THE SUPREME COURT OF KOSOVO

PRISHTINË/PRIŠTINA

Case number:	**PA-II-KZ-II. 7/15**
Date:	**1 December 2015**
Basic Court:	**Prizren, P. No. 171/2013**

The Supreme Court of Kosovo, in the panel composed of EULEX Judge Anna Adamska-Gallant, presiding, EULEX Judge Elka Filcheva-Ermenkova, and the Supreme Court Judge Nesrin Lushta, as panel members, assisted by Adnan Isufi, EULEX legal advisor acting in the capacity of a recording clerk,

in the criminal case against the defendants:

RM [redacted]

SP [redacted]

AA [redacted]

KU [redacted]

AT [redacted]

MK [redacted]

convicted with the judgment of the Basic Court of Prizren, dated 13 March 2014, for the following criminal offences:

RM [redacted] for the criminal offence of Abusing Official Position or Authority committed in continuation (Counts 1 to 4) and partially in co-perpetration (counts 2-to 4) as per article 422

paragraphs 1 and 2 subparagraphs 2.1 and 2.2 in conjunction with Articles 31 and 81 of the Criminal Code of the Republic of Kosovo (hereafter "CCRK");

SP [redacted] for the criminal offence of Abusing Official Position or Authority in co-perpetration in violation of Article 339 paragraphs 1 and 2 of the Criminal Code of Kosovo (hereafter CCK) in conjunction with Article 23 of the CCRK (count 3);

AA [redacted] for the criminal offence of Abusing Official Position or Authority in co-perpetration, in violation of Article 422 paragraphs 1 and 2 subparagraphs 2.1 and 2.2 in conjunction with Article 31 of the CCRK (count 2);

KU [redacted] for the criminal offence of Abusing Official Position or Authority, in violation of Article 422 paragraphs 1 and 2 subparagraphs 2.1 and 2.2 in conjunction with Article 33 of the CCRK (count 1); Abdullah Tejeci, for the criminal offence of Abusing Official Position or Authority, in violation of Article 339 paragraphs 1 and 2 subparagraphs 2.1 and 2.2 in conjunction with Article 25 of the CCK (count 4);

MK [redacted] for the criminal offence of Abusing Official Position or Authority, committed in continuation and in co-perpetration, as per Article 422 paragraphs 1 and 2 subparagraphs 2.1 and 2.2 in conjunction with Article 31 and 81 of the CCRK;

having received the appeal filed by the State Prosecutor of the Republic of Kosovo, dated 4 September 2015, against the ruling of the Court of Appeals issued on 22 July 2015 by which the judgment of the Basic Court was annulled and the case was returned for retrial,

having considered the response of Defence Counsel [redacted] on behalf of the defendant [redacted] and responses of Defence Counsel [redacted] and [redacted] on behalf of the defendant [redacted],

having deliberated and voted on 1 December 2015;

acting pursuant to Articles 412 (6), 412 (1), 416 (2) and 398 (2) of the Criminal Procedure Code of Kosovo (hereinafter "CPC");

with majority of votes renders the following:

RULING

1. The Appeal filed by the State Prosecutor of the Republic of Kosovo, dated 4 September 2015, against the ruling of the Court of Appeals issued on 22 July 2015 is hereby granted.
2. The appealed ruling is annulled and the case is returned to the Court of Appeals for reconsideration by a new trial panel.

REASONING

I. PROCEDURAL BACKGROUND

1. On 15 September 2011, the investigation was initiated against [redacted] and [redacted] for the criminal offences of Abusing Official Position, in violation of Article 339 of the Criminal code of Kosovo (hereafter CCK).
2. On 29 September 2011, the prosecutor issued another ruling on initiation of the investigation against the defendants [redacted] and [redacted] for the criminal offence of Abusing Official Position or Authority, in violation of Article 339 of the CCK.
3. On 14 November 2011, the third investigation was initiated by the ruling of the prosecutor against the defendant [redacted] for the criminal offence of Abusing Official Position or Authority, in violation of Article 339 of the CCK.
4. Upon request of the prosecutor, on 18 November 2011, the three judges' panel of the District Court of Prizren issued a ruling by which they decided that joint proceedings were to be carried on for the all three investigations.
5. On 27 February 2013, the prosecutor filed an indictment against the defendants [redacted] and [redacted] for the criminal offences of Abusing Official Position or Authority, in violation of Article 422 of the CCK, for the four acts as specifically described in the indictment.
6. On 25 March 2013, the initial hearing was held in the presence of Defendants, Defence Counsel and Prosecutor. The main trial started on 13 August 2013. After having held 28 sessions, on 13 March 2014 the trial panel announced the judgment.

7. The first instance court found the defendants guilty for having committed the following criminal offences: the defendant [redacted] for the criminal offence of Abusing Official Position or Authority committed in continuation (Counts 1 to 4) and partially in co-perpetration (counts 2-to 4) as per article 422 paragraphs 1 and 2 subparagraphs 2.1 and 2.2 in conjunction with Articles 31 and 81 of the Criminal Code of the Republic of Kosovo (hereafter "CCRK"); [redacted] for the criminal offence of Abusing Official Position or Authority in co-perpetration in violation of Article 339 paragraphs 1 and 2 of the Criminal Code of Kosovo (hereafter CCK) in conjunction with Article 23 of the CCRK (count 3); [redacted] for the criminal offence of Abusing Official Position or Authority in co-perpetration, in violation of Article 422 paragraphs 1 and 2 subparagraphs 2.1 and 2.2 in conjunction with Article 31 of the CCRK (count 2); [redacted] for the criminal offence of Abusing Official Position or Authority, in violation of Article 422 paragraphs 1 and 2 subparagraphs 2.1 and 2.2 in conjunction with Article 33 of the CCRK (count 1); [redacted] for the criminal offence of Abusing Official Position or Authority, in violation of Article 339 paragraphs 1 and 2 subparagraphs 2.1 and 2.2 in conjunction with Article 25 of the CCK (count 4); and [redacted] for the criminal offence of Abusing Official Position or Authority, committed in continuation and in co-perpetration, as per Article 422 paragraphs 1 and 2 subparagraphs 2.1 and 2.2 in conjunction with Article 31 and 81 of the CCRK.

