

SUPREME COURT of KOSOVO

Supreme Court of Kosovo
Ap.-Kz. No. 466/2011
Prishtinë/Priština
10 July 2012

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 24 November 2009 in the Supreme Court building in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge and Kosovo Supreme Court Judges Nesrin Lushta and Salih Toplica as panel members

And with Ms. Vllora Johnston as Court Recorder,

In the presence of the

Defense Counsel Av. S. [REDACTED] M. [REDACTED] for the defendant B. D. [REDACTED],
Defense Counsel Av. R. D. [REDACTED] for the defendant M. G. [REDACTED],
Defense Counsel Av. A. A. [REDACTED] for the defendant B. J. [REDACTED],
Defense Counsel Av. I. D. [REDACTED] for the defendant S. Z. [REDACTED];

In the criminal case number AP-KZ 466/2011 against the defendants:

B. D. [REDACTED], Kosovo Albanian, [REDACTED]
[REDACTED]
[REDACTED]

S. Z. [REDACTED], Kosovo Albanian, [REDACTED]
[REDACTED]
[REDACTED]

M. G. [REDACTED], Kosovo Albanian, [REDACTED]
[REDACTED]
[REDACTED]

B. J. [REDACTED], [REDACTED]
[REDACTED]

[REDACTED] Kosovo Albanian, [REDACTED]
[REDACTED]

In accordance with the Verdict of the first instance District Court of Prishtine/Pristina in the case no. P. Nr. 20/10 dated 29 July 2011 and registered with the Registry of the District Court of Prishtine/Pristina on the same day, the defendants were found guilty respectively not guilty of the following criminal offenses:

B [REDACTED] D [REDACTED] was found guilty of the criminal offense of Facilitating Prostitution as per Count 4 of the Indictment, contrary to Article 201 paragraph 1 of the Criminal Code of Kosovo (CCK) and as re-qualified by the panel pursuant to Article 391 of the Kosovo Code on Criminal Procedure (KCCP), because he knowingly recruited, organized or assisted another person or provided premises to another person for the purpose of prostitution. Specifically, **B [REDACTED] D [REDACTED]**, as the owner of the nightclub "Victoria" in Gjakova, during the time period of 2001 – 2008, recruited, organized and assisted a number of foreign national women for the purpose of prostitution, selling their sexual services for different amounts of money to different clients.

Therefore, he was sentenced to 3 (three) years of imprisonment.

Defendants **S [REDACTED] Z [REDACTED]**, **M [REDACTED] G [REDACTED]** and **B [REDACTED] J [REDACTED]** were found not guilty for the charges under Counts 1 and 2 of the Indictment, which refer to the criminal offenses of Abusing Official Position or Authority as per Article 339 of the CCK and of Smuggling of Migrants as per Article 138 of the CCK, whereas the defendant

B [REDACTED] D [REDACTED] was found not guilty for the charges under Count 3 of the Indictment, referring to the criminal offense of Money Laundering as per Article 11.2 items (a), (b) and (c) of UNMIK Regulation No.2004/53 as amended by UNMIK Regulation No.2004/2 On the Deterrence of Money Laundering and other relevant Criminal Offences.

The Defense Counsel of the defendant **B [REDACTED] D [REDACTED]** timely filed an appeal dated 20 September 2011 against the Verdict. Also the other Defense Counsel of the defendant, **Av. T [REDACTED] B [REDACTED]** timely appealed the first instance Judgment by written appeal dated 22 September 2011. It was asserted that the Verdict contains essential violations of the criminal procedure, erroneous and incomplete establishment of the factual state, violation of the criminal code and that the punishment imposed upon the accused was to be challenged. It was proposed to change the challenged Verdict as to acquit the accused from all charges or to quash the Verdict and return the case to the First Instance Court for re-trial.

