

BASIC COURT OF PRIZREN

P.n. 300/13

17th April 2014

The judgments published may not be final and may be subject to an appeal according to the applicable law.

In the Name of the People

The Basic Court in Prizren, in a trial panel comprised of:

EULEX Judge Anna Adamska-Gallant, as the Presiding Trial Judge,

EULEX Judge Piotr Bojarczuk and Kosovo Judge Teuta Krusha as panel members,

with the court recorder Tarik Mripa,

in the criminal case against:

Sh. K.,

N. M.,

M. S.,

A. R.,

charged with the indictment filed by the Special Prosecution Office of Kosovo (“SPRK”) dated 07 August 2009 against the first three defendants and the indictment filed by the SPRK dated 30 September 2009 against A. R., the indictments joined on 20 October 2009, and amended by the SPRK on 24 March 2014, with the following criminal offences:

- 1) Against Sh. K., N. M., M. S. and A. R.: the accused persons, as a well - organized group acting in co-perpetration and with the intention to gain an unlawful material benefit for themselves, without authorization have dealt with the transportation of narcotics with the intention to sell them. The accused Sh. K., following a phone agreement dated 9 February 2009 with person named M. N. on the date of 10 February 2009 with the defendant A. R. at Ben Af trade shopping center in S. R. took two bags of narcotic substances, of heroin type from NN person

and they placed this amount of drugs in the trunk of the vehicle, Mercedes ML, bearing number plates X KS X, which is the property of the defendant Sh. K. and subsequently transported the narcotics to P.. Another defendant M. S. through a telephone number provided to him by M. N., invited the defendant Sh. K. to P. and the defendants M. S. and N. M. met with him at the R. hotel which is located on the P. – F. road in the village of Q. for discussion of the sale of narcotic substances. They came into contact with two NN persons to discuss about the sale of narcotic drugs. On 13 February 2009, around 15.00, in vicinity of the Ben Af in P., two NN persons came into contact with the defendants M. S. and Sh. K., allegedly interested to buy the narcotics, they went together to the above-mentioned vehicle, a Mercedes ML. After they saw the narcotics, they moved away from the vehicle and called both defendants in question to give them the money, whereas during that time, the two other defendants, N. M. and A. R., who were watching out the area to prevent from being spotted or arrested by the police. At that moment, support police unit intervened and arrested the defendants Sh. K., N. M. and M. S., whereas from the vehicle Mercedes ML, the police seized the narcotic substance of heroin mixed with paracetamol and caffeine, weighting 13.882 kg.

This criminal action was classified as unauthorised purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substances, contrary to article 229, par. 4 item 1 of CCK and punishable by a fine and imprisonment between three and fifteen years.

- 2) Against N. M.: at a search of the house of the defendant N. M. on 13 February 2009, it was found a pistol model Crvena Zastava, caliber M-57, 7.62 mmX25 mm with serial number X, with a magazine containing 8 bullets, without a valid authorization.

This criminal action was classified as unauthorised ownership, control or use of weapons in violation of Article 328 (2) of the CCK punishable by a fine of up to 7.500 Euros or by imprisonment of one to eight years.

Having held the main trial hearings open to the public on the 12, 17, 18, 19 December 2013, 24, 29 January, 10, 24, 27 March and 15 April 2014 in the presence of:

- the SPRK Prosecutor Rexhat Millaku,
- the accused Sh. K. and his defense counsel B. T.,
- the accused N. M. and his defense counsels K. K. and H. S.,

- the accused M. S. and his defense counsel H. K.,
- the accused A. R. and his defense counsel H. C.,

having deliberated and voted on the 15th April 2014, pursuant to Article 471 paragraph 1 of the Criminal Procedure Code (hereinafter “ the CPC”), on the 17th April 2014 pronounces in public the following:

VERDICT

- 1) A. R., N. M. and M. S. are found not guilty of the criminal offence of unauthorised purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substances, contrary to article 229, par. 4 of CCK for which they have been charged, because it has not been proven that because it has not been proven that they had committed this act with which they have been charged;
- 2) Sh. K. is found guilty of the criminal offence of unauthorised possession of dangerous narcotic drugs and psychotropic substances, contrary to article 229, par. 1 of CCK because it has been proven that on the 13th February 2009, at around 15.00 in the parking lot of the Ben Af shopping Center in P. he possessed with intent to sell or distribute narcotic drugs in the form of 13.882 kg of heroin which was inside his vehicle Mercedes ML with plate numbers X KS X,

therefore:

Sh. K. is hereby sentenced pursuant to Article 229 par. 1 of CCK for this criminal offence to 3 (three) years imprisonment and a fine in the amount of 5000 (five thousand) Euro,

pursuant to Article 36 Paragraph 2 of the CCK the deadline for payment of the fine by Sh. K. is hereby determined as 1 (one) month;

pursuant to Article 73 Paragraph (1) and (3) of CCK the time already served by Sh. K. in detention from 13 February 2009 until 13 February 2012 is included in the punishment of imprisonment and the time from 14 February 2012 until 21 February 2012 is included in the punishment of fine (equal to 120 Euro);

pursuant to Article 229, par.5 of CCK the 13.882 kg of heroin is confiscated;

- 3) The charge of unauthorised ownership, control or use of weapons in violation of Article 328 (2) of CCK against N. M. is rejected pursuant to Article 389, par. 4 of the KCCP as the Law on Amnesty N.04/L-209) covers this act at the time indicated in the indictment;
- 4) Pursuant to Article 489, par. 1 of the KCCP the pistol model Crvena Zastava, caliber M-57, 7.62mm X 25mm with a serial number C211115, with a magazine containing 8 bullets, is confiscated.
- 5) Pursuant to Article 451 paragraph 4 of the KCCP the cost of the criminal proceedings shall be partially reimbursed by the accused Sh. K. in the lump sum of 1000 (one thousand) Euro.
- 6) The remaining costs of the criminal proceedings shall be paid from the budgetary resources.

REASONING

Procedural Background

The indictment

- 1) On 7 August 2009, the SPRK filed the Indictment PPS 03/09 which was amended through the confirmation ruling dated 24 September 2009 against the defendants Sh. K., N. M. and M. S. charged with *Unauthorised purchase, possession, distribution and sale of dangerous Narcotic drugs and psychotropic substances* (article 229, par. 4 item 1 of CCK), punishable by a fine and by imprisonment of three to fifteen years. In addition, N. M. was charged with *unauthorised ownership, control, possession or use of weapons* (article 328 par.2 of CCK), punishable by a fine of up to 7.500 euros or by imprisonment of one to eight years.
- 2) On 30 September 2009, the SPRK filed an indictment against A.R., charged with *Unauthorised purchase, possession, distribution and sale of dangerous Narcotic drugs and psychotropic substances* (article 229, par. 4 item 1 of CCK).
- 3) On 30 October 2009, pursuant to Article 33 of the KCCP, the Court ordered that the two indictments be joined and the defendants tried jointly.

- 4) The first main trial against the defendants commenced on 20 October 2009 and the then District Court of Prizren announced the judgment on 09 February 2010 finding all four defendants guilty of the charged criminal offences and convicted them as follows: Sh. K. to 8 years of imprisonment and a fine of 5000 Euros, N. M. to 8 years and 3 months of imprisonment and a fine of 5000 Euros, M. S. to 6 years of imprisonment and a fine of 5000 Euros and A. R. to 8 years of imprisonment and a fine of 5000 Euros.
- 5) Acting upon the Defence appeals against this Judgment, the Supreme Court of Kosovo rendered a ruling dated 26 July 2011 accepting the appeals, annulled the Judgment dated 09 February 2010 and returned the case for re-trial to the first instance court.
- 6) The second main trial started on 20 February 2012. On 23 May 2012, the court decided to reject all charges on the basis that prosecution is barred pursuant to Art. 389, par.4 of KCCP. Defendants had already been released from detention since 21 February 2012.
- 7) On 28 May 2013, the Court of Appeals rendered a ruling granting the appeal dated 0 July 2012 filed by the Prosecutor on 06 July 2012 and annulled the Judgment of the then District Court of Prizren dated 23 May 2012 and sent the case back for re-trial as it established substantial violation of the criminal procedure, incomplete determination of the factual situation and violation of the criminal law. The Court of Appeal further directed that the Basic Court should address the issue of the admissibility of evidence obtained in the case in light of the information obtained in the report dated 19 March 2012 and should conduct the main trial according to the law. In addition, the Trial Panel should establish prior the commencement of the main trial whether any of the accused requires interpretation into Turkish language.
- 8) The main trial against the four accused commenced on 12 December 2013. All the accused pleaded not guilty. During the main trial all defendants except of A. R. decided to remain silent.
- 9) On 20 March 2014, the prosecutor filed an amendment to the indictment adding description of the incriminating activities in the enacting clause of the indictment.

Applicable Procedural Law

- 10) As in course of the criminal proceedings against the accused the procedural law was subject to fundamental changes, it is necessary to outline the applicable law as a preliminary matter before entering into the merits of the case.
- 11) With the new Criminal Procedure Code (further “CPC”), Law 04/L-123 of 2012 in force since the 1st January 2013, the procedure law has fundamentally changed. Whereas under the Provisional UNMIK Criminal Procedure Code 2004 (further “PCPC”) the procedure was rather continental law oriented, the new code introduced more adversarial proceeding. For the case in hand the essential questions regarding applicable law are whether the proceedings before the Court will be governed by the CPC or by the PCPC. It is also crucial to determine which provisions should be applied by the Court to assess the admissibility of the evidence obtained during the investigation conducted under the previous Code. To answer these questions it is necessary to refer to the transitional provisions contained in the Chapter XXXVIII of the CPC.