8. The judgment was appealed by Defence Counsel [redacted] on behalf of Defendant [redacted] on behalf of Defendant [redacted] on behalf of Defendant [redacted] on behalf of the defendant [redacted] on behalf of Defendant [redacted] and Defence Counsel [redacted] and [redacted] on behalf of Defendant [redacted].

9. On 22 July 2015, the Court of Appeals with majority of votes granted the appeals filed by the defence Counsel, annulled the appealed judgment of the Basic Court and returned the case to the first instance court for a retrial. The Court of the Appeals found the following substantial violations of provisions of criminal procedure performed by the court of first instance:

   - of Article 370 (1) and (2) of the CPC because the impugned judgment was lacking of some necessary elements provided by the law such as: the first name and surname of the recording clerk, indication whether the defendants were present at the main trial,

the first name and surname of the state prosecutor, the names of the defense Counsel of the accused, and the date when the judgment was drawn up;[1]

- of Article 384 (1.12) in conjunction with Article 370 (6) and (7) of the CPC due to the fact that the enacting clause was incomprehensive, unclear and inconsistent with the statement of grounds and decisive facts presented by the first instance court; specifically it was unclear which facts and actions had been determined by the Basic Court by which evidence as there was no factual description that could have clarified the specific incriminatory actions of the accused; [2]
- of Article 384 (1.12) in conjunction with Article 370 (8) of the CPC as the judgment did not mention the circumstances taken into consideration by the court when determining the punishment.[3]

The Court of Appeals concluded that the appealed judgment of the Basic Court was legally inconsistent and as such it should have been annulled. Therefore, the case had to be sent back to the first instance court for retrial. In a course of the retrial, it is a duty of the Basic Court to eliminate all violations mentioned above, to administer all the evidence and to assess them in conformity with the provisions of Article 370 par. 6, 7 and 8 of the CPC, and then depending on the assessment of such evidence to draw correct and lawful conclusions based on the administered evidence before rendering a proper decision.[4]

In conclusion, the Court of Appeals indicated that the first instance court failed to present any mitigating and aggravating circumstances, and therefore the panel was not able to agree or disagree with the punishment. For that reason appeal was granted, the first instance judgment was annulled, and the case was returned for retrial.

The ruling of the Court of Appeals does not contain any explanation why this court did not proceed in this case under Article 403 of the CPC.

10. In accordance with Article 398 paragraph 4 of the CPC, the Presiding and Reporting Judge submitted a dissenting opinion to the ruling of the Court of Appeals. He explained why he disagreed with the majority of the panel.

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[1] Judgment of the Court of Appeals, 22.07.2015, PAKR 349/14, p. 21-22
[2] *ibidem*, p. 22-25
[3] *ibidem*, p. 25
[4] *Ibidem*, p. 26

11. On 4 September 2015, EULEX Prosecutor of the State Prosecutor of the Republic of Kosovo filed an appeal against the Ruling of the Court of Appeals dated 22 July 2015.

12. The appeal was consequently submitted to the defence counsel and the defendants.

13. On 8 and 9 September 2015 respectively, Defence Counsel [redacted] on behalf of Defendant [redacted] and Defence Counsel [redacted] and [redacted] on behalf of Defendant [redacted] submitted their opinions on the appeal of the prosecutor.

II. SUBMISSIONS OF THE PARTIES

Appeal of the State Prosecutor

14. Prosecutor challenges the Ruling of the Court of Appeals on the ground of Article 411 paragraph 1 subparagraphs 1.1, 1.2, 1.4 of the CPC. According to the appeal, the ruling violates: right provided to the party under the Constitution of the Republic of Kosovo, more precisely Article 54 of the Constitution; a substantive right provided to the party under the present Code, specified in Article 7 of the CPC, and the procedural right meant to guarantee a right under subparagraphs 1.1 to 1.3 of the present Article, specified in Article 404 paragraph 1 of the CPC.

15. Concerning admissibility of the appeal, Prosecutor submits that Article 411 paragraph 6 of the CPC authorizes the parties to file appeals against the ruling of the Court of Appeals. Paragraphs 6 to 11 of the same Article stipulate how to proceed with the appeals against the rulings of the Court of Appeals. Prosecutor submits that the appeal is therefore permissible and moves the Supreme Court of Kosovo to decide on its merits.

16. The State Prosecutor argues that the Court of Appeals failed to grant the right of judicial protection to those whose rights were violated by the criminal offences of the accused by summarily annulling the Judgment of the Basic Court instead of meticulously addressing the issues raised in the appeals, the reply of the Basic Prosecutor and the motion of the Appellate Prosecutor. According to the Prosecutor, the Court of Appeals did not truthfully and completely establish the relevant facts in order to render a lawful decision. The appealed ruling errs in law and fact, and is generic.

17. The State Prosecutor argues that the court of Appeals renders only few instructions to the retrial court, *i.e* to identify the damaged party, to engage an expert for establishing the damage, to review and assess the testimonies of witnesses, and clear the enacting clause and the reasoning of the first instance judgment from the violations as established by the Court of Appeals.