The Special Prosecutor of Kosovo (SPRK) as well timely appealed the District Court Judgment by written appeal dated 15 September 2011 and asserted that the Judgment would contain essential violations of the criminal procedure, erroneous and incomplete

establishment of the factual state and violation of the criminal code. In particular the not-guilty finding of the defendants S [REDACTED] Z [REDACTED] M [REDACTED] G [REDACTED] and B [REDACTED] J [REDACTED] as well as in parts of the defendant B [REDACTED] D [REDACTED] and the decision to release the defendants from responsibility for the respective charges of the Indictment was challenged. It therefore was proposed to the Supreme Court of Kosovo to overrule the contested Judgment in the releasing part, while to return the case for re-trial to the same first instance Court.

The Defense Counsels of the defendants S [REDACTED] Z [REDACTED] M [REDACTED] G [REDACTED] and B [REDACTED] J [REDACTED] as well as the defendant B [REDACTED] J [REDACTED] himself responded to the SPRK appeal and proposed to reject the appeal of the SPRK and confirm the challenged Judgment of the District Court.

The Office of the State Prosecutor of Kosovo (OSPK), with a response dated 15 December 2011 and registered with the Registry of the Supreme Court of Kosovo on 19 December 2011 fully supported the appeal of the SPRK and proposed to have it approved by the Supreme Court, but to reject the appeals of the defendant B [REDACTED] D [REDACTED] and his Defense Counsels.

Based on the written Verdict in case P. Nr. 20/10 of the District Court of Prishtine/Pristina, dated 29 July 2011, the submitted written appeal of the defendant and his Defense Counsels, the relevant file records and the oral submissions of the parties during the session on 10 July 2012, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 10 July 2012, hereby issues the following:

RULING

The appeals of the defense counsels filed on behalf of the defendant B [REDACTED] D [REDACTED] and the appeal of the Special Prosecutor of the Republic of Kosovo against the Judgment of the District Court of Prishtinë/Priština P. No. 20/2010, dated 29 July 2011, are GRANTED. The Judgment of the court of first instance is ANNULLED and the case is RETURNED FOR RETRIAL and decision.

REASONING

Procedural History

1. On 21 January 2010 the SPRK filed an Indictment (PPS No.462/2009) against B [REDACTED], J [REDACTED], M [REDACTED], G [REDACTED], S [REDACTED], Z [REDACTED] and B [REDACTED] D [REDACTED] as well as against four other defendants (in particular F [REDACTED] K [REDACTED], F [REDACTED] H [REDACTED], B [REDACTED] O [REDACTED] and A [REDACTED] F [REDACTED]), which at a later stage was amended on 30 April 2010 upon instruction of the Conformation Judge.

As per the amended Indictment, the various defendants were charged with multiple criminal offenses, which allegedly have occurred between January 2007 and October 2008. Defendants B [REDACTED], J [REDACTED], M [REDACTED], G [REDACTED], S [REDACTED], Z [REDACTED], B [REDACTED] O [REDACTED] and F [REDACTED] H [REDACTED] were all alleged to be official persons in the Migration Office in Prishtine/Pristina and at the border point of the International Airport of Prishtine/Pristina. It was alleged that in co-perpetration with each other and in their capacity of official persons and with the intent to obtain unlawful material benefit for themselves or others, they enabled foreign persons to enter Kosovo unlawfully. The Indictment specifically names thirty five (35) persons who allegedly entered Kosovo without proper documentation or procedures due to the defendants' alleged criminal conduct. The overwhelming majority of the illegal immigrants were females from Moldova.

Defendants B [REDACTED], J [REDACTED], M [REDACTED], G [REDACTED], S [REDACTED], Z [REDACTED], B [REDACTED] O [REDACTED] and F [REDACTED] H [REDACTED] were each charged with two Counts: Abuse of Official Position as per Article 339 of the CCK and Smuggling of Migrants as per Article 138 of the CCK.

Defendants B [REDACTED] D [REDACTED], F [REDACTED] K [REDACTED] and A [REDACTED] F [REDACTED] were each charged with Facilitating Prostitution as per Article 201 paragraph 3 of the CCK. The Indictment alleged that B [REDACTED] D [REDACTED] and F [REDACTED] K [REDACTED] each owned a nightclub in the City of Gjakova/Djakovica and that during the time frame 2007 – 2008 they recruited, organized, assisted and exploited sixteen (16) named Moldovan citizens in furtherance of prostitution. A [REDACTED] F [REDACTED] was alleged to have acted in co-perpetration by "booking" the women for various clients who thereafter engaged in acts of prostitution with them.

