concerned, a reduced sentence of imprisonment and the ordered fine of fifty (50) Euros are sufficient to sanction the criminal act. Article 229 Paragraph 1 of the CCK foresees sanctions of fine and - cumulatively - of imprisonment of one year to five years. Though the challenged Judgment imposed a minimal fine and a sentence of one (1)-year imprisonment, the concrete situation requires a reduction to the minimum punishment of imprisonment.

Articles 65, 66 and 67 of the CCK enable the Court to deviate from the punishment prescribed by law. Under Article 67 Paragraph 4, the punishment of imprisonment for such criminal act can be reduced it up to three months. These prerequisites are fulfilled due to the particularly mitigating circumstances justifying to impose a lesser punishment as foreseen in Article 66 Paragraph 2.

The Defendant had committed the crime years ago, in 2007. The Judgment of the First Instance Court has only been pronounced in May 2011; the Judgment of the Supreme Court even has been realized in March 2012. Since 2007, criminal proceeding against the Defendant for which the outcome was uncertain was on going. He has suffered

deprivation or restriction of liberty by measures of detention on remand and house detention.

The prosecution of this deed obviously has impressed him, preventing to further repeating the criminal offences. At least there are no attestable records in so far.

A decisive mitigating circumstance is the fact that the infringement of Article 229 involves a very small quantity of drug and the punishment was only enabled by the confession of the Defendant. Considering the purpose of punishment according Article 34 Paragraph 1 of the CCK, it can be achieved by imprisonment of four (4) months crediting the time spent in detention on remand and in house detention.

The sentencing of four (4) months, apart from the needed minimal fine of fifty (50) Euros, can - exceptionally - be suspended according to Articles 43 and 44 of the CCK. The Court has considered the special circumstances of Article 44 Paragraph 3, mainly the purpose of a suspended sentence, the past conduct of the perpetrator, his behaviour after the commission of the criminal offence. As described the favourable circumstances permit to renounce to the execution of the imposed sentence. It can be taken responsibility for this exception, though regularly sanctions for this type of offence require sentencing with longer imprisonment and execution of such sentencing.

The penalty for the charge of Unauthorized possession of weapons requires only a fine of 400 Euros. The frame of punishment according to Article 328 Paragraph 2 is a fine up to 7.500 Euros or an imprisonment of one to eight years.

The Supreme Court deems that the sanction to a fine to a modest extent is sufficient. It has to be seen that the ammunition without a shooting instrument is a restricted dangerous weapon. The main aspect for reduction of the imposed sentence is that the District Court felt bound to refuse a fine as suitable punishment because of the Defendant's previous conviction for Unauthorized possession of weapons in 2009. It failed to consider that the criminal offence subject to the present proceeding has been committed only in 2007, meaning that the Defendant did not have any criminal record at that time.

As a punishment of imprisonment and fine was imposed for the drug charge and a sentence of fine for the weapon charge, there is no basis for an aggregate punishment pursuant to Article 71 CCK. The Defendant is warned that the suspended sentence can be revoked if he commits a new criminal offence for a period of one (1) year according to Article 45 of the CCK.

As for the costs of this criminal proceeding, the decision is based on Article 99 of the CCK.

Presiding Judge:

[Signature]
EULEX Judge Horst Proetel

Panel member:

[Signature]
EULEX Judge Martti Harsia

Panel member:

[Signature]
Supreme Court Judge Avdi Dinaj

Recording Clerk:

[Signature]
Legal officer Chiara Rojek

SUPREME COURT OF KOSOVO
13th March 2012
Ap – Kz 387/11
Prishtinë/Priština