12) The Article 544 of the CPC reads as follows:

“After the entry into force of the present Code, if on the occasion of an appeal or an extraordinary legal remedy the judgment is annulled, the main trial shall be conducted *mutatis mutandis* under the previous case.”

13) In the present case the indictments against all the accused was filed in 2009, a time when the PCPC was applicable. The first two judgments issued in this case had been annulled by the Court of Appeal and the case had been sent back to the first instance court for retrial. In accordance with the provision quoted above the main trial in this case was conducted in accordance with the previous code.

Competence of the Court and Panel Composition:

- 14) In accordance with Article 11 (1) of *the Law on Courts (Law No. 03/L-199)* the Basic Court is competent to adjudicate in the first instance all cases, except otherwise foreseen by Law.
- 15) The criminal offences, according to the Indictment, were committed in the town of Prizren which is in the territory of the Basic Court of Prizren. Therefore, in accordance with Article 27 (1) of the PCPC, this court has territorial jurisdiction to adjudicate the case.

16) No issue was raised by the parties regarding the composition of the trial-panel.

Competence of the Prosecutor to amend the Indictment

17) During the main trial session held on the 27th March 2014 the SPRK Prosecutor filed an amended indictment against all the accused in which he contained one enacting clause against all of them with regard to the criminal offence of possession and distribution of drugs and narcotic substance. In accordance with the amendment, Sh. K., M. S., A. R. and N. M. were charged with the criminal offences as mentioned in the enacting clause of the judgment.

18) On the request of the Presiding Trial Judge, the Prosecutor explained that the legal ground to amend the indictment is Article 376 (1) of the PCPC, which stipulates:

“if the prosecutor finds in the course of the main trial that the evidence presented indicates that the factual situation as described in the indictment has changes, he or she may modify the indictment orally during the main trial and may also make motion to recess the main trial on order to prepare a new indictment.”

19) The Defence, in accordance with Article 376 (3) of the PCPC was given the opportunity to make a motion to recess the main trial in order to prepare the defense. None of them requested the recession of the proceedings.

20) The Defence of A. R. during the session presented their stance on this issue. In their opinion the Prosecutor was not allowed to amend the indictment as it was based on the evidence which was not admissible.

21) The Trial Panel avers that the Prosecutor was authorized to amend the indictment at this stage of the proceedings, pursuant to the relevant provision of the Criminal Procedure Code mentioned above.

Main Trial

22) The main trial was held in public on 12, 17, 18, 19 December 2013, 24, 29 January 2014, 10, 24, 27 March 2014 and 15 April 2014 in the presence of the SPRK Prosecutor Rexhat Millaku, the accused Sh. K. and his defense counsel B. T., the accused N. M. and his

defense counsels K. K. and H. S., the accused M. S. and his defense counsel H. K. and the accused A. R. and his defense counsel H. C.

23) In accordance with the law international interpreters translated the court proceedings and all court documents relevant to the trial from English into Albanian and vice-versa. The Turkish translation was also provided for the accused Sh. K. and N. M.

Factual findings

24) During at least 10 days before the 13th February 2009, officers from the Special Department for Drug Crimes of the Police Office in Prishtina were conducting a cover operation of simulated purchase of drugs¹. This cover measure was not authorized through a pre – trial judge’s order.

25) On the 13th February 2009, in the morning, the Police in Prishtina obtained intelligence information that there would be an attempt to sell drugs which would take place in Prizren, in the area of the Ben Af Shopping Center. Police officers engaged in the operation were informed about the brands of the vehicles that would be used by alleged perpetrators, among of them there were Mercedes ML, Golf V and Audi A3. At this stage of the action they did not obtain any details regarding to the persons who were suspected to offer drugs.²

26) The members of a special unit responsible for fighting with drugs, of surveillance and supportive units arrived to Prizren, Ben Af parking about 12.00. They were located in different places in this area and were observing the vehicles coming there. For communication among themselves, police officers were using radio and mobile phones. A. O. was responsible for this operation.³

27) About 14.00 Audi A3 and black Mercedes ML were noticed arriving to Ben Af, which corresponded with the description given to the police officers in the morning. Audi A3 parked inside the parking, while Mercedes ML in the street, next to the entrance. After

¹ Testimonies of the witness 25, minutes of 29 January 2014, p. 4 – 25; testimonies of A. O., minutes of 10 March 2014, p. 3 - 13

² Testimonies of F. R., minutes of 12 December 2013, p. 10 – 23; testimonies of a witness 0110, minutes of 17 December 2013, p. 2 – 22;