Additionally, the Indictment charged B [REDACTED] D [REDACTED] with the criminal offense of Money Laundering as per Article 11.2 of UNMIK Regulation 2004/53 as amended by UNMIK Regulation 2006/2.

2. A Confirmation hearing was held and on 02 June 2010. The Confirmation Judge dismissed the Indictment against defendants F [REDACTED] K [REDACTED] and A [REDACTED] F [REDACTED] whilst on 21 June 2010 he issued a ruling partially again dismissing the Indictment with regards to defendants B [REDACTED] O [REDACTED] and F [REDACTED] H [REDACTED], but confirming the Indictment with regards to the charges against defendants B [REDACTED], J [REDACTED], M [REDACTED], G [REDACTED], S [REDACTED], Z [REDACTED] and B [REDACTED] D [REDACTED].

3. The Confirmation Rulings finally were confirmed in their entirety by a three judge panel of the District Court of Prishtine/Pristina by ruling dated 29 December 2010, after the SPRK Prosecutor had appealed them.

4. Main Trial commenced through altogether seven sessions on 12 April, 18, 19, 20, 21, 22 and 27 July 2011 before the assigned panel of the District Court Prishtine/Pristina, within which the witnesses Police Officers N [REDACTED] Q [REDACTED], S [REDACTED] X [REDACTED] and Police Captain H [REDACTED] F [REDACTED] were heard.

In addition, the trial panel admitted the following evidence: Records of SMS messages sent and received by the defendants; report prepared by Captain H [REDACTED] F [REDACTED] dated 12 March 2009; report on the inspection in the Office of Migration and Deportation in the Airport, dated 25 April 2009; report of the inspection related to the documents in the Directory of Migration, dated 30 June 2009; report of the Investigation Unit in the Airport of Prishtine/Pristina, dated 01 July 2009; photocopied files concerning the alleged illegal entry of the foreign citizens named in the indictment as well as those whose names were amended in the Indictment during the trial; files of the Directory of Migration which are incomplete and contain errors; copies of the tickets and passport pages of L [REDACTED] C [REDACTED] reports of the financial transactions from Western Union to the network of Financial Union in Prishtine/Pristina for the defendant B [REDACTED] D [REDACTED], financial records from various banks on the accounts of B [REDACTED] J [REDACTED], S [REDACTED] Z [REDACTED] and M [REDACTED] G [REDACTED], reports of Kosovo Police Officer N [REDACTED] Q [REDACTED] dated 10 May 2007, 07 July and 12 February 2009.

5. On 22 July 2011, at the conclusion of the Main Trial and immediately prior to the closing arguments, the SPRK Prosecutor amended the Indictment. Specifically, the Prosecutor amended Count 1 of the Indictment regarding the criminal offence of Abusing Official Position or Authority, now reflecting a time frame of January to December 2007, rather than the originally charged time frame of January 2007 to October 2008. Additionally, the Prosecutor amended the names of the foreign citizens who were allegedly allowed entry into Kosovo as part of the criminal undertaking by the defendants from the original list of thirty five to the following five persons: M [REDACTED] L [REDACTED], A [REDACTED] S [REDACTED] A [REDACTED] T [REDACTED], T [REDACTED] V [REDACTED] and T [REDACTED] T [REDACTED]. None of these persons were named in the original Indictment. Count 1 of the amended Indictment further alleges that defendants in co-perpetration illegally admitted a person named L [REDACTED] C [REDACTED] into Kosovo.

In the same context, the SPRK Prosecutor moreover amended Count 2 of the Indictment on Smuggling of Migrants as per Article 138 of the CCK, now reflecting on a time frame of January to December 2007, rather than the originally charged time frame of January 2007 to October 2008.

