SUPREME COURT

Case number: **Pml.Kzz 8/2015**
(P. Nr. 346/2012 Basic Court of Peje/Pec)
(PAKR 102/2013 Court of Appeals)

Date: **18 February 2015**

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Elka Filcheva- Ermenkova (Presiding and Reporting), EULEX Judge Willem Brouwer and Supreme Court Judge Valdete Daka as Panel members, and EULEX Legal Officer Elise Svenkerud Thoen as Recording Officer, in the criminal case number P. Nr. 346/2012 of the Basic Court of Peje/Pec against:

1. **N.M.,** father's name …, mother's maiden name .., born on ***** in the village ****, Municipality of *****, male, nationality Bosnian, Kosovo citizen, ID no ****, lawyer, previously ****, university degree with bar exam from Prishtine/Pristina, of poor economic status, married with 3 children, last residence in freedom in ***** no. *** in ***, Kosovo, convicted of the criminal offences of **Abuse of Official Position or Authority** pursuant to Article 422 (1) of the Criminal Code of Kosovo (CCK) (applicable pursuant to Article 3(2) of the CCK as the most favourable law) and **Abuse of Official Position or Authority** pursuant to Article 339 (1) of the CCK and sentenced to an aggravated punishment of three (3) years and six (6) months of imprisonment as well as the accessory punishment of prohibition from exercising any public administration or public service functions for a period of three (3) years after the term of imprisonment;

2. **R.Z.,** father's name ..., mother's maiden name..., born on ***** in *****, male, Kosovo Albanian, Kosovo citizen, General Director and Administrator of company *****, of average economic status, married with 2 children, last residence in freedom **** Street no. *** in ****, Kosovo, convicted of the criminal offences of **Trading in Influence** contrary to Article 345 (1) in conjunction with Article 23 of the Provisional Criminal Code of Kosovo (PCCK) and **Incitement to Abusing Official Position or Authority** pursuant to Article 442 (1) in conjunction with Articles 31 and 32 of the CCK (applicable pursuant to Article 3 (2) of the CCK as the most favourable law) and sentenced to an aggravated punishment of three (3) years and six (6) months imprisonment;

3. **X.Z.,** father's name **..,** mother's maiden name **…**, born on ****** in ********, male, Kospvo Albanian, Kosovo citizen, mechanical engineer, graduated from high school, of very poor economic status, married with 3 children, last residence in freedom **** Street no. *** in ****, Kosovo, convicted of the criminal offences of **Trading in Influence** contrary to Article 345 (1) in conjunction with Article 23 of the Provisional Criminal Code of Kosovo (PCCK) and **Incitement to Abusing Official Position or Authority** pursuant to Article 442 (1) in conjunction with Articles 31 and 32 of the CCK (applicable pursuant to Article 3 (2) of the CCK as the most favourable law) and sentenced to an aggravated punishment of three (3) years and six (6) months imprisonment;

acting upon **the Requests for Protection of Legality** filed by the defendant N.M. on 5 August 2014, filed by the defendant R.Z. on 18 August 2014, filed by the defendant X.Z. on 18 August 2014 and filed by defence counsel K.S. on behalf of X.Z. on 17 September 2014.

having considered the Response to the Requests filed by the Office of the State Prosecutor on 23 January 2015;

having deliberated and voted on 18 February 2015

pursuant to Articles 418 and Articles 432-441 of the Criminal Procedure Code (CPC) *renders the*

following

JUDGMENT

The Requests for Protection of Legality filed by defendant N. M. on 5 August 2014, defendant R.Z. on 18 August 2014, defendant X.Z. on 18 August 2014 and defence counsel K.S. on behalf of X.Z. on 17 September 2014 against Judgment dated 23 May 2013, in case number P no. 346/12 of the Basic Court of Peje/Pec, affirmed with Judgement dated 6 June 2014, in case number PAKR 413/13 of the Court of Appeals, are rejected as unfounded.

REASONING

1. Procedural background

1.1. On 31 July 2012 the EULEX District Prosecutor filed Indictment PPS. 114/2012 against the defendants, which was confirmed by the Confirmation Ruling KA 228/12 dated 17 September 2012, and amended on 4 December 2012. The main trial before the District Court of Peje/Pec commenced on 3 December 2012.

