COURT OF APPEALS

PRISTINA

Case number: **PAKR 349/14**

Date: **22.07.2015**

Basic Court: **Prizren, P 171/13**

Original: **English**

The Court of Appeals, in a Panel composed of EULEX Court of Appeals judge Piotr Bojarczuk, as presiding and reporting judge, Kosovo Court of Appeals judge Abdullah Ahmeti and Kosovo Court of Appeals judge Dr. Driton Muharremi as panel members, assisted by Dr. Bernd Franke, EULEX legal officer, acting in the capacity of a recording officer,

in the criminal case against the defendants:

1. **R.M.**, father`s name […]; date of birth […] in […], Kosovo-Albanian, current address: […];

2. **S.P.**, father`s name […], date of birth […], in […], Kosovo-Albanian, current address: […];

3. **A.A.**, father`s name […], date of birth […], Kosovo-Albanian, current address: […];

4. **K.U.**, father`s name […], date of birth […] in […], Kosovo-Albanian, current address: […];

5. **A.T.**, father`s name […], date of birth […] in […], Kosovo-Albanian, current address: […];

6. **M.K.**, father`s name […], date of birth […] in […], Kosovo-Albanian, current address: […].

All of them charged pursuant to indictment of 26 February 2013, filed with the Basic Court of Prizren on 27 February 2013 with the following criminal offense:

Abusing Official Position or Authority pursuant to Article 422 paragraph 1, 2 subparagraphs 2.1 and 2.2 of Criminal Code valid from 1 January 2013 in continuation pursuant to Article 81 valid from 1 January 2013 and partially in co-perpetration pursuant to Article 31 of the Criminal Code valid from 1 January 2013;

adjudicated in first instance by the Basic Court of Prizren with judgment P. no. 171/13, dated 13 March 2014, by which the defendants were found guilty and sentenced as followed:

1. R.M.

Pursuant to Articles 41, 49, 50, 52, 73, 81 and 422 paragraph 1 of the Criminal Code of Kosovo valid from 1 January 2013 to the punishment of 2 years of imprisonment with execution being suspended pursuant to Article 51 paragraph 2 of the Criminal Code of Kosovo valid from 1 January 2013 for three (3) years of verification period if the defendant does not commit another criminal offense for the verification period.

Pursuant to Article 65 paragraph 2 of the Criminal Code of Kosovo valid from 1 January 2013 to the punishment of prohibition of exercising public administration or public services functions for thirty (30) months.

2. S.P.

Pursuant to Articles 34, 42, 43, 44, 64 and Article 339 paragraph 2 of Criminal Code valid until 1 January 2013 to the punishment of eight (8) months of imprisonment with execution being suspended pursuant to Article 43 paragraph 2 of the Criminal Code of Kosovo valid from

1 January 2013 for two (2) years of verification period if the defendant does not commit another criminal offense for the verification period.

Pursuant to Article 65 paragraph 2 of the Criminal Code of Kosovo valid from 1 January 2013 to the punishment of prohibition of exercising public administration or public service functions for twelve (12) months.

3. A.A.

Pursuant to Articles 41, 49, 50, 52, 73, 75, 76 and 422 paragraph 1 of the Criminal Code of Kosovo valid from 1 January 2013 to the punishment of five (5) months of imprisonment with execution being suspended pursuant to Article 51 paragraph 2 of the Criminal Code of Kosovo valid from 1 January 2013 for eighteen (18) months of verification period if the defendant does not commit another criminal offense for the verification period.

4. K.U.

Pursuant to Articles 33, 41, 49, 50, 52, 73, 74, 75 and 422 paragraph 1 of the Criminal Code of Kosovo valid from 1 January 2013 to the punishment of eight (8) months of imprisonment with execution being suspended pursuant to Article 51 paragraph 2 of the Criminal Code of Kosovo valid from 1 January 2013 for twenty (20) months of verification period if the defendant does not commit another criminal offense for the verification period.

5. A.T.

Pursuant to Articles 25, 34, 42, 43, 44, 64, 65 and Article 339 paragraph 2 of Criminal Code valid until 1 January 2013 to the punishment of one (1) month of imprisonment with execution being suspended pursuant to Article 43 paragraph 2 of the Criminal Code of Kosovo valid from 1 January 2013 for one (1) year of verification period if the defendant does not commit another criminal offense for the verification period.