The SPRK Prosecutor also amended Count 4 of the original Indictment regarding the criminal offense of Facilitating Prostitution as per Article 201 of the CCK, by amending the names of the alleged victims of the offense. Whilst the original Indictment listed the names of sixteen (16) alleged victims of prostitution, the amended Indictment now lists

the names of sixteen (16) victims as well, out of which only two of them however were named in the original Indictment as well. The remaining fourteen (14) persons named in the original Indictment were substituted with the names of fourteen (140 different individuals, all of whom are alleged Moldovan citizens.

6. **The Defense Counsel Av. S [REDACTED] M [REDACTED]** of the defendant **B [REDACTED] D [REDACTED]** timely filed an appeal dated 20 September 2011 against the Verdict. Also the other Defense Counsel of the defendant, **Av. T [REDACTED] B [REDACTED]**, timely appealed the first instance Judgment by written appeal dated 22 September 2011. It was asserted that the Verdict contains essential violations of the criminal procedure, erroneous and incomplete establishment of the factual state, violation of the criminal code and that the punishment imposed upon the accused was to be challenged. It was proposed to change the challenged Verdict as to acquit the accused from all charges or to quash the Verdict and return the case to the First Instance Court for re-trial.

7. **The Special Prosecutor of Kosovo (SPRK)** as well timely appealed the District Court Judgment and asserted that the Judgment would contain essential violations of the criminal procedure, erroneous and incomplete establishment of the factual state and violation of the criminal code, all as outlined above.

8. The Defense Counsels of the defendants **S [REDACTED] Z [REDACTED]**, **M [REDACTED] G [REDACTED]** and **B [REDACTED] J [REDACTED]** as well as the defendant **B [REDACTED] J [REDACTED]** himself responded to the SPRK appeal and proposed as pointed out before.

9. **The OSPK** in their response fully supported the appeal of the SPRK and proposed to have it approved by the Supreme Court, but to reject the appeals of the defendant **B [REDACTED] D [REDACTED]** and his Defense Counsels as pointed out before.

FINDINGS OF THE COURT

A. Substantial violation of the provisions of the Criminal Procedure

10. The SPRK – supported by the OSPK – as well as the Defense Counsel **Av. S [REDACTED] M [REDACTED]** of the defendant **B [REDACTED] D [REDACTED]** have challenged the District Court Judgment for alleged violation of Article 403 paragraph 1 item 12 of the KCCP, because of considerable contradictions between the reasoning of the Judgment, which – despite that it would not reflect the final facts as established – would also not be in line with the content of documents and records on declarations as given in the Court hearings. In particular, the reasoning of the Judgment would not reflect the statement of witness **N [REDACTED] Q [REDACTED]**, according to which data regarding the alleged victim **L [REDACTED] C [REDACTED]** was found at the computer of the defendant **M [REDACTED] G [REDACTED]** who was accused in the context of illegal issuance of ID cards. Moreover and amongst others, according to the report of the same witness, dated 10 May 2007, the alleged victim **L [REDACTED] C [REDACTED]** had faxed her Moldovian ID to the defendant **B [REDACTED] J [REDACTED]**, who on 15 January 2007 and based upon information taken from that ID card had issued an UNMIK ID card for

L [REDACTED] C [REDACTED] with personal number 2911147001, but without L [REDACTED]'s presence and signature.

11. According to the SPRK a violation of Article 403 paragraph 2 item 1 of the KCCP as read with Article 164 paragraph 2 of the KCCP was done by the District Court, because after approving the Prosecutor's proposal to hear witnesses KP Officers S [REDACTED] X [REDACTED] and N [REDACTED] Q [REDACTED], the Court had not allowed the witnesses to state with regards to the declarations of the injured party A [REDACTED] J [REDACTED] as given to these Officers. The Court had not been entitled to limit witness statements.

12. The Defense Counsels of defendant B [REDACTED] D [REDACTED] have moreover stressed that the District Court Judgment would contain substantial violation of the provisions of the Criminal Procedure in particular with regards to Article 403 paragraph 1 item 8 of the KCCP, but without substantiating their allegations.

I. ALLEDGED VIOLATION OF ARTICLE 403 PARAGRAPH 1 ITEM 12 OF THE KCCP:

13. The Supreme Court of Kosovo indeed finds that the enacting clause of the challenged Judgment is insufficient in at least some parts and that the challenged Judgment lacks sufficient reasoning that would fully reflect the enacting clause.