³ Testimonies of F. R., minutes of 12 December 2013, p. 10 – 23; testimonies of A. O., minutes of December 2013, p. 25 – 41; testimonies of the witness 0110, minutes of 17 December 2013, p. 2 – 22; testimonies of the witness 1811, minutes of 17 December 2013, p. 23 - 35; testimonies of the witness 2002, minutes of 24 January 2014, p. 3 – 11;

some time Golf V arrived which parked behind the Mercedes. Afterwards, it occurred that Sh. K. was a driver of Mercedes, and N. M. was a driver of Golf.⁴

28) N. M. left his vehicle and got into Mercedes where he was staying for some time, talking with Sh. K.. Later he left it and went to a shop with woodwork.⁵ There he was talking with its owner F. M. about parquet he wanted to buy.⁶

29) About 15.00 two covert agents (including the witness 25) met with Sh. K. who was a driver of Mercedes ML. During the further part of conversation which took place inside this vehicle between Sh. K. and the witness 25, the latter was informed that K. brought with him about 14 kg of heroine. K. showed the bag with it to the agent who tested whether it was the substance as declared by the accused. When he confirmed the character of it, the witness 25 and Sh. K. left the Mercedes and went toward the vehicle used by the agents where the transaction was to be finalized. On the way the witness 25 gave a signal to police officers from the supportive unit to arrest Sh. K. and other alleged co – perpetrators of sale of drug.⁷

30) The police during the operation conducted at Ben Af Parking in Prizren arrested Sh. K. and few other men, including N. M., M. S. and A. R.. All of them were taken to the police station where they were interrogated with regard to alleged participation in possession, purchase and distribution of drugs and other narcotic substance.⁸

31) The substance seized in the vehicle belonging to Sh. K. was examined by experts. They found that it weighted 13.882 kg and consisted of at least 50 % of heroin.⁹

32) On the same day, after the operation at Ben Af parking had been concluded, the police conducted a search of the house belonging to N. M.. As a result of it a pistol Crvena Zastava caliber M-57, 7.62 mm X 25 mm with serial number C211115, with a magazine

⁴ Testimonies of F. R., minutes of 12 December 2013, p. 10 – 23; testimonies of A. O., minutes of December 2013, p. 25 – 41; testimonies of the witness 0110, minutes of 17 December 2013, p. 2 – 22; testimonies of the witness 2002, minutes of 24 January 2014, p. 3 – 11;

⁵ Testimonies of F. R., minutes of 12 December 2013 , p. 10 - 23

⁶ Testimonies of F. M., minutes of 18 December 2013, p. 2 - 16

⁷ Testimonies of the witness 25, minutes of 29 January 2014, p. 4 - 25

⁸ Testimonies of F. R., minutes of 12 December 2013, p. 10 – 23; testimonies of A. O., minutes of December 2013, p. 25 – 41; testimonies of F. M., minutes of 18 December 2013, p. 2 - 16

⁹ Opinion of the expert S. D., minutes of 19th December 2013, p. 2 – 10; Toxicological report no 2009/0408 dated 27 April 2009; Supplemental report dated 26 October 2009

containing 8 bullets was found which belonged to N. M.. He did not possess a valid authorization for possession of this equipment.¹⁰

Evaluation of evidence

General remarks

- 33) The Trial Panel finds it necessary to underline that most of the evidence against the accused on which the Prosecutor based the indictment was collected as a result of a covert measure conducted by the Police. These operational activities had been taken before an investigation was formally initiated and they consisted of a secret operation including simulated purchase of items. As it results from the information obtained during the main trial, there was a provocation on the side of secret agents acting in this case.
- 34) Operations of this kind may be applied only exceptionally, when circumstances strictly stipulated by the law occur. The necessary prerequisite to base a judgment on the evidence obtained through such actions is adherence to all legal requirements by police officers and a prosecutor conducting this operation. All activities must be performed in accordance with the law, and a court is obliged to assess rigorously and thoroughly their legality and admissibility of the evidence obtained through them. Such approach prevents police and other state authorities from abuse of power in relations with an individual and is a necessary element of the rule of law and the right to a fair trial.
- 35) As a principle at the stage when the covert measure is applied before the investigation is initiated, the access of a court to materials obtained through it is quite limited. It means that the full assessment of this step of police activity may be done only when the indictment is filed. In this moment a court shall examine whether the evidence was obtained in accordance with the rules prescribed in the criminal procedure code, therefore legally, or it was an illegal operation. The evidence obtained without meeting strict legal requirements must be treated as obtained illegally and therefore inadmissible.
- 36) Covert measures *per se* drastically interfere in the constitutional right to privacy, freedom and secrecy of communication and stay in conflict with the constitutional guarantee of

¹⁰ Attestation of temporary item confiscation dated 13 February 2009; Eight photos taken on 13 February 2009 of the items seized at N. M. house

court protection of human rights. Therefore using of them by state authorities requires professionalism and rigorous approach to legal requirements.