6. M.K.

Pursuant to Articles 41, 49, 50, 52, 73, 81 and 422 paragraph 1 of the Criminal Code of Kosovo valid from 1 January 2013 to the punishment of one (1) year and six (6) months of imprisonment with execution being suspended pursuant the Article 51 paragraph 2.1 of the Criminal Code from

1 January 2013 for two (2) years of verification period if the defendant does not commit another criminal offence for the verification period. Pursuant to Article 65 paragraph 2 of the Criminal Code of Kosovo valid from 1 January 2013 to the punishment of prohibition of exercising public administration or public service functions for eighteen (18) months.

Furthermore, the defendants were imposed to pay all costs of the criminal proceedings in the amount of 1,200 EUR. The obligation of each defendant has been limited to the amount of 200 EUR each. Furthermore pursuant Article 463 paragraph 2 of the CPC the Ministry of Justice, Municipality of Prizren, Kosovo Privatization Agency, Forestry Organization Sharri have been instructed to pursue their property claim in civil litigation.

Seized of the appeals filed by defense counsel Ruzhdi Berisha on behalf of **R.M.** on 27 May 2014, by defense counsel Sahit Bibaj on behalf of **S.P.** on 26 May 2014, by defense counsel Rexhep Hasani on behalf of **A.A.** on 26 May 2014, by defense counsel Brahim Sopa on behalf of **K.U.** on 20 May 2014, by defense counsel Skender Morina on behalf of **A.T.** on 20 May 2014 and by defense counsels Pjetr Pergjoka and Bashkim Nevzati on behalf of **M.K.** on 28 May 2014, all against judgment P. no. 171/13, rendered by the Basic Court of Prizren on 13 March 2014;

having considered the response of prosecutor Danilo Ceccarelli on behalf of the EULEX Prosecution Office, filed on 8 July 2014;

having considered the motion of the Appellate State Prosecutor, Judit Eva Tatrai, filed on 4 September 2014,

after having held a public session of the Court of Appeals on 9 June 2015;

having deliberated and voted on 22 July 2015;

acting pursuant to Articles 389, 390, 394, 398 and 402 of the Criminal Procedure Code of Kosovo (CPC);

renders the following:

RULING

The Appeal filed by defense counsel Ruzhdi Berisha on behalf of R.M. on 27 May 2014, the appeal filed by defense counsel Sahit Bibaj on behalf of S.P. on 26 May 2014, the appeal filed by defense counsel Rexhep Hasani on behalf of A.A. on 26 May 2014, the appeal filed by defense counsel Brahim Sopa on behalf of K.U. on 20 May 2014, the appeal filed by defense counsel Skender Morina on behalf of A.T. on 20 May 2014 and the appeals filed by defense counsels Pjetr Pergjoka and Bashkim Nevzati on behalf of M.K. on 28 May 2014 are hereby granted and the Judgment of the Basic Court of Prizren rendered on 13 March 2014, P. No. 171/13 is annulled.

The case is returned to the Basic Court of Prizren for retrial.

REASONING

I. PROCEDURAL BACKGROUND

On 15 September 2011, the prosecutor from the district prosecutor office issued a ruling on initiation of investigation with reference number HP. no. 147/2011 against **R.M.**, N.K., **S.P.** and **A.A.** all of them investigated for the commission of the criminal offense of abusing official position as per Article 339 of the Criminal Code of Kosovo, hereafter "CCK".

On 26 September 2011, the Acting District Prosecutor of Prizren, Syle Hoxha, made a request to EULEX Prosecution Office in Prizren to take the case over due to the fact that they are dealing with high municipality officials and the case is considered to be highly sensitive.

On 29 September 2011, the local prosecutor issued ruling on initiation of investigation HP. no. 255/2011, against **R.M.**, **K.U.**, **A.A.** and **A.T.** for the offences of Abusing Official Position or Authority as per Article 339 of the CCK.

On 3 October 2011, the Acting Chief EULEX Prosecutor issued a decision to take the case over and assign it to a EULEX prosecutor for further investigation.

On 14 November 2011, after reviewing the evidence the prosecutor issued another ruling on initiation of investigation (PPN. no. 204/11) against **R.M.** for the criminal offence of Abusing Official Position or Authority as per Article 339 of the CCK.

On 14 November 2011, the EULEX prosecutor filed a motion to the court to combine the investigations PP. no. 147/2011, HP No. 255/2011 and PPN no. 204/11 against all defendants and to proceed with a single investigative procedure.