1.2. On 23 May 2013 the Basic Court of Peje/Pec rendered a Judgment in case no. P. 346/12 finding the defendant N.M. guilty of the criminal offences of Abusing Official Position or Authority in violation of Article 422 of the CCK, Abusing Official Position or Authority in violation of Article 399 paragraph 1 of the CCK, Unauthorized Possession of Weapons in violation of Article 374 paragraph 1 of the CCK, and sentenced him to an aggravated punishment of five years within 30 (thirty) days as well as to the accessory punishment of prohibition from exercising any public service or function for a period of three years after the term of imprisonment has been served. The defendants R.Z. and X.Z. were both found guilty of the criminal offences of Trading in Influence in violation of Articles 354 paragraph 1 in conjunction with Article 23 of the PCCK, Incitement to Abuse Official Position or Authority in violation of Article 422 paragraph 1 in conjunction with Article 31 and 32 of the CCK, and sentenced to an aggravated punishments of four years imprisonment and fines in the sum of 10,000 (ten thousand) Euros each to be paid within 30 (thirty) days. The Basic Court also confiscated assets from R.Z. and X.Z. and a weapon and bullets from N.M.

1.3. On 6 June 2013 the Court of Appeals rendered judgement in case PAKR 413/13 partially granting the appeals filed on behalf of the defendants. The First Instance Judgment was modified and the Court sentenced N.M. to an aggregated punishment of three years and six months of imprisonment as well as to the accessory punishment of prohibition from exercising any public administration or public service function for a period of three years after the term of imprisonment has been served; whereas the charge of Unauthorized Possession of Weapons, Article 374 paragraph 1 of the CCRK was dismissed pursuant to Articles 2.1 and 3.1.1.10 of the Law no. 04/L-209 on Amnesty. R. and X.Z. were both sentenced to and aggregated punishment of three years and six months of imprisonment. The confiscation of some of the items seized during the house search of R. and X.Z. was lifted. In all other aspects the appeals were rejected and the appealed judgement confirmed.

1.4. On 5 August 2014 the defendant N.M. filed a request for protection of legality against the judgment of the Court of Appeals which was supplemented on 16 October 2014. On 18 August 2014 both defendants R. and X.Z. filed requests for protection of legality against the judgments of the Basic Court of Peje/Pec and the Court of Appeals. The defence counsel of X.Z. filed request for protection of legality against the judgment of the Basic Court of Peje/Pec n 17 September 2014.

1.5. On 23 January 2015 the Office of the State Prosecutor filed a reply to the requests for protection of legality.

2. Submissions by the Parties

The requests for protection of legality filed by the defendant N.M.:

2.1. On 5 August 2014 (supplemented on 16 October 2014) the defendant N.M. filed a request for protection of legality against the judgment of the Court of Appeals on the grounds of violation of the criminal procedure and on the account of the decision of the criminal sanction. The defendant firstly claims that the trial panel was not properly formed as some of the panel members participated in pre-trial proceedings. Secondly, the defendant claims that the proceedings should have been conducted on the basis of the provisions in the Criminal Procedure Code of Kosovo of 1 January 2013 and not the old Criminal Procedure Code. Thirdly, the defendant claims that the testimony of the witness P.M. should have been declared inadmissible based on the violations of the provisions relating to the attribution of the status of cooperative witness. The defendant claims as a forth points that the judgment of the Court of Appeals extended the scope of the indictment thus violating the Criminal Procedure Code. Finally, the defendant claims that the punishment imposed by the Court of Appeals was too severe and that the Court failed to readjust the accessory punishment when modifying the judgment of the Basic Court.

The requests for protection of legality filed by the defendants R. and X.Z.:

2.2. On 18 August 2014 both defendants R. and X.Z. filed requests for protection of legality against the judgments of the Basic Court of Peje/Pec and the Court of Appeals on the ground of violations of the criminal procedure. The defendants claim that the trial panels in both the Basic Court and the Court of Appeals were not properly formed as some of the panel members participated in pre-trial proceedings.