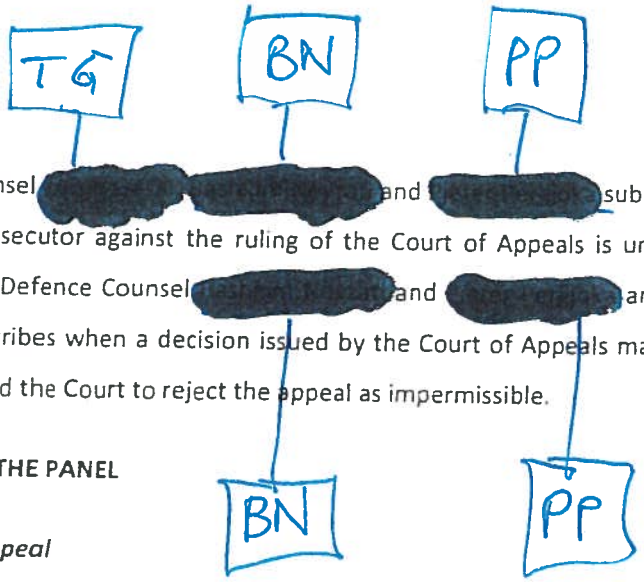
18. The State Prosecutor submits that the Court of Appeals did not individually examine the issues raised in the appeals of Defence, nor the matters constituting the scope of the appellate review provided in Article 394 paragraph 1 of the CPC. Neither, the court considered the matters brought to its attention in the reply of the Basic Prosecutor, and in the motion of the Appellate Prosecutor. According to Prosecutor, the Court of Appeals failed to address the issue whether or not the Basic Court exceeded the charge, as raised by Defence Counsel [redacted] for Defendant [redacted] in his appeal, or the prejudice of the Trial Panel as alleged in the joint appeal of Defence Counsel [redacted] and [redacted] for defendant [redacted]

19. Prosecutor submits that according to Article 371 paragraphs 1 and 2 of the CPC, the deficiencies regarding the form of the written judgment, *i.e.* names of Defense Counsel and of prosecutor etc., may be corrected by a separate ruling of the presiding trial judge on the motion of the parties, defense counsel or *ex officio*. If these *de minimus* or harmless errors of the judgment are raised in the appeal, as established in the present case, the Court of Appeals can also correct them under Article 403 of the CPC.

20. Prosecutor submits that the Court of Appeals did not base its standing to any specific provision of the CPC, which prohibits the first instance court in making reference to the charges brought against the accused in the indictment. Prosecutor argues that the description of the facts in the indictment and the establishment of the facts in the enacting clause of judgment may be clearly distinguished, both the enacting clause and the reasoning of the judgment clearly state the facts and the underlying evidence, as well as the actions for which the accused were found guilty by the Basic Court.

21. Regarding the volume of damages and the amount of material benefit, Prosecutor submits that material benefit or damage is not an element of the criminal offence which the defendants were charged with. What Article 422 of the CCK requires is only the specific intent to acquire any benefit for himself or another person, or to cause damage to another person, or to seriously violate the rights of another person. Further, with regard to Defendants [redacted] and [redacted] Prosecutor submits that the elements of the criminal offence is the damage or grave violation of the rights of another person (results of the criminal act) and not the material benefit.

Response of Defence Counsel:



22. Defence Counsel [redacted] and [redacted] submitted that the appeal of the state prosecutor against the ruling of the Court of Appeals is unlawful, and respectively inadmissible. Defence Counsel [redacted] and [redacted] argued that Article 407 of the CPC prescribes when a decision issued by the Court of Appeals may be appealed. Defence Counsel moved the Court to reject the appeal as impermissible.

III. FINDINGS OF THE PANEL

Admissibility of the appeal

General remarks

23. The preliminary issue to be decided in this case is whether the appeal against the ruling of the Court of Appeals is permitted at all. There has been an ambiguous court practice applied on this matter recently, therefore it is necessary to conduct a thorough analysis of the applicable law.

24. Pursuant to Article 16 of the Constitution of the Republic Kosovo, the Constitution is the highest legal act of the country, and laws and other legal acts shall be in accordance with it and interpreted accordingly (Supremacy of the Constitution). In its Article 102 (5) the Constitution provides for one of general fundaments of the judicial system: the right to appeal a judicial decision which is granted unless otherwise provided by law. As a principle any judicial decision may be appealed, and exceptions to this general rule must be strictly defined by law.

25. Due to the supremacy of the Constitution, the provisions of the Criminal Procedure Code must be interpreted in accordance with this highest legal act.

26. The Criminal Procedure Code of Kosovo does not clearly determine if the proceedings are two or three – instances. Therefore, following Article 102 (5) of the Constitution, all judicial decision issued in a course of criminal proceedings can be appealed, unless otherwise provided by the law.

27. The types of legal remedies in criminal proceedings are listed in Article 374 of the CPC which stipulates:

> *1. Unless otherwise provided for under the present code, a party may seek legal remedies from a court of higher instance through:*
>
> *1.1 An appeal against the judgment of the Basic Court to the Court of Appeals;*

1.2 An appeal against the judgment of the Court of Appeals to the Supreme Court of Kosovo under Article 407 (1) or where the judgment has imposed a sentence of life – long imprisonment;

1.3 An appeal against a decision of the Basic Court to the Court of Appeals;

1.4 An application for extraordinary legal remedies from the Basic Court of Court of Appeals to the Supreme Court of Kosovo.

2. An order of a pretrial judge may be reviewed by a panel comprised of three (3) basic court judges if authorized under the present Code. An order reviewed by a review panel under this paragraph is reviewable by the Court of Appeals or Supreme Court only during an appeal against the judgment of the Basic Court.

As clearly results from the expression "Unless otherwise provided for under the present code", it is not a closed catalogue of legal remedies.

28. Article 408 (1) of the CPC explicitly indicates the types of rulings that can be appealed. It provides that:

An appeal against a ruling or order of a pre – trial judge and against other rulings rendered by the Basic Court may be filed by the parties and persons whose rights have been violated in accordance with Article 411 of the present Code, unless an appeal is explicitly prohibited by the provisions of the present Code."