Assessment of the evidence in the present case

- 37) The Trial Panel must emphasize that the evidentiary proceedings in the present case show many violations of procedural law which occurred during the investigation and before it was formally initiated. Additionally, there was a visible lack of cooperation between the prosecutor and police officers participating in the criminal proceedings what had definitely negative impact on its results.
- 38) There is no doubt that before the 13th February 2009 a covert operation was conducted which was aimed on finding persons engaged in distribution of drugs. The police officers undertook an action of a simulated purchase of drugs. This fact is supported by the evidence administered during the main trial, particularly testimonies of the witness A. O. and the witness 25.
- 39) The Prosecutor was not able to present in the court orders issued by a pre – trial judge which would authorize the police to conduct this kind of operation. The only document with regard to activities of the police before the 13th February 2009 was obtained during the main trial from the witness A. O.¹¹ It is an order of the prosecutor, dated the 12th February 2009, through which interception of telecommunication was authorized against N. M.. From this document it is not clear in which criminal proceedings it was issued, as the order refers to a previous ruling on covert measures which were extended.
- 40) The Trial Panel does not agree with the Prosecutor that in this specific situation the court order was not necessary and the police officers were authorized to conduct operation against persons allegedly engaged in distribution of drugs and narcotic substance.
- 41) The term “a simulated purchase of an item” is defined in Article 256 (7) of the PCPC, in accordance to which such cover measure means an act of buying from a person suspected of having committed a criminal offence an item which may serve as evidence in criminal proceedings. In accordance with Article 258 (2.8) of the PCPC a simulated purchase requires an order of a pre-trial judge issued on the basis of an application by a public

¹¹ Filed with the court on the 12th March 2014

prosecutor. As results from Article 257 (3.1.i) of the PCPC (relevant in this case) a simulated purchase may be ordered against a particular person if there is a grounded suspicion that such person has committed or, in cases in which attempt is punishable, has attempted to commit a criminal offence punishable by imprisonment of at least four years. Additionally, pursuant to Article (3.2) of the PCPC the information that could be obtained by the measure to be ordered must be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to other.

- 42) The Prosecutor stood on the position that the definition of a simulated purchase refers only to the very moment of buying, which in his opinion should be restricted to the act of exchange goods for money. In the present case this had not occurred as the purchase had not been fulfilled because the exchange had not been concluded. Therefore, the Prosecutor avers that the court order was not required by the law.
- 43) The Trial Panel does not agree with such interpretation of this covert measure. The term “simulated purchase” embraces all actions taken by police investigators directly in purpose to buy an item, that is exchange money for goods with the aim of obtaining property. This moment is usually preceded by getting in touch with potential sellers (of drugs in this case), negotiations of price, amount, quantity and quality of items to be delivered.
- 44) The analysis of the evidence administered during the main trial leads to conclusion that for at least 10 days before the events which took place in Ben Af parking place in Prizren the covert operation of a simulated purchase of drugs had been conducted. Covert agents had met few times with potential suppliers of the narcotic substance, they had been negotiating with them terms of the purchase (quantity, quality and price), they had obtained financial measure from operational sources to conclude the transaction and they had agreed as to the date and place of the exchange. On the settled day of the purchase, other police units were informed about the operation and were engaged into it. The meeting with the supplier of drugs (Sh. K.) occurred, who presented the narcotics. In this moment the operation was broken off and the alleged perpetrators of sale of drugs were arrested.
- 45) As it was already mentioned above, this simulated purchase had been conducted before the investigation against the accused in this case was formally initiated. Furthermore, the Prosecutor did not obtain the court order for this operation. For that reason, in accordance

with Article 264 (1) of the PCPC, as interpreted *a minori ad maius*, the evidence acquired by a measure of a simulated purchase is inadmissible.