The requests for protection of legality filed by the defence counsel of X.Z.

2.3. On 17 September 2014 the Defence Counsel of X.Z. filed a request for protection of legality against the judgment of the Basic Court of Peje/Pec on ground of violations of the criminal law. The Defence Counsel submits that the criminal law was violated because the defendant was convicted and not acquitted by the Court even though it was not proven that he committed the criminal actions he was accused of. On this basis the Defence Counsel refers to the principle in *dubio pro reo* and states that due to what he considers to be a doubtful factual situation. Court should have decided in favour of the defendant. The Defence Counsel also mentions the testimony given by the cooperative witness and suggests that there are significant contradictions in his testimony which makes it difficult for the Court to objectively and reasonably find the testimony credible. The Defence Counsel refers to Article 157 paragraph 4 of the PCPC which prescribes that the Court cannot find a person guilty solely on the basis of testimony given by the cooperative witness.

The Reply of the Office of the State Prosecutor

2.4. On 23 January 2015 the Office of the State Prosecutor filed a reply to the requests for protection of legality. The State Prosecutor submits that most of the claims raised in the submitted requests were already raised in previous stages of the criminal proceedings with respect to the judgment of the Basic Court of Peje/Pec and rejected as ungrounded. The State Prosecutor refers to the arguments of the previous opinion of the Appellate Prosecutor dated 13 November 2013 as an integral part of the reply.

2.5. In relation to the claim that the trial panel was not properly formed raised by all the defendants, the State Prosecutor refers to the judgment issued by the Court of Appeals in which the Court dealt with this claim in details and gave a clear account of the legal basis supporting the conclusion that no violation of the procedure has occurred. The State Prosecutor holds that he shares the findings of the Court and considers the claim of the defendants as unfounded.

2.6. In relation to the second claim raised by defendant M. that the criminal proceedings should have been conducted on the basis of the Criminal Procedure Code of 28 December 2012 (CPC), the State Prosecutor finds that this claim is without merit. He observes that the main trial commenced on 3 December 2012 while the old criminal procedure code (PCPC) was still in force and was therefore concluded based on the same Law pursuant to the legal opinion of the Supreme Court no. 56/2013 dated 23 January 2013. The State Prosecutor argues that although it is indisputable that judges are independent in exercising their functions and deciding on the applicable law, the Supreme Court is the highest judicial authority in Kosovo according to Law no. 3/L-199on Courts, and defines principles attitudes and legal remedies for issues that have importance for the unique application of laws by the courts in the territory of Kosovo.

2.7. In relation to the third claim raised by defendant M. that the testimony of witness P.M. should have been declared inadmissible because of the violation of the provisions relating to the attribution of the status of cooperative witness, the State Prosecutor finds this claim to be without merit and refers to the findings of the Court of Appeals who duly addressed these issues in its Judgment.

2.8. In relation to the fourth claim raised by defendant M. that the judgment issued by the Court of Appeals exceeded the scope of the charge, the State Prosecutor finds that the defendant failed to provide the grounds for this assertion, and finds the claim to be without merit. And finally, in regards to the fifth claim raised by defendant M., claim concerning the sentence imposed on him, the State Prosecutor finds the sentence to be adequate to the circumstances of the case and to the level of criminal liability.

3. The Competence of the Panel

3.1. Law No. 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo (hereinafter "*Omnibus Law'),* approved on 23 April 2014 and entered into force on 30 May 2014 *inter alia* modifying Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (hereinafter [4]*Law on Jurisdiction')* regulates the jurisdiction of EULEX Judges which is related to the competence of the Court.

3.2. The Panel unanimously decided that the Requests for Protection of Legality filed by the defendants and the Defence Counsel should be considered an "ongoing" case pursuant to Article l.A of the Omnibus Law, and thus EULEX judges have jurisdiction on the case.

4. Findings of the Panel

A. General findings

4.1. The Requests for Protection of Legality by the defendants and the Defense Counsel and the Response by the State Prosecutor are admissible and timely filed.