29. In subsequent paragraphs, Article 408 of the CPC provides following general exceptions from the principle that rulings can be appealed:

- a ruling rendered by the review panel of three judges in the pre – trial stage of proceedings, unless otherwise provided for by the Code (Article 408 (2) of the CPC);
- a ruling rendered in connection with the preparation of the main trial and judgment, unless otherwise provided for by the Code (Article 408 (3) of the CPC);
- a ruling rendered by the Supreme Court (Article 408 (4) of the CPC).

30. The Code also defines specific instances when a judicial decision cannot be appealed. These are:

- a ruling joining the proceedings or rejecting a motion for a joinder (Article 35 (8) of the CPC);
- a ruling severing proceedings or rejecting a motion for severance (Article 36 (3) of the CPC);

- an order as to delegated competence and transfer of jurisdiction (Article 37 (6) of the CPC);
- a ruling which accepts a petition for disqualification of a judge (Article 42 (3) of the CPC);
- a ruling, by which the petition to disqualify a judge is dismissed (Article 42 (4) of the CPC);
- a ruling on dismissal of the defence counsel (Article 59 (3) of the CPC);
- a ruling on regularizing accounts (Article 148 (5.2) of the CPC);
- a decision of the pre – trial judge, single trial judge or presiding judge to grant the inspection, copying or photocopying (Article 213 (7) of the CPC);
- a decision of the pre – trial judge against the refusal of the state prosecutor to allow the injured party to inspect the files (Article 214 (3) of the CPC);
- a ruling on denying the defence counsel or authorized representative the right to defend or represent their clients at the main trial if after being punished they continue to disturb order, connected with recession or adjournment of the main trial (Article 302 (3) of the CPC);
- decisions relating to the maintenance of order and the direction of the main trial, different than a ruling imposing punishment (Article 303 (1) (2) of the CPC;
- a ruling by which the main trial is adjourned (Article 310 (2) of the CPC)
- a ruling of the Court of Appeals to extend or terminate detention on remand against the accused (Article 402 (4) of the CPC);
- a ruling of the Court of Appeals to order or cancel detention on remand against the accused (Article 403 (3) of the CPC);
- a ruling allowing a return to the *status quo ante* (Article 448 (2) of the CPC);
- a ruling of the trial panel concerning temporary measures securing the property claim (Article 467 (3) of the CPC).

31. Additionally, in Article 432 (2) the Code provides that the request for protection of legality, which is an extraordinary legal remedy, cannot be filed against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon. The lawmaker found it necessary to regulate clearly that the decision of the Supreme Court on this matter cannot be challenged. There is still an exception to this general exclusion which is defined in Article 432 (3) of the CPC.

32. In contrast to the general exemption referring to decisions of the Supreme Court which neither can be appealed (Article 408 (4) of the CPC), nor in principle the request for protection of legality against them is allowed (Article 432 (2) of the CPC), the Code does not contain a similar regulation for decisions issued by the Court of Appeal. It leads to a conclusion that in the absence of a specific prohibition, the general constitutional principle prevails, and the parties are permitted to file appeals against rulings of the Court of Appeals.[5]

33. The Code also stipulates a specific procedure to make the right to appeal against a ruling of the Court of Appeal which is finally decided by the Supreme Court effective (Article 411 and 412 of the CPC). If appeals were prohibited these provisions would be redundant. The latter would be contrary to the assumption presumption that the lawmaker is rational.

34. The protection of constitutional rights is of crucial importance as the Code allows for appellate review even for the appeal which does not comply with its Chapter XXI, that is when it raises an important issue of constitutionally protected rights (Article 411 (9) of the CPC).

Admissibility of the appeal in a context of a form of a decision

35. The analysis of the Code leads to the conclusion that there are decisions as to the material subject of the case (*meritum*) and other decisions. The decisions as to the *meritum* of the criminal case refer to the issues of guilt and punishment (Article 1 (2) of the CPC). All other decisions taken by the court during the course of proceedings are usually of preparatory or procedural nature. The first ones refer to actions necessary to conduct criminal proceedings, such as obtaining of evidence, (*e.g.* through surveillance), admission of evidence, application of measures to ensure the presence of the defendant, freezing of assets, conduct of criminal proceedings, etc. Furthermore, the court takes many decisions of strictly procedural character: *e.g.* it determines the composition of the panel, schedules and adjourns the main trial, or decides on the admissibility of legal remedies.

36. The *meritum* of the criminal case is decided by the court in a judgment after the main trial is concluded. In principle, the appellate proceedings against the judgment are two – instance as any judgment of the Basic Court can be appealed to the Court of Appeals.

37. As the court of the second instance, the Court of Appeals issues in a form of a judgment the following decisions:

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[5] Judgment of the Supreme Court of Kosovo, dated 26 November 2015, PN.II. 8/2015

- A judgment by which an appeal is rejected as unfounded and the judgment of the Basic Court is affirmed (Article 401 of the CPC);
- A judgment by which the judgment of the Basic Court is modified because of erroneous or incomplete determination of facts (Article 403 (1) of the CPC), or because there are legal grounds for a judicial admonition (Article 403 (2) of the CPC);
- A judgment rejecting the appeal against a ruling of the Basic Court by which the indictment is dismissed (Article 416 (3) of the CPC).

38. In a form of a ruling, the Court of Appeals issues following decisions:

- A ruling on appeal against a ruling of the Basic Court when the appeal is dismissed as belated or inadmissible (Article 416 (2) of the CPC);
- A ruling on appeal against a ruling of the Basic Court when the appeal is accepted and the ruling is modified or annulled and returned for reconsideration when necessary (Article 416 (2) of the CPC);
- A ruling by which an appeal against a judgment is dismissed as belated (Article 399 of the CPC);
- A ruling by which an appeal against a judgment is dismissed as not permitted (Article 400 of the CPC);
- A ruling by which the judgment of the Basic Court is annulled and the case is returned for retrial (Article 402 (1) of the CPC);
- A ruling by which the judgment of the Basic Court is annulled and the indictment is rejected because of circumstances specified in Article 358 (1) of the CPC (Article 402 (2) of the CPC).