1. Involvement of defendant Bib DOQAJ:

14. It must be left open at the current stage of proceedings, whether or not the defendant B [REDACTED] D [REDACTED] was involved into the criminal offense of Facilitating Prostitution as per Article 201 of the CCK and if the evidence presented – in difference to the findings of the District Court - would suffice to find him guilty also for the criminal offense of Money Laundering as per Article 10.2 of UNMIK Regulation 2004/2 as amended by UNMIK Regulation 2004/53.

15. With regards to the criminal offense of Facilitating Prostitution it however needs to be underlined that in the case at hand the reasoning of the challenged District Court Judgment bases the guilt of B [REDACTED] D [REDACTED] exclusively upon some electronic text messages, which have been sent to his mobile phone from different other telephone numbers, each asking to make reservation for 'L [REDACTED]', 'M [REDACTED]', 'M [REDACTED]', 'L [REDACTED]', 'M [REDACTED]' or 'L [REDACTED]', who allegedly are females the senders of the text messages wanted to meet with. The challenged Judgment in its reasoning lacks clarifying the identity of the persons behind the aforementioned nicknames and does not provide any assessment on whether or not they are identical with the alleged victims from the Indictment. The reasoning of the challenged Judgment moreover does not contain a single sentence regarding the statements of the alleged victims themselves as well and whether or not these statements correspond to the contents of the text messages thus corroborating them and therefore –

together with them - would indicate the legal requirements of Article 201 paragraph 1 of the CCK.

16. As to the re-qualification of the criminal offense of Facilitating Prostitution as per Article 201, which the defendant B● D●●● originally was charged for pursuant to paragraph 3 of the Article and him being found guilty by the District Court for the same criminal offense but pursuant paragraph 1 of the Article instead, the reasoning of the challenged Judgment does not contain a single sentence as well. The poor reference to a re-qualification in the enacting clause through only one half-sentence does not suffice at all.

17. As to the criminal offense of Money Laundering pursuant to Article 10.2 of UNMIK Regulation 2004/2 as amended by UNMIK Regulation 2004/53, the defendant B● D●●● was found not guilty and therefore was acquitted from the respective charges of the Indictment, but without describing the act of which he was charged, as it is provided for by Article 396 paragraph 4 of the KCCP. Also the respective reasoning is completely insufficient, just providing that *"[t]he Prosecution has failed to prove the charge of Money Laundering beyond a reasonable doubt. The panel never received a financial expertise and has no understanding of the money flow concerning B● D●●●'s business, the nightclub Viktoria. This panel will not surmise or assume facts that were not presented during the trial"* (p.9 of the challenged Judgment in its English version).

2. Involvement of defendants B●●● J●●●●●, M●●●● G●●●● and S●●●● Z●●●●:

18. It may be left open as well at this point, whether or not the defendant M●●●● G●●●● was involved in providing fake identification documents to the victim L●●●● C●●●● or if and in which way he may have been involved in her smuggling to Kosovo. It also must not be finally evaluated, whether or not the defendant B●●● J●●●● personally has issued an UNMIK ID card for that victim on 15 January 2007 with personal number 2911147001, but without her presence and signature, as stressed by the SPRK in their appeal. Also the role and involvement of defendant S●●●● Z●●●● does not need to be assessed at the current stage of proceedings. The reasoning of the District Court Judgment however does not sufficiently reflect the evidence assessment regarding a possible criminal participation of the defendants into the criminal acts they are charged with.

19. Also with regards to the aforementioned defendants, the enacting clause of the challenged Judgment thus finding the defendants not guilty lacks any description of the acts of which they were charged, as it is provided for by Article 396 paragraph 4 of the KCCP.

20. The reasoning of the challenged Judgment is generally extremely thin and is not in line with the requirements of the Law. Whilst the substantial reasoning, which does not contain more than altogether four pages, provides numerous allegations and assertions as

i.e. that it was the defendant B J who processed the applications on behalf of the victims M L, A S, A T and T V and that defendant M G processed the application of victim T T the Judgment generally does not comply with Article 396 paragraphs 6 and 7 of the KCCP, which – as much as it is relevant here - stipulate as follows:

(6) In the statement of grounds for a judgment, the court shall present the grounds for each individual point of the judgment.