4.2. A large number of points were raised by the defendants and the Defence Counsel. However, the Supreme Court notes that most of the submissions are mere repetitions of the issues that were raised in the appeals against the First Instance Judgement which were carefully and thoroughly considered by the Court of Appeals. Defendants and Defense Counsel are reminded that Requests for Protection of Legality may be filed on the ground of a violation of the criminal law, on the ground of certain substantial violations of the provisions of the criminal procedure, or if there is any other violation of the provisions of the criminal procedure that has affected the lawfulness of the judicial decision. A Request may not be filed on the ground of erroneous or incomplete determination of the factual situation (Article 432 of the CPC). It is a widely spread unfortunate tendency among many Defense Counsels to try to use the Request for Protection of Legality as a second Appeal, which it is not supposed to be. The Supreme Court thus finds that any allegations made as to the ground of erroneous or incomplete determination of the factual situation, must be dismissed as inadmissible.

B. The matter of disqualification of judges

4.3. Several of the judges in the main trial in the Basic Court of Peje/Pec were previously involved in decisions concerning detention on remand. The defendants all argue that these judges should have been excluded from participating in the main trial according to Article 40 (2) of the CPC.

4.4 Article 40 (2) of the PCPC stipulates that *a judge shall be excluded [.. .]from the trial panel if in the same criminal case or in a case against the same defendant, he or she has participated*

in pre-trial proceedings, including in proceedings to confirm the indictment [...]. Article 40 (2) of the CPC refers to disqualification of judges under Article 39 which stipulates in paragraph 2 that *a judge shall be excluded as the single trial judge, presiding trial judge, a member of the trial panel, a member of the appellate panel or Supreme Court panel if he or she has participated in previous proceedings in the same criminal case [...]*

4.5. The Supreme Court notes that the members of the main trial panel in the Basic Court of Peje/Pec participated in the following cases:

- Judge Malcolm Simmons presided in a panel extending detention on remand (KP no. 57/12);

- Judge Darius Sielicki presided in a panel extending detention on remand (KP no. 50/12) as well as took part in a panel dealing with an appeal on expert analysis (PP no. 43/12); and

- Judge Elmaze Syka was a member of a panel extending detention on remand (KA no 228/12 PPS no. 114/12), as well as in a panel dismissing an appeal by the prosecutor where he requested that the defendants would not be allowed to receive visitors (KP no 68/12).

4.6. Furthermore, the members of the panel in the appellate proceedings in the Court of Appeals participated in the following cases:

- Judge Tore Thomassen presided in a panel extending detention on remand and was a member of a panel deciding on a prosecution appeal against a ruling replacing detention on remand with bail, accepting the appeal and modifying this Ruling by increasing the amount of bail (PK no. 186/2013). He was also a member of a panel deciding on a prosecution appeal against an order to return confiscated items to the defendants. The appeal was accepted and the ruling modified so the defendants were not returned the confiscated items ((PN/KR 62/2013). He also presided *jif* a panel deciding on an appeal against a ruling on extending detention on remand in the Supreme Court (Pn-Kr. No. 822/2012); and - Judge Tonka Berisha took part in a panel extending detention on remand and was a member of a panel deciding on a prosecution appeal against a ruling replacing detention on remand with bail, accepting the appeal and modifying this Ruling by increasing the amount of bail (PK no. 186/2013).

4.7. The question at hand is thus whether or not the judges in question "*participated in pretrial proceedings* " in accordance with article 40 (2) of the PCPC and the CPC due to their involvement in decisions concerning detention on remand etc. This issue is discussed at length in the Judgment issued by the Court of Appeals. The Court of Appeals refers to two judgements rendered by the Supreme Court of Kosovo in 2009 where the Court found that decisions on detention on remand are not considered participating in pre-trial proceedings in accordance with the Law. In the first case referred to[1], the Supreme Court stated that *"decisions on a particular activity on security matter which falls outside a specific phase of the proceedings* In the second case referred to[2] the Supreme Court stated that *"The said panel has taken case of security matters, thus evaluating on the conditions for detention on remand. [...] The concerned judge did not go into the merit of the case at all but evaluated only the conditions for detention on remand".* The Court of Appeals also referred to an ECHR case "Hauschildt vs Denmark" where the Court concluded that in a system like the Danish (which was the relevant one in the case at hand) it cannot be made that the fact that a judge has taken part in a pre-trial decision on detention on remand in itself justifies fears of impartiality under Article 6 of the European Convention on Human Rights.