On 18 November 2011, the three judge panel of the District Court of Prizren issued a ruling Kp. no. 407/2011, by which they decided that a unique procedure is to be applied for all three investigations and that the case will proceed with case number Hep. no. 147/2011.

On 23 November 2011, the Prosecutor filed a motion to the President of the Assembly of EULEX Judges to assign the case to the EULEX judges and on 4 January 2012 the present of the assembly of EULEX Judges issued a decision JC/EJU/OPEJ/2697/ff/11 by deciding to assign the case to EULEX judges team of Prizren.

On 14 March 2012, the EULEX prosecutor issued a decision ono expansion of the investigation against **R.M.**, N.K., **S.P.**, **A.A.**, **K.U.**, **A.T.** and **M.K.**

On 20 February 2013, the newly appointed prosecutor of the case, Natasha Vicary, brought three separate rulings on partial termination of the investigation in regard to **R.M.**, N.K. and **A.A.** for the criminal offence of Abusing Official Position or Authority as per Article 422 of the CCK (new criminal code).

On 27 February 2013, the prosecutor of the case filed the indictment against **R.M.**, **S.P.**, **A.A.**, **K.U.**, **A.T.** and **M.K.** for the criminal offence of Abusing Official Position or Authority as per Article 422 of the CCK, for the four acts as described in the indictment.

On 25 March 2013, the initial hearing was held in the presence of the defendants, defense counsels and prosecutor. After objections were filed by the defense counsel, the judge issued a ruling rejecting the objections and deciding to send the case file to main trial.

The ruling was appealed to the court of Appeals and on 29 May 2013, after the review the Court of Appeals issued ruling PN. no. 372/13 by annulling the ruling of the presiding trial judge and sending the case back for reconsideration.

Upon the decision of the court of appeals this presiding trial judge after reconsideration issued another ruling on 14 June 2013 by sending the case file to the main trial. After the objections filed by the defence counsels and the opinion of the Prosecutor on 25 July 2013, the Court of Appeals issued a ruling by confirming the ruling of the presiding trial judge and sending the case to the main trial.

The main trial in this case started on 13 August 2013 and after having had 28 sessions on 13 March 2014 the trial panel announced the judgment.

The judgment was appealed by defense counsel Ruzhdi Berisha on behalf of **R.M.**, by defense counsel Sahit Bibaj on behalf of **S.P.**, by defense counsel Rexhep Hasani on behalf of **A.A.**, by defense counsel Brahim Sopa on behalf of **K.U.**, by defense counsel Skender Morina on behalf of **A.T.** and by defense counsels Pjetr Pergjoka and Bashkim Nevzati on behalf of **M.K.**

The session of the Court of Appeals Panel was held on 9 June 2015 in the presence of the defendants and their defense counsels. The appellate state prosecutor was not present.

The Panel deliberated and voted on 22 July 2015.

II. SUBMISSIONS OF THE PARTIES

1. **Defence Counsel Ruzhdi Berisha on behalf of R.M.** on 27 October 2014 filed an appeal dated 27 October 2014 with the Basic Court on the grounds of:

- Essential violation of the provisions of criminal procedure (Article 384 CPC);
- Erroneous and incomplete determination of the factual situation (Article 386 CPC);
- Violation of the criminal law (Article 385 CPC);
- Wrongful decision of the criminal sanction (Article 387 CPC).

The defense asserts that the judgment is not in compliance with Article 365 and 370, paragraphs 3, 4 and 7 of the CPC. The enacting clause of the judgment is in contradiction to the legal provisions and is completely incomprehensible and contradiction to itself. It is unclear whether the facts of the indictment are made part of the introduction or the enacting clause of the judgment. Instead of presenting the facts for which the accused were found guilty the enacting clause refers to the counts of the indictment. The judgment lacks reasoning regarding the specific *intent* to obtain material benefit, to cause damage or to seriously violate the rights of another person. Violation of law *per se* without the specific intent does not constitute a criminal offense.

With regard to count 1, the defendant did not know all persons benefitting from the offence. In count 2 the injured party, sustaining the damage is a non-existing organisation. In count 3 the benefiting organisation is a foreign investor. Regarding count 4 none of those who sustained the violation of their rights, sought remedy.

He argues that the keeping of the cadaster records does not fall under the obligations or competencies of the mayor. Referring to Article 58 of the Law on Local Self-Government and Article 50 of the Statute of Prizren Municipality, the changes in cadastral registry are not an obligation of a mayor. Therefore, he could not have committed this offence by failing to fulfill

his official duties under his competencies. In any way civil servants must not implement orders and instructions of their supervisors if those are contrary to the law.