39. There are three situations when the Code provides that the Court of Appeals decides on appeal with a judgment. The first two are clear as they refer to the situation when the Basic Court decided on the *meritum* of the criminal case: the Court of Appeals finds that a judgment of the first instance is to be affirmed (1), or is to be modified (2). In the third situation, the Court of Appeals decides with the judgment that a ruling of the Basic Court by which the indictment was dismissed is to be confirmed (3).

40. In the situation when the ruling of the Basic Court on dismissal of the indictment is confirmed, the Court of Appeals does not decide on the *meritum* of the criminal case in a sense that it does

not determine whether the criminal offence had been committed, and if so, whether the defendant shall be held responsible for it. With the judgment, the Court of Appeals confirms the assessment of the Basic Court that the indictment should have been dismissed because the circumstances stipulated in Article 253 of the CPC exist. It means that the Court of Appeals agrees with the Basic Court that:

- The act charged is not a criminal offence;
- Circumstances exist which exclude criminal liability;
- The period of statutory limitation has expired, an amnesty or pardon covers the act, or other circumstances exist which bar prosecution; or
- There is no sufficient evidence to support a well – grounded suspicion that the defendant has committed the criminal offence.

41. The consequence for a decision taken by the Court of Appeals in a form of a judgment is significant. There is a very limited possibility to appeal against it to the Supreme Court. In principle, the Code guarantees the stability of judgments issued by the Court of Appeals. Therefore, the third instance proceedings are provided only in situations when:

    - the Court of Appeals found the defendant guilty after the acquittal by the Basic Court, and the rationale of this solution is to guarantee a defendant a right to contest the first finding of his guilt to the second instance;
    - the life – long imprisonment was imposed/confirmed by the second instance court, because of a very far – reaching interference into personal freedom of an individual (Article 407 (1) of the CPC).

42. If the Court of Appeals upholds the ruling of the Basic Court by which the indictment was dismissed this decision is exceptionally issued in a form of a judgment. It cannot be appealed, as such decision does not fall within the scope of Article 407 (1) of the CPC. The rationale behind this principle is to protect an individual from ungrounded indictments, as the act of filing an indictment often triggers stigmatization of the indictee. The lawmaker clearly applied a concept that there is no further need to examine this decision with ordinary legal remedies if courts of two instances decided that there were reasons to dismiss the indictment and to terminate the proceedings.

43. In case of an appeal against a judgment of the Basic Court, the Court of Appeals decides with a ruling in the situations when:

    - the appeal is belated (Article 399 of the CPC); or
    - the appeal is not permitted (Article 400 of the CPC).

    In both situations, having established these circumstances, the Court of Appeals shall dismiss the appeal with a ruling.

44. Accordingly to Article 402 (1) of the CPC, the Court of Appeals shall annul by a ruling the judgment of the Basic Court and return the case for retrial, if:

    - there exists a substantial violation of provisions of criminal procedure; or
    - a new main trial before the Basic Court is necessary because of the erroneous or incomplete determination of the factual situation.

    In both situations, the Court of Appeal must establish that it is not possible to proceed as stipulated in Article 403 of the CPC and to modify the judgment.

45. In a ruling by which the first-instance judgment is annulled and the case is returned for retrial the Court of Appeals does not assess the *meritum* of the criminal case in the above explained sense. In a situation, provided in Article 402 (1.1) of the CPC, the Court establishes that during the proceedings before the Basic Court a substantial violation of criminal procedure occurred as provided in Article 384 of the CPC. When the case is returned for retrial accordingly to Article 402 (1.2) of the CPC, the Court of Appeals finds that the factual situation was determined erroneously or incompletely. In both situations, the Court must have ascertained that it is not possible to correct the judgment of the Basic Court in a course of the appellate proceedings.

46. The interpretation of Article 402 (1) read along with Article 403 of the CPC leads to the conclusion that a decision to return the case for retrial should be taken only exceptionally, when the Court of Appeals cannot modify a judgment. Such approach is in accordance with the principle of the fair trial, which contains also a duty to decide the case in a reasonable time, without a delay[6]. Any retrial prolongs the criminal proceedings and postpones taking a final decision, which is often against the interest of the parties, in particular the defendant, who has the right to a fair trial within reasonable time. It is also against the public interest. The purpose of this safeguarding, which roughly refers to the popular maxim "justice delayed is justice

[6] Stögmüller v Austria [1969] ECHR 25, para 5 (under the heading "As to the Law"); and UN Human Rights Committee, CCPR General Comment 32 (2007), para 35.

denied", is to avoid keeping persons in a state of uncertainty by protecting all parties to court proceedings against excessive procedural delays, which may, in turn, jeopardize the effectiveness and credibility of the administration of justice.[7] The delay may be predominantly harmful in a case when the defendant was acquitted by the Basic Court, and then the Court of Appeals returns his or her case for retrial. The probability of violating the right to a fair trial within reasonable time increases drastically.

47. The Supreme Court underlines that the legal remedy must be effective. If the court avoids taking decisions, the judicial protection of procedural safeguarding becomes illusory.[8] Such interpretation is further supported by Article 54 of the Constitution which provides that:

> *Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.*

48. Article 402 (2) of the CPC provides that the Court of Appeals shall annul by a ruling the judgment of the Basic Court and reject the indictment when the following circumstances under Article 358 (1) of the CPC apply:

- The proceedings were conducted without the request of the state prosecutor;
- If the required motion of the injured party of the permission of the competent public entity is lacking or if the competent public entity has withdrawn permission;
- If there are other circumstances which bar prosecution.

49. In all situations when the Court of Appeals decides with a ruling on an appeal against a judgment of the Basic Court the *meritum* of the criminal case is not assessed. The Court, because of different procedural failures and violations, is not able to assess properly whether the criminal offence was committed, and if so, whether the defendant shall be held responsible for this.