4.8. Based on the abovementioned, the Supreme Court finds that the provision in Article 40 (2) of the PCPC does not in general exclude judges who took part in decisions concerning detention on remand. However, on the basis of the defendants' right under Article 6 paragraph 1 of the ECHR *to a fair [...] hearing by an [...] impartial tribunal*, the Supreme Court must determine if there are any subjective aspects indicating that the judges in the case at hand, through their earlier involvement in the case, have formed an opinion as to the whether or not the defendants are guilty of the suspected criminal offences. In addition, the Court must assess if there are any objective aspects that indicate that the judges should be excluded due to their earlier involvement in the case[3].

4.9. The Supreme Court has carefully considered all the aforementioned procedural decisions (related to extension of restrictive measures and alike) in which the judges participated prior

[1] Ap-Kz no 371/2008 dated 10 April 2009
[2] Pkl-Kzz 71/09 dated 10 November 2009
[3] According to the European Court on Human Rights the4mpartiality of a tribunal must be assessed by means of a subjective test, which consist in seeking to,-determine the personal conviction of a particular judge in a given case, and by means of an objective test, which consists in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubts in this respect (cf. *Padovani* v. *Italy*, p 20 para 25 and *Tierce and others v. San Marino*, p 12 para 75. /

to the main hearing, and found no indication that they had formed any opinion as to the merits of the case *i.e.* whether or not the defendants were guilty in committing the crimes at hand. Furthermore, the Supreme Court finds no objective reason why the judges' involvement in the above mentioned decisions should disqualify them. Unless there is a reason to believe that judges were already prejudiced, for which there are no indications whatsoever, their impartiality should be considered unchallenged as is the case. On this basis, the Supreme Court finds that the allegation that the aforementioned judges should have been excluded is without merit.

C. The application of the Provisional Criminal Procedure Code

4.10. The defendant N. M. holds that the proceedings should have been conducted on the basis of the provisions in the Criminal Procedure Code of 13 December 2012 and not the Provisional Criminal Procedure Code of 6 July 2003.

4.11. Chapter XXXVIII of the Criminal Procedure Code of Kosovo of 13 December 2012 which entered into force on 1 January 2013 includes the transitional provisions of the Law. According to the Supreme Court, as explicitly stated in its Legal Opinion no. 56/2013 2013 (General Session of the Supreme Court on 23 January 2013) these transitional provisions are to be interpreted so that criminal proceedings initiated prior to the entry into force of this law, for which the main trail has commenced, but not completed, the provisions of the Provisional Criminal Procedure Code apply *mutis mutandis* until the decision becomes final.

4.12. This Panel of the Supreme Court concurs with this stance and on this basis finds that the criminal proceedings have been conducted in accordance with the correct procedural law.

D. The cooperative witness

4.13. The defendant M. claims that the testimony of the cooperative witness, P.M., should have been declared inadmissible because of the violation of the provisions relating to the attribution of the status of cooperative witness.

4.14. First, the Supreme Court notes that the same allegation was raised in the appeal against the First Instance Judgment and the Supreme Court fully concurs with the assessment of the Court of Appeals in regards to this issue. As stated by the Court of Appeals (under the heading "Use of inadmissible evidence" paragraph 1 of the Judgment). Article 298 of the PCPC provides that the status as a cooperative witness can be given to a suspect or to a defendant with respect to whom the indictment has not yet been read at the main trial. Although the law provides a specific definition as to what qualifies as a "suspect" the law does not prescribe the need of any formal procedure in order to give someone this status. According to Article 151 (1) of the PCPC a suspect is a *"person whom the police or the authorities of the criminal prosecution have a reasonable suspicion of having committed a criminal offence, but against whom criminal proceedings have not been initiated* P. M/ contacted the police himself and admitted that he had paid a prosecutor to terminate investigations against him. It is therefore clear that he already at that moment became a suspect of being involved in the criminal activities under investigation. Consequently, P.M. fulfils the requirements of a "suspect" as prescribed in the law.