Regarding Count 1 he remarks that due to legal obstacles and technical defects it was impossible to execute the decision of the Supreme Court and to register the change of the ownership of the land parcels no. 8617 and no. 8619 in the cadaster records. Insofar, the enacting clause of the decision does not refer to the parcels i.e. to parcel no. 8618. Secondly, the decision errs in facts. Thirdly, the defendant was not mayor of Prizren when the judgment was delivered to him.

Afterwards on 17 November 2006, the Municipal of Prizren ordered re-trial in the same matter which procedure became final by the ruling of the district court of Prizren on 2 April 2007. The proposal for revision filed by the lawyer of the municipality was dismissed by the Supreme Court on 6 June 2011. The defendant became mayor of Prizren on 3 January 2008. At this time the original decision of the Supreme Court was not executable as there was an ongoing re-trial in this case. According to the defense Article 427 paragraph 2 of the Law on Contested Procedure (1977) applicable at that time ruled that in case of a re-trial all previous court decisions are terminated.

Even if the Supreme Court decided on the ownership of the parcels and the changes have been recorded in the cadaster, the factual situation of the parcels did not change as those are still in possession of **M.K.**, M.Q. and J.A. The accuracy of the cadaster records is inessential and the failure to record changes in the rights and facts did not contribute to obtaining material benefit or to causing damage.

The defense further submits that the amount of the material benefit in count 1 is miscalculated. The amount of the material benefit is calculated based on the received rent for the lease of the buildings and not based on a possible lease of the land plots.

Regarding count 2 the ownership of the cadaster parcel no. 800 “Korishe CZ” remained a socially owned property and only right for using the land was transferred to the organisation “Gulistan”. Ruling no. 01-370 was drafted by a legal officer and it might happen that the law was incorrectly applied. There was no appeal filed by the Privatization Agency of Kosovo or by the non-existent Forestry Company that means that no harm was done by the decision. Before signing the contract, the board of directors of the municipality approved the request of “Gulistan” and allocated the parcel without compensation. The Municipal Assembly approved

the request of "Gulistan" in 2009. In 2011, the Municipal Assembly allocated a land parcel form the area called "Boka Boka" to "Gulistan"; therefore the defendant only executed the decision.

Regarding count 3 the defense argues that the defendant did not commit the criminal offense, as the agreement between the municipality and the private company "Kamila" was never realized. Thus, the private company did not gain any material benefit. The property was registered under the former Federal Secretariat for the People`s Defence of Yugoslavia and as a matter of fact the municipality can use or administer the land.

With regard to count 4 in one of the meetings of the mayor, his deputies and the directors they ordered the director of the Directorate of Geodesy and Cadaster that by a separate decision he`s to ban the experts from the performing judicial expertise in court proceedings. Therefore, the criminal liability should be distributed amongst those who rendered the decision. In order to convict the accused for count 4 the violation of the rights of a specific person should have been established in the impugned ruling. The geodesics of the municipality are not the only experts in this field. The court could have engaged other experts who were available to assist in lawsuits.

With regard to the violation of the criminal law the defense submits that after the substantial violation of the provisions of the criminal procedures and the erroneous determination of the factual situation the court erred to conclude the criminal liability of the defendant in any charges. He concludes that given the defendant did not commit the criminal offense the imposed criminal sanction is also unlawful.

The defense proposes to approve the present appeal and to modify the judgment of the first instance court, so that the accused **R.M.** due to the lack of evidence to be acquitted for all criminal offences he has been charged with, or to annul it and return the case for re-trial.

2. **Defence Counsel Sahit Bibaj on behalf of S.P.** on 26 May 2015 filed an appeal dated 26 May 2015 with the Basic Court on the grounds of:

- Violation of the Criminal Law.

The defense raises a violation of Article 385 points 1.1, 1.2 and 1.3. He refers to Article 339 Provisional Criminal Code of Kosovo and asserts that the trail did not attest through any evidence the element of obtaining material benefit neither for the defendant nor for another

person. Instead, only the public benefitted from the construction of the chocolate factory because it boosted employment, turned a waste dump into urban area, and induced local taxation while the ownership shall remain with the municipality in compliance with the contract.