- 46) The relevance of testimonies of the witnesses examined during the main trial (A. O., F. R., witnesses 0110, 25, 2002 and 1811) is therefore limited only to establishing that the accused Sh. K. on the 13th February 2009 possessed narcotic substance. These pieces of evidence cannot be used against the accused to establish their alleged involvement in distribution or sale of drugs before that date because the witnesses were describing actions which in opinion of the Trial Panel were illegal.
- 47) Additionally, the Trial Panel opines that it was necessary to examine in a capacity of witnesses police officers participating in the operation before the critical day because it was crucial to find out what kind of operation had been conducted against the accused. This obligation also results from the judgment of the Court of Appeals, dated 28 May 2013.
- 48) During the operation which took place on the 13th February 2009 at Ben Af parking in Prizren police officers were conducting covert photographic and video surveillance in public place. They were monitoring, observing and recording persons allegedly engaged in the distribution of drugs, by means of photographic and video devices, without their knowledge or consent.
- 49) The police officers at the time of this operation did not have the prosecutor's written order for a measure of covert photographic and video surveillance in public places. It was only issued by him retroactively, on the 15th February 2009.
- 50) The Trial Panel finds that this order did not need to be confirmed by a pre-trial judge as pursuant to Article 258, par.1 of the PCPC the measure of covert photographic and video surveillance in public places was under the sole competence and authority of the Public Prosecutor. However, pursuant to Article 259 of the PCPC, an order for a covert measure must be in writing and shall specify:
 - the name and address of the subject or subjects of the order,
 - the nature of the measure,
 - the grounds of the order,
 - the period within which the order shall have effect, which shall not exceed 60 days from the date of the issuance of the order,

- the agency of the judicial police authorized to implement the measure and the officer responsible for supervising such implementation.

51) The order issued by the prosecutor on the 15th February 2009 does not meet requirements prescribed by the law. It does not contain the names of the defendants, even though their identities were already known by the police. In addition, the grounds for issuing such order, as stipulated in Article 257 of the CPC were not specified. Therefore, the Trial Panel found that the order of this date for covert photographic and video surveillance in public places did not comply with the legal requirements of Article 259 of the CPC. For this reason, the evidence obtained by this measure is inadmissible pursuant to Article 264 of the CPC¹².

52) Furthermore, it is worth to note that the Code does not provide retrospective order for a covert measure to be issued by a prosecutor. Such possibility applies only when the prosecutor in emergency cases issues an order which falls within competence of a pre – trial judge, what results from Article 258 (4) of the PCPC. Then the pre-trial judge within twenty four hours of issuance shall confirm in writing an order of the prosecutor. If he/she fails to do it, the order ceases to have effect.

53) Therefore, the Trial Panel with the ruling dated 19 December 2013 decided that video recordings and photos obtained through a measure of covert photographic and video surveillance, as well as reports based on them are inadmissible (video recording, photos, police surveillance log (“official memorandum”) dated 13 February 2009, police report dated 16 February 2009 and informative report 29 September 2009).

54) The Trial Panel finds necessary to underline that the inadmissibility of the evidence obtained through photographic and video surveillance does not exclude a possibility to examine in a capacity of witnesses police officers present at the place where the covert measure was executed. They had a possibility to observe the situation, what was happening, persons on the crime scene, etc. Their testimonies do not fall within the scope of the evidence obtained through photographic and video surveillance because as such shall be treated only pictures, video films, and reports as well as other materials based on the analysis of them.

¹² Ruling on inadmissibility of evidence, dated 19th December 2013, p. 18 – 19 of the minutes

55) As it has been already mentioned, the investigation against the accused was formally initiated only after the operation at Ben Af parking place in Prizren took place. Therefore, the Trial Panel opines it is necessary to assess these activities in light of provisions applicable at this stage, particularly contained in Article 201 of the PCPC.

56) Article 200 (1) of the PCPC reads:

The police shall investigate criminal offences and shall take all measures without delay, in order to prevent the concealment of evidence.

Article 201 of the PCPC stipulates:

(1)

If there is a reasonable suspicion that a criminal offence prosecuted ex officio has been committed, the police have a duty, either ex officio or on the request of the public prosecutor, to take all steps necessary to locate the perpetrator, to prevent the perpetrator or his or her accomplice from hiding or fleeing, to detect and preserve traces and other evidence of the criminal offence and objects which might serve as evidence, and to collect all information that may be of use in criminal proceedings.

(2)

In order to perform the tasks under paragraph 1 of the present article the police shall have the power:

- 1) To gather information from persons;*
- 2) To perform provisional inspection of vehicles, passengers and their luggage;*
- 3) To restrict movement in a specific area for the time this action is urgently necessary;*
- 4) To take the necessary steps to establish the identity of persons and objects;*
- 5) To organize a search to locate an individual or an object being sought by sending out a search circular;*
- 6) To search specific buildings and premises of public entities in the presence of a responsible person and to examine specific documentation belonging to them;*
- 7) To confiscate objects which must be confiscated under the Provisional Criminal Code or which may serve as evidence in criminal proceedings;*

8) *To provide for a physical examination of the injured party, in accordance with Article 192 of the present Code; and*

9) *To undertake other necessary steps and actions provided for by the law.*

57) The interpretation of these provisions, including the systemic one, leads to conclusion that they apply to actions of the police before an investigation is formally initiated. On this basis, the police during this “pre-investigative” stage is authorized to conduct specific activities, including collecting the evidence. Such competence to act before the investigation is formally commenced is necessary for effective combat against the crime.