4.15. Furthermore, as pointed out by the Court of Appeals, even if the status of a cooperative witness had been wrongly attributed to P.M., his testimony could not have been challenged as inadmissible because there is no provision in the law expressly prescribing that consequence.

4.16. Based on the above, the Supreme Court finds that the allegation that the testimony of the cooperative witness should have been declared inadmissible because of the violation of the provisions relating to the attribution of the status of cooperative witness is ungrounded.

4.17. In regards to the cooperative witness, the Defence Counsel of X.Z. refers to Article 157 paragraph 4 of the PCPC which provides that the Court cannot find a person guilty solely on the basis of testimony given by the cooperative witness. He suggests that there are significant contradictions in the testimony of the P.M. which makes it difficult for the Court to objectively and reasonable find the testimony credible.

4.18. The Supreme Court points out that Article 157 paragraph 4 of the PCPC does not set any further rules to specify what kind of other corroborative evidence is required, or for which elements or facts related to the criminal offence. Thus, the Supreme Court considers that this question, whether there is sufficient corroborative evidence presented, has to be assessed in each case separately. When doing this the trial court has to take into consideration all the evidence presented in the case and the reliability of that evidence.

4.19. The Basic Court has in an extensive manner studied the credibility of the cooperative witness and found his testimony trustworthy, credible and plausible. The testimony of the cooperative witness is supported by the statements of several other witnesses. The Defence Counsel refers to significant contradictions in the testimony of P.M., but fails to describe what these alleged contradictions are. The Supreme Court thus concludes that the challenges on this ground are without merit and there is no violation of Article 157 paragraph 4 of the PCPC.

E. *In dubio pro reo*

4.20. The Defence Counsel of X.Z. refers to the principle in *dubio pro reo* and states that due to what he considers to be a doubtful factual Situation, the Court should have decided in favour of the defendant,

4.21. The Supreme Court notes that the PCPC Article 3 paragraph 2, prescribes that "*doubts regarding the existence of facts relevant to the case or doubts regarding the implementation of a certain criminal law provision shall be interpreted in favour of the defendant and his or her rights under the present Code [...]".*

4.22. It is a common practice amongst Defense Counsels to invoke the principle of *in dubio pro reo.* It is frequently argued that where the evidence of one witness is in contradiction with that of another witness as to fact, then doubt exists, and therefore applying the principle *in dubio pro reo* the version of facts in the defendants' favour must be found, leading to acquittal. The Supreme Court notes that this is a misunderstanding of the principle.

4.23. The principle means that where there is doubt as to the defendant's **guilt,** this must be resolved in the defendant's favour. A defendant may not be convicted by the Court when doubts about his or her guilt remain. This does not constrain a Trial Panel, as the trier of fact, from assessing conflicting evidence and concluding that they do not have doubts as to their findings.

4.24. The essential content of the principle *in dubio pro reo* can be illustrated by the decision on appeal at the ICTY[4] in the case of *Prosecutor v. F.L, H.B. and I.M* The Appeal Chamber considered that the principle of *in dubio pro reo,* as a corollary to the presumption of innocence and the burden of proof beyond reasonable doubt, applies to findings required for conviction, such as those which make up the elements of the crime charged. The principle is essentially just one aspect of the requirement that guilt must be found beyond reasonable doubt. Further, the principle of *in dubio pro reo* is not applied to individual pieces of evidence and findings of fact on which the judgment does not rely.[6]

4.25. The Defence Counsel merely refers to the lack of evidence against his client XH.XH, and what he considers to be a factual doubtful situation, but fails to substantiate this allegation any further. The Supreme Court is satisfied that there has been no violation of the principle of *in dubio pro reo.*

F. The allegation that the Judgment exceeds the scope of the indictment

4.26. The defendant N.M. claims that the judgment of the Court of Appeals extended the scope of the indictment, thus violating the CPC.