50. The Code contains no specific provision which would exclude the appeal against rulings issued by the Court of Appeals on an appeal against the judgment of the Basic Court. Therefore, according to Article 102 (5) of the Constitution it must be concluded that the appeal is allowed.

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[7] H. v France [1989] ECHR 17, para 58; Bottazzi v Italy [1999] ECHR 62, para 22, Cocchiarella v Italy [2006] ECHR 609, para 119
[8] Airey v Ireland [1979] ECHR 3, para 24; and Artico v Italy [1980] ECHR 4, para 33.

51. Whenever the Court of Appeals refuses to decide on the *meritum* of the case and to review the judgment of the Basic Court, and instead it terminates the proceedings or sends a case for retrial a new *gravamen* (ground of a grievance) for at least one of the parties appears. These are few examples of possible reasons to appeal against such decision, to illustrate the presented argumentation:

    a. In a situation when the appeal is rejected on the ground provided in Article 399 of the CPC, the party may appeal to the Supreme Court, arguing that the appeal was filed on time, but *e.g.* not to a competent court (Article 445 (5) of the CPC);

    b. When the Court of Appeals rejects with a ruling an appeal as not permitted, the party may appeal to the Supreme Court, arguing that *e.g.* he or she is an injured party in the proceedings and as such is competent to file an appeal;

    c. When the Court of Appeal annuls a judgment and rejects with the ruling the indictment upon Article 358 of the CPC, the party may contest this decision on the ground of erroneous establishment of facts by the Court of Appeal because *e.g.* there was a motion of the injured party, or a request of a competent prosecutor;

    d. The party may also argue that the Court of Appeals wrongly assessed the existence of a circumstance which bars prosecution (Article 358 (1.3) of the CPC). The possibility to contest the decision of the Court of Appeals based on this ground is of particular importance because the Code does not provide *numerus clausus* of situations which bar prosecution. The party must have right to challenge the decisions of the Court of Appeals, as otherwise he or she would be deprived of the right to court, which is one of the constitutional guarantees of a rule of law state.

The limit on the right to appeal against the ruling of the Court of Appeals

52. The sole fact that the Supreme Court finds that the law allows to appeal against a ruling of the Court of Appeals does not lead to a conclusion that the Code enables the parties to appeal to the third instance court any decision. For proper understanding of the ruling of the Supreme Court, it is necessary to interpret accurately a notion of "a judicial decision" as it is used in Article 102 (5) of the Constitution.

53. The systematic interpretation of the Criminal Procedure Code, made in the light of the constitutional principles, allows for concluding that the notion of "judicial decision" should be

interpreted not in a formal way, but from the point of view of a purpose which is to be obtained by the court. Therefore, the teleological interpretation shall be applied, which will be helpful to find out the proper scope of the appellate procedure applicable by Kosovo courts.

54. The Constitution guarantees any individual the right to a fair and impartial trial (Article 31), to judicial protection and effective legal remedy (Article 54), and to appeal against a judicial decision, unless otherwise provided by law (Article 102 (5)). The judicial system is able to provide an individual with an effective legal remedy only if there is a limit imposed on the possibility to appeal against judicial decisions. Without restrictions on the appellate procedure, the judicial system would become unstable and create uncertainty.

55. The Supreme Court underlines again that the main purpose of criminal proceedings is to determine whether the defendant committed a criminal offence, and if the answer to this question is positive, whether he or she should be held responsible for this act. Other decisions taken in a course of criminal proceedings have a subsidiary character for this ultimate goal.

56. The *meritum* of the criminal proceedings may be examined twice, initially by the Basic Court, and then by the Court of Appeals, in case if the party files a request for legal remedy. In exceptional situations, provided in Article 407 of the CPC, the judgment of the Court of Appeals can be appealed to the Supreme Court.

57. With regard to all other matters decided by the Court of Appeals, different than the *meritum* of the criminal proceedings, few questions are to be answered to determine whether the decision may be challenged to the third instance. Firstly, it is necessary to find out if there is any provision in the Criminal Procedure Code which strictly excludes the possibility to file an appeal against the decision. Secondly, the functional test shall be applied, i.e. it is necessary to assess if the decision in question addresses a new issue which was not considered by the court of the first instance. If an answer is positive, then in principle the party has a right to have the issue examined by the second instance.

58. Even if the result of this test is negative result, the Court of Appeals/ the Supreme Court, while deciding upon the admissibility of an appeal must apply the ultimate criterion, which is strictly prescribed in Article 411 (2) and (9) of the CPC. The appeal can be summarily dismissed only after ensuring that it does not raise an important issue of constitutionally protected rights. If the Court finds that a violation of such a right is at stake, then the appeal shall be allowed. [9]

[9] This ultimate criterion was recently applied by the Supreme Court in the ruling dated 26 November 2015, PNII 8/2015, p. 6-7.

59. Bearing in mind the test, *e.g.* the ruling of the Court of Appeals dismissing the appeal as belated (Article 399 of the CPC) can be appealed to the Supreme Court, as it refers to the new issue (whether the remedy was filed in a timely manner), and the party has the right to have it examined by two instances. On the other hand, *e.g.* the issue of a measure to be applied against a defendant to ensure his presence (like detention on remand), if decided by the Basic Court can be appealed to the Court of Appeals. If the Court of Appeals decides on the question whether to apply the specific measure, its decision cannot be challenged to the Supreme Court. The examination of the same subject matter by courts of two instances is sufficient to meet the requirements specified in the Constitution.

60. The application of this test to the ruling of the Court of Appeals by which the judgment is annulled and the case returned for the retrial leads to the conclusion that it can be appealed to the Supreme Court. First of all, there is no provision which would exclude the right to appeal against such ruling. Secondly, the Court of Appeals does not assess in this judgment the *meritum* of the criminal case, and finds that there are serious violations which cannot be remedied in a course of the appellate procedure. Each party, which does not agree with such assessment of the Court of Appeal, must have right to challenge it before the Supreme Court.

