

SUPREME COURT OF KOSOVO

Pml.-Kzz. No. 44/2013

Prishtinë/Priština

14 August 2013

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of
EULEX Judge Gerrit-Marc Sprenger as Presiding Judge and
EULEX Judge Bertil Ahnborg and
Supreme Court Judge Meleqe Bexheti as members of the panel,
with EULEX Legal Officer Holger Engelmann, acting in the capacity of recording
clerk,

In the criminal case against:

J.V.

Convicted for having committed criminal offence of **Unauthorized Ownership, Control, Possession or Use of Weapons** contrary to Article 328 Paragraph 2 of the Criminal Code of Kosovo (CCK) and sentenced to **one (1) year of imprisonment** by final Judgment AP.-KŽ. 129/2012 of the Supreme Court of Kosovo, dated 24 July 2012;

Deciding upon the **Request for Protection of Legality** (the Request) filed on 27 November 2012 by Defence Counsel **H. Sh. Çelaj** on behalf of the defendant against the Judgment P. 259/2011 of the District Court of Pejë/Peć, dated 30 November 2011, and the Judgment AP.-KŽ. 129/2012 of the Supreme Court of Kosovo, dated 24 July 2012, confirming the Judgment of the court of first instance,

Issues the following

JUDGMENT

The Request for Protection of Legality filed on behalf of the defendant **J.V.** against the Judgment P. 259/2011 of the District Court of Pejë/Peć, dated 30 November 2011, and the Judgment AP.-KŽ. 129/2012 of the Supreme Court of Kosovo, dated 24 July 2012, is hereby **REJECTED AS UNFOUNDED**.

REASONING

Procedural History

On 30 November 2011 the District Court of Peja/Pec by Judgment P.nr. 259/11 found the accused guilty of the criminal offense of Unauthorized Ownership, Control, Possession or Use of Weapons as per Article 328 paragraph 2 of the Criminal Code of Kosovo (CCK) and sentenced him with one year of imprisonment. At the same time the summary indictment on the criminal offense of Participating in a Brawl as per Article 155 paragraph 1 of the CCK was rejected pursuant to Article 389 of the Kosovo Code of Criminal Procedure (KCCP).

On 24 July 2012 the Supreme Court of Kosovo by Judgment Ap-Kz 129/12 rejected the appeal of the Defense Counsel of the accused as ungrounded pursuant to Article 420 paragraph 1 item 2 as read with Article 423 of the KCCP.

On 27 November 2012 the Defense Counsel of the accused filed a request for protection of legality against both, the Judgment of the District Court of Peja/Pec and the Judgment of the Supreme Court of Kosovo., alleging substantial violations of provisions of the criminal procedure as per Article 403 paragraph 1 and 3 of the KCCP on grounds that the first two and the last main trial sessions were held without the accused being present.

Findings of the Court

The Supreme Court of Kosovo establishes that the Request is admissible but unfounded.

The allegations of the defense point at a violation of the principle of fair trial as laid down in Article 6 paragraph 1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) to the detriment of the accused.

1. Absence of the accused during the first two main trial days:

Despite the fact that the accused in front of the first instance Court was continuously represented by his Defense Counsel on every day of the main trial, the Supreme Court of Kosovo finds that according to the minutes of the main trial the accused indeed was not present during the first two days of the main trial. It however was established that the accused was one out of four defendants in the case at first instance level. As the accused – although properly summonsed – did not appear in front of the court, no formal decision was made to sever his case from the others. Instead, the first instance Judgment states at page 5 that the trial panel reopened the main trial regarding the accused on 03 November 2011, which was the third main trial day, when he first attended the Court. It was also established based on the minutes that during the two previous main trial days of his absence none of the witnesses gave statement regarding the indictment against the accused. After the accused first attended the Court on 3 November 2011, the indictment against him was read and – with the consent of all parties – the minutes from the first two main trial days were considered being read out.

The accused then pleaded guilty to the remaining charge against him. He was found guilty based upon his own statement that during the referred night of the brawl he was carrying a gun with him. The issue was also confirmed by the co-defendant [REDACTED] and the witness [REDACTED] who testified in the presence of the accused in court.

S.V.

A.F.

2. Absence of the accused during the announcement of the Judgment:

Although duly summonsed and represented by his Defense Counsel, the accused was also not present during 30 November 2011, the day when the Judgment was announced. The Supreme Court however finds that as per Article 392 of the KCCP the Code authorizes that a Judgment be announced in the absence of the accused.

3. The Judgment of the Supreme Court of Kosovo

The Supreme Court of Kosovo at the appellate stage has already duly and correctly considered and assessed all relevant aspects as addressed again in the context at hand.

In particular, the Supreme Court has pointed out that – although the presence of the accused during the main trial is of mandatory nature under the Kosovo procedural rules – the KCCP foresees moderations to this principle, as there are in particular the announcement of the judgment in absence of a party as per Article 392 paragraph 3 of the KCCP or the removal of the accused from the courtroom in case of disturbance as per Article 336 paragraph 2 of the KCCP. Therefore, a procedure in absentia was known under the old law.

It is also worth mentioning that a trial held in the absence of the accused with strict procedural safeguards is possible in a number of European legal systems, which is why such a habit is not necessarily in contradiction with the ECHR, but in line with European standards.

In addition, the European Court of Human Rights (ECtHR) held that a trial in absentia has to ensure the guarantees of fair trial under the ECHR, which shall be respected at all stages of the proceedings¹. The ECtHR in this context set up some minimum standards to be followed and in particular pointed out that national authorities have to demonstrate due diligence in trying to locate the accused and inform the individual of the charges and the details of the case.

The compliance of such procedure with the guarantees of fair trial depends on the circumstances of the case and needs to be examined on a case-by-case basis.

However, the Supreme Court of Kosovo finds that all requirements are met in the case at hand and therefore has decided as in the enacting clause.

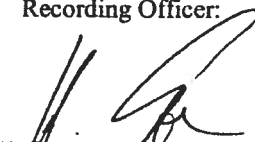
¹ ECtHR, *Poitrimol v. France*, Application no. 14032/88, Judgment of 23 November 1993, para. 34 ff.

Presiding Judge:



Gerrit-Marc Sprenger
EULEX Judge

Recording Officer:



Holger Engelmann
Legal Officer

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