(7) The court shall state clearly and exhaustively which facts it considers proven or not proven, as well as the grounds for this. The court shall also, in particular, make an evaluation of the credibility of conflicting evidence, the grounds for not approving individual motions of the parties, and the reasons by which the court was guided in settling points of law [...].

21. The reasoning of the challenged Judgment moreover completely lacks both, an individual and a general assessment of evidence, as it is provided by Article 387 paragraph 2, stipulating that “[t]he court shall be bound to assess conscientiously each item of evidence separately and in relation to other items of evidence and on the basis of such assessment to reach a conclusion whether or not a particular fact has been established”.

II. ALLEDGED VIOLATION OF ARTICLE 403 PARAGRAPH 2 ITEM 1 OF THE KCCP:

22. It is indeed not plausible, why the District Court in its session dated 19 July 2011 (*p.13 of the minutes*) has not allowed the witness KP Officer S X to state with regards to the written statement of the alleged victim A J as given to Kosovo Police 27 June 2008. Although the victim herself was not available during the Main Trial, the SPRK had presented her statement, which is included to the case file but not translated into English, as evidence.

B. Erroneous and incomplete determination of the factual situation

23. Moreover, the SPRK – again supported by the OSPK - has stressed that the factual situation was not properly established by the District Court. In particular, the Court had not taken into consideration that according to the inspection report of SPK – Airport, dated 12 March 2009 and signed by witness Captain H F, the defendant B J was brought in connection with respective criminal activities several times. Also the transcripts of telecommunication interceptions between the defendants B J and B D as well as between the defendant M G and other – partially unknown – persons had not been considered properly by the Court.

24. In addition, the District Court had not taken into consideration the fact that the signatures of the alleged victims L [REDACTED] M [REDACTED], A [REDACTED] S [REDACTED], A [REDACTED] T [REDACTED], T [REDACTED] V [REDACTED] and T [REDACTED] T [REDACTED] at the Kosovo entrance application forms – although not verified by graphological expertise - are clearly different from the ones at their work contracts.

25. Also the Defense Counsels of defendant B [REDACTED] D [REDACTED] have stressed that the District Court Judgment would contain erroneous and incomplete determination of the factual situation. In the context given particularly Defense Counsel Av. S [REDACTED] M [REDACTED] has stressed that no evidence was established by the Court for that the defendant B [REDACTED] D [REDACTED] ever has forced his female employees to exercise prostitution or that he had limited their freedom of movement otherwise. Also the exercise of prostitution by the women working for the nightclub of the defendant had not been proved at all. The five foreign employees in the night club of the defendant, 'Viktory' bar in Gjakova/Djakovica, had been provided with working contracts and temporary UNMIK ID cards. The whole approach of the District Court in this regard had violated also the principle of 'fair trial' as laid down in Article 6 paragraph 3 of the European Convention of Human Rights and Freedoms (ECHR).

26. The Supreme Court of Kosovo indeed finds that no proper and complete assessment of facts has been provided by the District Court, as well with regards to the alleged involvement of the defendant B [REDACTED] D [REDACTED] into the criminal charges of Facilitating Prostitution and Money Laundering as with regards to the defendants B [REDACTED] J [REDACTED], M [REDACTED] G [REDACTED] and S [REDACTED] Z [REDACTED] into the criminal activities of Smuggling Migrants and Abuse of Office or Authorization they are charged with.

Almost no energy was invested to assess the evidence and facts presented with regards to the role of the defendants.

27. With regards to the involvement of the defendant B [REDACTED] D [REDACTED] into the criminal offense of Facilitating Prostitution as per Article 201 paragraph 1 of the CCK no proper assessment of evidence was conducted with regards to the statements of the alleged victims as outlined before. Regarding the charges on Money Laundering, the District Court in a superfluous manner has wiped away the allegations of the prosecution, because the Court – contrary to its obligation pursuant to Article 7 paragraph 1 of the KCCP – was not willing to have the case more carefully investigated and the alleged gaps in the establishment of facts closed.