Conclusion on the admissibility of the appeal

61. Having considered the above, the Supreme Court finds that the appeal of the State Prosecutor against the ruling of the Court of Appeals, dated 4 September 2015 is admissible. It was filed by the party in this case on time.

Meritum of the case

62. The Supreme Court analyzed thoroughly the judgment of the Basic Court and the challenged ruling of the Court of Appeal in the light of the arguments presented by the Prosecutor in the appeal. Furthermore, the Supreme Court considered the dissenting opinion of the Presiding Judge of the Appeal Panel, where he presented his extensive and all – embracing argumentation against the decision of the majority. Based on careful and meticulous assessment of these documents, the Supreme Court avers that the appeal filed by the State Prosecutor against the ruling of the Court of Appeals shall be granted as grounded.

63. As it was already mentioned above, the decision to annul the judgment and send a case for retrial shall be taken only exceptionally, when having established the existence of certain procedural

violations, the Court of Appeal finds that it cannot proceed accordingly to Article 403 of the CPC and modify the impugned judgment of the court of the first instance. The Court of Appeal must present in the ruling reasons why it was not possible proceed as prescribed in the mentioned provision.

64. The Supreme Court finds necessary to underline that the standard for appellate procedure which result from Article 2 of Protocol 7 to *the European Convention on Protection of Human Rights and Fundamental* Freedoms requires that a review by an appellate court is a full and thorough evaluation of the relevant factors.[10] As concluded by the European Court of Human Rights, there can be no useful or effective enjoyment of rights of appeal without a judgment that indicates with sufficient clarity the grounds on which the decision was taken.[11] Reasoned decisions also serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision.[12] It is also only by giving a reasoned decision that there can be public scrutiny of the administration of justice.[13]

65. In the impugned ruling, the Court of Appeals indicated the procedural violations of the Basic Court, which refer to the form and the content of the judgment. The Supreme Court agrees with the Prosecutor that the judgment of the Basic Court contained all necessary elements as prescribed in the law[14]. The deficiencies regarding the form of the written judgment can be corrected by a separate ruling of the presiding trial judge, acting on the motion of the parties, Defence Counsel or *ex officio*. In this case, these *de minimus* or harmless errors of the judgment could have been corrected also by the Court of Appeals, under Article 403 of the CPC.

66. The Supreme Court concurs with Prosecutor that both the enacting clause (pages 6 and 9) and the reasoning (pages 21 – 35) of the judgment of the Basic Court clearly state the facts and actions for which the accused were found guilty, and the assessment of the underlying evidence. Furthermore, the judgment contains the justification of the legal classification of criminal offences, the criminal liability in relation to each count and each accused. Therefore, the assessment of the Court of Appeals that the first instance judgment lacks clarity and reasoning cannot be approved.

67. Therefore, the Supreme Court finds that in principle the judgment of the Basic Court contains all necessary elements as provided by the Criminal Procedure Code in Article 370.

68. Furthermore, the Court of Appeal did not explain why the judgment of the first instance could not have been modified accordingly to Article 403 of the CPC. There is no single argument to support the

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[10] *Lalmahomed v the Netherlands* [2011] ECHR 338, para 37.
[11] *Hadjianastassiou v Greece* [1992] ECHR 78, para 33; *Baucher v France* [2007] ECHR, para 42
[12] *Taxquet v Belgium* [2010] ECHR 1806, para 91. See also *Suominen v Finland* [2003] ECHR 330, para 37.
[13] *Suominen v Finland* [2003] ECHR 330, para 37.
[14] The appeal of the Prosecutor, dated 4 September 2015, p.6- 8

existence of any circumstances which would not allow the Court of Appeals to decide as to the *meritum* of the case. In this way, it is visible that the Court of Appeal avoided to take a decision what in the opinion of the majority of this Panel is unacceptable.

69. There is an apparent discrepancy between the assessment of the Court of Appeals and the Supreme Court as to the possibility to proceed with the appellate review of the *meritum* of the case. Therefore, the Supreme Court, accordingly to Article 398 (2) of the CPC, decided that the case shall be sent for reconsideration to the Court of Appeals to the new panel.

70. During the appellate proceedings, the Court of Appeals shall proceed again in accordance with provisions contained in Chapter XXI of the Criminal Procedure Code. Particularly, the Court shall examine the part of the judgment which is challenged by the appeal. In addition, the Court shall examine *ex officio* whether there are violations as provided in Article 394 (1) of the CPC. Finally, the Court of Appeal shall render a decision with a reasoning which will indicate clearly the grounds on which the decision is taken.

71. The Supreme Court does not prejudge the outcome of the appellate proceedings with relation to the judgment of the Basic Court. The Court of Appeals is competent to decide whether this judgment is to be affirmed, modified, or annulled and sent for retrial. Nevertheless, each decision of the Court of Appeal must be based on a full and thorough evaluation of all relevant factors, and properly reasoned. Unfortunately, this was not done by the Court of Appeals in the impugned ruling.

72. Having considered the above, it has been decided as in the enacting clause.

THE SUPREME COURT OF KOSOVO

PRISHTINË/PRIŠTINA

PA-II-KZ-II. 7/15

Presiding Judge

Anna Adamska - Gallant

EULEX Judge

Recording Officer

Adnan Isufi,

EULEX Legal Advisor

DISSENTING OPINION OF JUDGE NESRIN LUSHTA IN THE CRIMINAL CASE PA-II-KZ-7/2015

On 01.12.2015 in a panel composed of Supreme Court EULEX Judges, we review the case PA-II-KZ-7/2015 upon appeal filed by the State Prosecutor against the Ruling of the Court of Appeals of Kosovo PAKR-KTZ.nr.349/14 dated 22.07.2015.