58) The Trial Panel avers that the actions taken by the police on the 13th February 2009 at Ben Af parking in Prizren must be assessed in accordance with the provisions quoted above. It is clear that the police obtained intelligence information about alleged purchase of drugs. For these reasons, the Trial Panel concludes that there existed a grounded suspicion that a criminal offence prosecuted *ex officio* had been committed and the police had a legal obligation to act to find a perpetrator and preserve all traces and evidence. For this purpose, it was first of all necessary to perform provisional inspection of the vehicle, establish the identity of persons and objects and confiscate objects which must be confiscated under the Code and may serve as evidence in criminal proceedings.

59) The police on the 13th February 2009 after having received information about potential sale of drugs took actions to find out the alleged perpetrators and preserve evidence. As a result Sh. K. was arrested while he possessed in his vehicle narcotic substance. This factual finding is based mainly on the testimonies of the witnesses examined during the main trial: A. O., F. R., and protected witnesses: 25, 2002, 1811 and 0110.

60) All the witnesses presented a logical, detailed report on observations made by each of them at the critical time. Their testimonies are consequent and correspond with each other. The Trial Panel paid special attention to the statement of the witness 25, who was present in the vehicle while Sh. K. showed narcotic substance to him. He described with details what was happening inside the vehicle and after they left it. He recognized Sh. K. as a person who possessed narcotics and showed it to him inside Mercedes ML.

61) At the main trial, during the session on the 19th December 2012 two DVD records were presented. These pieces of evidence are admissible because as it was established they were

not produced through video surveillance conducted by the police, but they came from Ben Af Shopping Centre. These were records from industrial cameras installed by the owner of the centre in his private area. Their relevance for the case is not so high as these materials confirm only the presence of the police officers at Ben Af parking space in Prizren and the arrests of some persons.

- 62) After meticulous reciprocal comparison of testimonies given by A. O., F. R., and protected witnesses: 25, 2002, 1811 and 0110, as well as the remaining pieces of evidence that were indicated above the Trial Panel came to conclusion that in relation to essential elements all these pieces of evidence fully corroborated and confirmed each other. There were some minor divergences and disparities between witness' testimonies as for example an exact location of the vehicles used by alleged perpetrators. However, in the opinion of the Trial Panel they resulted from the lapse of time and natural imperfection of human memory. In fact, these divergences and disparities assured the Trial Panel that the testimonies were fully spontaneous and had not been concocted beforehand by the witnesses.
- 63) The Trial Panel finds that toxicological report no 2009/0408 dated 27 April 2009, supplemental report dated 26 October 2009 and the oral expert opinion produced by S. D. are credible pieces of evidence. S. D. has a proper expertise and professional experience in examination of narcotic substances. He explained thoroughly the way he conducted his analysis, the methods he used and the conclusions he obtained. S. D. clarified also why it was not possible to establish the exact quantity of heroin in the substance that was seized. Nevertheless, from his expert opinion clearly results that the substance contained at least 50 % of heroin. The Trial Panel finds it was sufficient to establish that heroin was possessed.
- 64) There were no reasons to doubt the credibility of the Attestation of temporary item confiscation dated 13 February 2009. The Trial Panel assessed as credible the Opinion of the fingerprint science expert no 2009-DKKO-055 dated 24 June 2009.
- 65) The report produced by A. O. and filed with the Court on the 19 March 2012 does not have an evidentiary value. The Trial Panel treated it just as information about the source of evidence, which was the testimony of this police officer in a capacity of a witness. Therefore it was necessary to summon A. O. again for the main trial and examine him on all the relevant facts and circumstances of the operation conducted on the 13th February 2009 and before this date.

66) The Trial Panel had no grounds based on admissible evidence to discredit N. M. statement that he did not participate in the distribution of drug substances and his fingerprints on the bag with the narcotic were produced accidentally.

Conclusion with regard to N. M., M. S. and A. R. (charge 1)

67) There is no admissible evidence to establish that N. M., M. S. and A. R. committed a criminal offence classified as unauthorized purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substances, contrary to article 229, par. 4 item 1 of CCK. Therefore they were found not guilty of this charge.

Conclusion and legal assessment of the action of Sh. K. (charge 1)

68) During the main trial it was proven beyond reasonable doubt that Sh. K. on the 13th February 2009, at around 15.00 in the parking lot of the Ben Af shopping Center in Prizren he possessed with intent to sell or distribute narcotic drugs in the form of 13.882 kg of heroin which was inside his vehicle Mercedes ML with plate numbers X KS X.