28. With regards to the defendants B [REDACTED] J [REDACTED], M [REDACTED] G [REDACTED] and S [REDACTED] Z [REDACTED] the Court in an almost lapidary manner states in its challenged Judgment that *"no evidence was offered during the trial concerning the alleged impropriety contained in the files regarding M [REDACTED] L [REDACTED], A [REDACTED] S [REDACTED], A [REDACTED] T [REDACTED], T [REDACTED] V [REDACTED] or T [REDACTED] T [REDACTED]"* (p.7 of the challenged Judgment in its English version).

29. It needs to be stressed in the context given that in particular pursuant to Article 7 paragraph 1 of the KCCP “[t]he court [...] participating in criminal proceedings must truthfully and completely establish the facts which are important to rendering a lawful decision”. What this means is described in detail in paragraph 2 of the same Article, according to which the Court has “a duty to examine carefully and with maximum professional devotion and to establish with equal attention the facts against the defendant as well as those in his favor, [...] before the beginning and during the proceedings”. It goes without saying that these commitments and steps of the Court later need to be reflected in the issued verdict, as it also can be understood from Article 8 paragraph 2 as well as from Article 360 paragraph 1 of the KCCP.

30. Whereas the Supreme Court with regards to the assertions of the SPRK in their appeal finds that the signatures of the alleged victims L M, A S, A T, T V and T T at the Kosovo entrance application forms on a first view seem to be identical to those at their work contracts (keeping in mind that the working contract of T T does not contain a signature at all) and that a graphological expertise does not seem to be helpful or possible at all, given that there are only a few signatures but no longer text passages available, other facts could have been proven much better than this was provided by the District Court.

31. The District Court in particular did not undertake the following needed steps in order to establish the relevant facts:

- In order to prove criminal responsibility of the defendants B J, M G and S Z under the aspect of Abuse of Official Abuse of Office or Authority pursuant to Article 339 of the CCK and regarding alleged Smuggling of Migrants as per Article 138 paragraphs 1 and 3 of the CCK it in the first place would have been needed to understand the system of PIN codes and other keys and administrative registration systems as provided by the inspection report of SPK – Airport, dated 12 March 2009 and in fragments described upon request of the Court by witnesses N Q during the Court sessions on 18 and 19 July 2011 and H F during the Court session on 21 July 2011.
- Since the most crucial aspect in both cases is the subjective requirements of “*intent to obtain unlawful material; benefit*” for the perpetrator or a third person, seeking for indications in order to prove or at least make most likely such intent would have been mandatory for the Court. Reference is made in particular to a full binder of the case file containing detailed information regarding several bank accounts of the defendants and the money movements there also within the time period as referred to by the Indictment. In some cases, in particular as to the defendants B J and M G is quite eye-catching that from time to time bigger amounts of money (approximately between 5000 and 1500 €) have been transferred to and withdrawn from these bank accounts, whilst the salary of the defendants as police officers was not more that about 250,- € per months and does not justify movements and money transfers of the described level at all. It could have illuminated the case a lot to figure out, where these

bigger amounts of money came from and whether they were made available to the defendants in a timely context close to the aforementioned alleged victims entering Kosovo without proper documentation.

- The evaluation of transcripts of telecommunication interceptions and metering of text messages between the defendants B J and B D as well as between the defendant M G and other – partially unknown – persons have not been considered properly by the Court but could have shed additional light upon the case and the connections between the defendants as well. Also this was not done by the Court at all.

C. Substantial violation of the Criminal Law

32. The SPRK – supported by the OSPK - has challenged the District Court Judgment for alleged violations of the Criminal Law. In particular, contrary to what the challenged Judgment had stated the Prosecutor would have the right to correct and precise even the confirmed Indictment, but without changing legal qualifications. Specifically, the Court had not properly applied the provisions of Article 339 paragraph 1 of the CCK (Abuse of Official Position or Authority), which does not require that the perpetrator indeed has gained property benefits for himself or another person, but asks for the intention to do so only. Last but not least the District Court had found the defendant B D guilty for the criminal offense of Facilitating Prostitution pursuant to Article 201 paragraph 1 of the CCK, whilst the defendant was charged with the same offense by the Indictment, but pursuant to Article 201 paragraph 3 of the CCK. Nevertheless, the Judgments refers to Article 201 paragraph 1 of the CCK on p. 3 of the English version, whilst on p. 2 of the same version reference is made to Article 201 paragraph 3 of the CCK.