I have stated my dissenting opinion with other panel members, in regard to:

The permissibility of the Appeal against the Ruling rendered by the second instance court, annulling the judgment of first instance court and sending the case back to first instance court for reconsideration

RM

In the concrete case, with the judgment of the Basic Court in Prizren P.nr.171/13 dated 13.03.2014, the accused [redacted] et alia were tried for the criminal offense of Abusing Official Position or Authority under Article 422 (1) and (2) (2.1) and (2.2) as read with Article 31 of CCK.

In appeal proceedings, the Court of Appeals of Kosovo has issued a Ruling PAKR.nr.349/14 dated 22.07.2015, by which it approved the appeals of defense counsels of the accused, annulled the first instance court judgment and sent the case back for reconsideration.

The State Prosecutor filed an appeal against this ruling due to violation of a right given to the party pursuant to the Constitution of the Republic of Kosovo – Article 54, an essential right provided to the party pursuant to Article 7 of CPC and the procedural right the intention of which is to guarantee a right pursuant to sub-paragraph 1.1 to 3.1 of this article, specified with Article 404 par. 1of CPC.

I base my opinion on the following facts:

1. Unless otherwise provided for under the present code, a party may seek **legal remedies** from a court of higher instance through:

1.1. An appeal against the judgment of the Basic Court to the Court of Appeals.

1.2. An appeal against the judgment of the Court of Appeals to the Supreme Court of Kosovo under Article 407 paragraph 1 of the present Code or where the judgment has imposed a sentence of life-long imprisonment.

1.3. An appeal against a decision of the Basic Court to the Court of Appeals.

1.4. An application for extraordinary legal remedies from the Basic Court or Court of Appeals to the Supreme Court of Kosovo.

Regarding an appeal against a decision, namely types of rulings that can be appealed, we have the legal provision of article 408 of CPCK, which states that:

1. An appeal against a ruling or order of a pre-trial judge and against other rulings rendered in the Basic Court may be filed by the parties and persons whose rights have been violated in accordance with Article 411 of the present Code, unless an appeal is explicitly prohibited by the provisions of the present Code.

2. No appeal shall be permitted against a ruling rendered by the review panel of three (3) judges in the pre-trial stage of the proceedings, unless otherwise provided for by the present Code.

3. A ruling rendered in connection with the preparation of the main trial and judgment may only be challenged in an appeal against the judgment, unless otherwise provided for by the present Code.

4. No appeal shall be permitted against a ruling rendered by the Supreme Court of Kosovo.

From these legal [redacted]esults that a possibility of appeal against the ruling of the Court of Appeals is not foreseen, by which it is decided upon appeal filed against a judgment of the first instance court and by which it is annulled.

It is demonstrated to be correct not only by our courts' longeval juridical practice, but also by a correct meaning/interpretation of chapter XXI of CPCK. Article 402 of CPCK which regulates annulment of judgments of the Basic Court states that annulment is done by a **ruling**. Nowhere it is stated that this ruling must be final, but it is only stated a "ruling", therefore we are dealing with a decision which may not be appealed. This is clear also pursuant to the provision of the article 406 of the CPCK which regulates the retrial proceedings at the Basic Court upon the ruling of the Court of Appeals, from which it results that the first instance court proceeds in accordance with this ruling, undertakes all procedural actions and reviews all contested issues stated in the decision of the Court of Appeals, during the retrial.

Ruling of the Court of Appeals issued upon an appeal against the judgment of the first instance, by which this judgment is annulled, is not reviewed by the Supreme Court in any case. The law does not foresee this. If the appeal and review of this ruling was possible, CPCK would have prescribed provisions for this proceeding, but they do not exist.

If an appeal against such ruling would have been permitted, we could find ourselves in a situation where a ruling is annulled and the case is sent to the Court of Appeals for reconsideration and in this process to issue a different decision, for example the first instance judgment is not annulled, but it is affirmed or modified. The consequence would be the possibility that the appeal filed against the first instance judgment would be reviewed two times

or more. This would not be in a spirit of the CPCK; it would create a situation of legal uncertainty and would open a door for any such decision to be reviewed by the Supreme Court, which is inconsistent and not foreseen by the CPCK.

The ruling of the Court of Appeals issued upon the appeal against the first instance judgment, by which this judgment is annulled, is not a decision on the merits in the sense that it is decided on the culpability of the accused or the existence of the criminal offense etc., but it is a decision establishing legal violations or defects in establishment of the facts, which are of such nature that render the first instance judgment legally inconsistent, and the retrial is necessary in order to avoid them. For this reason, here it is regarding a ruling and not a judgment.

A provision shows that this is correct.

It is regarding the appeal which may be filed against the **judgment** of the Court of Appeals that was issued in the second instance, so, upon the appeal filed against the judgment of the first instance – appeal in the third instance. This appeal, pursuant to the provision of the article 407 of the CPCK is permitted only in two cases, when the Court of Appeals has modified a judgment of acquittal of the Basic Court and rendered instead a judgment of conviction and when in case it imposed a sentence of life-long imprisonment.

Therefore, the lawmaker was very restrictive regarding the decision on the merit – judgments rendered in the second instance, has allowed appeals only in two cases, which shows that against the ruling in question which does not affect the rights of the accused (it is not being decided on his culpability etc.,) the appeal is not permitted, a let alone the possibility to appeal indefinitely.

Provision of the article 411 par. 6 of the CPCK, talks about the **appeal against the ruling of the Court of Appeals**. According to this provision, an appeal on the ruling of the Court of Appeals shall be filed by an authorized party with the Court of Appeals, but on other rulings, as the ruling by which the Court of Appeals orders detention on remand (deciding against the ruling of the first instance by which detention on remand was not ordered), ruling on the request for disqualification of a judge pursuant to article 42 par. 3 of the CPCK, when the request for disqualification is rejected and in similar cases foreseen by the law.

My conclusion is that the appeal should be dismissed as impermissible pursuant to the article 400 of the CPCK.

On 01.12.2015

Judge
Nesrin Lushta