4.27. This allegation was also raised by the Defence Counsel of N.M. in the appeal against the First Instance Judgement and is thoroughly addressed by the Court of Appeals under the heading "Judgement exceeded the scope of the charge (Article 403 (1) (10) of the

[4] International Tribunal for the Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
[5] *Prosecutor v F.L., H.B., I.M.* IT-03-66-A, Judgment, 27 September 2007
[6] See page 11 of the judgment IT-0/-66-A. •

CPC)". The Supreme Court fully concurs with the findings of the Court of Appeals and refers to its Judgement in full in regards to this matter. The Supreme Court notes that, as pointed out by the State Prosecutor, the defendant merely states in his request that "*one can see clearly that the judgment surpasses the description of the facts that the [...] indictment contains [...]"* without giving any concrete reasoning as to the basis of his allegation. The Judgement neither exceeds the factual situation of the charged offences, nor does it contain legal qualifications of these offences, given by the prosecutor and not adequately addressed by the lower level courts. In addition, as noted by the Court of Appeals, imposition of accessory punishment is an intrinsic element of the sentencing. On this basis, the Supreme Court finds that the claim be rejected as ungrounded.

G. The allegation that the imposed Punishment is too severe

4.28. The defendant M. finally claims that the imposed punishment is too severe.

4.29. The majority of the Panel of the Supreme Court[7] finds that due to the limitations of the grounds on which one can file a request for protection of legality as prescribed in Article 432 of the PCPC, a decision on punishment may be challenged in a request for protection of legality only if the court upon rendering its decision has exceeded its legal competencies which would constitute a violation of the criminal law. It is clear that this is not the issue in the case at hand. The majority of the Panel therefore finds that this allegation be dismissed as inadmissible.

H. Conclusion

4.30. The requests must be rejected.

Done in English, an authorised language.

Presiding Judge	**Recording Officer**
Elka Filcheva-Ermenkova	Elise Svenkerud Thoen
EULEX Judge	EULEX Legal Officer

7.The dissenting opinion of Presiding Judge Elka Filcheva-Ermenkova on this issue is attached to this Ruling.

I.

Panel members

Willem Brouwer	\	Yaldete Daka
EULEX Judge	' ^	Supreme Court Judge

Descending opinion of the reporting judge Elka Filcheva-Ermenkova with regard the issue whether or not the punishment imposed could be altered in the procedure of protection of legality:

I disagree with the majority of the Panel, that the imposed punishment cannot be addressed in the procedure of request for Protection of Legality.

According to art. 432 (1.1) of CPCK the request for protection of legality against a final decision can be filed on the ground of a violation of the criminal law {art. 432 (1.1)}; on the ground of substantial violation of the provisions of the criminal procedure provided for in art. 384, paragraph 1 of the CPCK {(art. 432 (1.2) ibid} and on the ground of another violation of the provisions of the criminal procedure if such violation affected the lawfulness of a judicial decision {(art. 432 (1.3) ibid}.

With regard to the possible procedural violations evocable in the procedure of protection of legality the law refers to the list provided for the appeals procedure under art. 384(1) *ibid.*

With regard the possible violations of the material law the procedural code does not refer strictly to art. 385 *ibid*, applicable to the procedure of appeal. Thus merely the grammatical interpretation of the procedural law supports the opinion that not only violations of the material criminal law, as listed under art. 385 *ibid* may give ground for filing a request for protection of legality, but also violations of the material criminal law, not explicitly listed there. Whenever the court fails to determine the punishment correctly, without exceeding its authority under the law {which is a specific hypothesis under art. 385 (1.5)} the court violates the material criminal law. Thus no impediment for the Supreme Court in the current procedure to address the determination of the punishment should it be necessary. Another argument in favour of this stance is the fact that the law maker when defining the jurisdiction of the Supreme Court in the procedure of protection of legality explicitly excluded the possibility for the SC to review the facts as established by the lower level courts {(art. 432 (2) ibid} but the lawmaker did not explicitly exclude the revision of the imposed punishment, which by all means is a matter of proper application of the material criminal law, as already noted. However, in the concrete case at hand no such misapplication was observed therefore the differences in the opinions would not have led to a different result.

Elka Filcheva-Ermenkova /

EULEX Judge