33. Also the Defense Counsels of defendant B D have stressed that the District Court Judgment would contain violations of the Criminal Law. In particular, the Court had found the defendant guilty for the criminal offense of Facilitating Prostitution pursuant Article 201 paragraph 1 of the CCK without any facts proven.

I. POWER OF THE PROSECUTOR TO AMEND THE CONFIRMED INDICTMENT:

34. As to the amendments provided to the Indictment by the Prosecutor during the session on 22 July 2011, the Supreme Court refers to Article 376 paragraph 1 of the KCCP, according to which the prosecutor, if s/he *“finds in the course of the main trial that the evidence presented indicates”* a different factual situation as described in the indictment, *“he or she may modify the indictment orally during the main trial and may also make a motion to recess the main trial in order to prepare a new indictment”*.

Although sufficiency and rationality of the actions taken in the case at hand need to be left open, the Prosecutor on 22 July 2011 has in particular made reference to new names

of alleged victims, which exclusively derive from the lists of money transfers as provided by Western Union and presented as evidence to the Court during the main trial. Instead of a withdrawal of the already confirmed Indictment and the substitutional filing of a new – amended – Indictment (which although more work intensive would have been recommendable in the interest of a clear and non-confusing procedural step) the Prosecutor has submitted his oral amendments in a written form to the Court as ‘closing speech’ (PPS no. 426/2009), dated 22 July 2011.

It must be left open whether such an action, even if it should be interpreted in line with the requirements of the Law, makes sense at all or is merely due to increase confusions.

II. ALLEGED IMPROPER APPLICATION OF CRIMINAL LAW REGARDING B. J., M. G. AND S. Z.

35. However, given the insufficiencies of the challenged Judgment as outlined before under the aspect of alleged erroneous and incomplete establishment of facts, a proper and full-fledged analysis and assessment of the evidence provided regarding the alleged activities of defendant B. D. as to Facilitating Prostitution and Money Laundering and in particular of the money transfers at the bank accounts of the defendants B. J., M. G. and S. Z. as read in connection with the results of internal investigation reports may lead to a different qualification of the majority of criminal offenses and activities committed in the case at hand.

D. Decision on the punishment

36. Both Defense Counsels of defendant B. D. have stressed that the decision on punishment would be unjust. Defense Counsel Av. S. M. has pointed out that the decision on punishment was done without taking into consideration any mitigating circumstances and that therefore the defendant has received the highest punishment possible according to the Law.

37. The Supreme Court finds that the District Court indeed has carried out only a very short evaluation of mitigating and aggravating circumstances in the case of defendant B. D. (p.10 of the challenged Judgment in its English version) and that the respective reasoning does not provide more than 13 lines (in the English version). Moreover, indeed the punishment of three (3) years of imprisonment imposed to the defendant B. D. is the highest punishment possible under Article 201 paragraph 1 of the CCK. However, no final assessment upon the punishment to be imposed is done in the case at hand, since a re-trial of the whole case and proper consideration of all aspects as addressed before may lead to overall different punishment decision.

For the foregoing reasons the Supreme Court decided as in the enacting clause.

Panel Members:



Nesrin Lushta
Supreme Court Judge



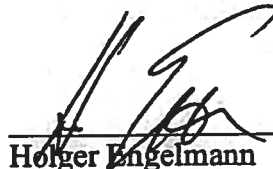
Salih Toplica
Supreme Court Judge

Presiding Judge:



Gerrit-Marc Sprenger
EULEX Judge

Recording Clerk:



Holger Engelmann
EULEX Legal Officer

SUPREME COURT OF KOSOVO
Ap.-Kž. No. 466/2011
Prishtinë/Priština
10 July 2012