69) The Trial Panel came to conclusion that Sh. K. committed the criminal offence of unauthorised possession of dangerous narcotic drugs and psychotropic substances, contrary to Article 229, par. 1 of the CCK. His behavior did not contain the elements of the criminal offence provided in Article 229 (4) of the CCK as it was classified by the Prosecutor in the amended indictment. It must be underlined that the Court in accordance with Article 386 (2) of the PCPC is not bound by the motions of the prosecutor regarding the legal classification of the act.

70) The offence of unauthorised possession of dangerous narcotic drugs and psychotropic substances is defined in Article 229 (1) of the CCK which provides as follows:

Whoever, without authorization, purchases or possesses with the intent to sell or distribute or offers for sale substances or preparations which have been declared to be dangerous narcotic drugs or psychotropic substances shall be punished by a fine and by imprisonment of one to five years.

71) Logical interpretation of this provision leads to the conclusion that the criminal offence as specified in the quoted Article has been committed whenever one of the following actions with regard to determined substances has been taken:

- purchase with the intent to sell or distribute,
- possession with the intent to sell or distribute,
- offering for sale.

The "or" operator produces a result of true whenever *one or more* of its operands are true.

72) Heroin is defined as narcotic substance by the Law no. 02/1-128 on Narcotic Medicaments, Psycho-tropes and Precursors (Table I - Plants, Narcotic Drugs and Psychotropic Substances with High Danger that Are Not Used in Medicine and Veterinary and that Are Not Allowed in Kosova)

73) There is no doubt that Sh. K. was not authorized under the law to possess dangerous narcotic drugs or psychotropic substances. Nevertheless, on the 13th February 2009 he possessed narcotic drugs in the form of 13.882 kg of heroin (containing at least 50 % of pure heroin). The amount of the drugs indicates that he possessed them with the intent to sell.

74) The Trial Panel concludes that the behavior of Sh. K. could not be classified as a criminal offence provided in Article 229 (4) of the CCK as it was not proven that he acted as a member of a group.

Conclusion and legal assessment of the action of N. M. (Charge 2)

75) It was also proven that on the 13th February 2009 N. M. possessed without a valid authorization a pistol Crvena Zastava caliber M-57, 7.62 mm X 25 mm with serial number C211115, with a magazine containing 8 bullets was found which belonged to N. M.

76) N. M. on this day committed a criminal offence of unauthorized ownership of weapon in violation of Article 328 (2) of CCK. This charge of unauthorised ownership, control or use of weapons in violation of Article 328 (2) of CCK against him is rejected pursuant to Article 389, par. 4 of the KCCP as Article 3 (1.1.10) of the Law on Amnesty (N.04/L-209) covers this act at the time indicated in the indictment.

77) Pursuant to Article 489, par. 1 of the KCCP the pistol model Crvena Zastava, caliber M-57, 7.62mm X 25mm with a serial number C211115, with a magazine containing 8 bullets, is confiscated.

Determination of the Punishment imposed on Sh. K.

78) While determining the punishment for Sh. K. the Trial Panel was obliged to take into account the purposes of punishment determined in Article 34 of the CCK which stipulates them as follows:

- to prevent the perpetrator from committing a criminal offenses in the future and to rehabilitate the perpetrator;
- to deter other persons from committing criminal offences.

79) Additionally, the Trial Panel took into consideration the high degree of criminal liability of Sh. K., the financial motive for committing the criminal offence and the fact that he had not been sentenced for criminal offence before.

80) The Trial Panel considered the aggravating factors as follows:

- a high degree of intention to commit the criminal offence;
- the fact that criminal offence of unauthorized purchase, distribution and sale of dangerous psychotropic substance's is committed frequently in Kosovo nowadays. This seriously affects public order; therefore the punishment for this kind of crime should serve as a general deterrent for all potential perpetrators;
- the big amount of dangerous narcotic drugs which indicates serious engagement of the accused Sh. K. in the criminal behavior of this kind.

81) The Trial Panel does not find any mitigating factors which could justify more lenient punishment.

82) Taking the above into consideration the Trial Panel imposed on Sh. K. the punishment of 3 (three) years imprisonment and a fine in the amount of Euro 5 000 (five thousand).

83) Pursuant to Article 39 (2) of the CCK¹³ the deadline for payment of the fine by Sh. K. is determined as 1 (one) month.

84) In accordance with Article 73 Paragraph (1) and (3) of CCK the time already served by Sh. K. in detention from 13 February 2009 until 13 February 2012 is included in the

¹³ In the enacting clause by mistake it is mentioned "Article 36" instead of Article 39.

punishment of imprisonment and the time from 14 February 2012 until 21 February 2012 is included in the punishment of fine (equal to 120 Euro).

85) Pursuant to Article 229, par.5 of CCK the 13.882 kg of heroin is confiscated;

Costs

86) The Court based its decision on the costs of criminal proceedings on legal provisions quoted in enacting clause.

17th May 2014

Anna Adamska – Gallant

Court Recorder