Furthermore the defense submits that the defendant was obliged to perform and implement the orders of his senior; he only followed orders by doing so. Although the defendant **R.M.** has signed an agreement for the allocation of the land, on 15 April 2011 the defendant has signed another contract with the company for a construction on a changed parcel with no. 688/2; if the other contract would not have been signed by the defendant, then the municipality should have had to compensate the damage that was caused to the said company and also the municipality of Prizren would have no investments and no employment of its citizens.

The defense refers to several statutes, the Law no. 03/L-40 on Local Governance, the Law no. 03/L-090 on Public-Private Ownership and the Law no. 02/L -33 on Foreign Investments in Kosovo and concludes that the incriminated transfer of the use of the land parcel no. 688/2 to the legal person "Kamila" was in harmony of the provisions of these laws. Accordingly Kosovo shall promptly, routinely and uneventfully comply in good faith with all obligations that it has to a foreign investor. Furthermore, the first purpose of the law should be to ensure the most efficient, cost-effective use of public funds.

All in all there is no evidence to prove the criminal liability of the accused; he had no knowledge that signing such contract was unlawful. However, even if it would be proved the commission of the criminal offence, there are circumstances that acquit him from the criminal liability.

He proposes to annul the appealed judgment and to acquit the defendant of the charge or to grant the appeal and return the case for a re-trial.

3. **Defence Counsel Rexhep Hasani on behalf of defendant A.A.** filed an appeal dated with 26 May 2014 on the grounds of:

- Essential violation of the provisions of criminal procedure;
- Erroneous determination of the factual situation;
- Violation of the criminal law;
- Wrongful decision on the criminal sanction.

With regard to the essential violations of the provisions of the criminal procedures the defence considers that the enacting clause of the impugned judgment is unclear and unfounded especially in parts related to co-perpetration. Neither in the enacting clause, nor in the reasoning of the appealed judgment concrete details about the actions and engagements are provided. He argues that the defendant issued decision 07-025-6976Z and by doing so he had a legal cover, the decision of the Mayor of Prizren in (Ruling 01-370, date 24 November 2010) and the request of the administration directory of the municipality of Prizren (no. 03-3, date 24 October 2010), to make the change in the cadastral data. The acts, on the bases of which the accused made changes in the cadastral data for the cadastral parcel no. 800/2 at the location called "Boka Boka" have been of the authority. Therefore the accused could not change, verify or undertake any action.

The defendant was neither involved at the beginning of talks, about the request of the Educational Center "Gulistan" since he was not part of the decision-making structures. The accused was only a civil servant. He has made changes in the cadastral parcel no. 800/2 by order of the authority. Services of the Directory of Cadaster and Geodesy rendered the ruling the bases of the valid documentations and the accused signed and acted according to his duties. Therefore the accused could not change, verify or undertake any other action. In the judgment it is not explained nor justified how the co-perpetration of the criminal offence has been conducted.

The defense further refers to Article 31 of CCK and the joint decision as condition for co-perpetration. He argues that the actions haven never been done voluntarily; therefore the judgment is, particularly regarding the enacting clause, unclear and unjustified for crucial facts. The actions undertaken by the defendant are unclear, confusing and without any argumentation because it cannot be verified how and which actions are undertaken by the accused. Thus, the first instance court violated the provisions of the criminal procedure from Article 384, paragraph 1, point 1.12, related to Article 370, paragraph 5.5 and 7 of CPCK.

Finally, the factual situation has not rightly and completely been certified. With no relevant and concrete evidence it is proven that the defendant acted in co-perpetration and in commission of the criminal offences with the accused **R.M.** and **M.K.** It has not been proved that the defendant as accomplice of the criminal offence, enabled for the municipality of Prizren to take under possession the cadastral parcel no. 800/2 and enabled signing the contract between the

municipality of Prizren and he EC Gulistan through which the use of the cadastral parcel were given.

Because of the essential violation of the provisions of the criminal procedure – the erroneous determination of the factual situation – the first instance court violated the criminal law set in Article 385 paragraph 1, point 1.1 of the CPCK.

Based on the above, the defense concludes on the violation of the criminal law, adds that the court failed to apply Article 71 of the CCK and finds that his conviction is based only on assumptions.

He proposes to approve his appeal as grounded, to annul the impugned judgment, to return the case for re-trial or for amend pursuant the provisions of Article 403, paragraph 1, points 1.2 of the CCK and to acquit the accused of the charges.

4. **Defence Counsel Brahim Sopa on behalf of defendant K.U.** on 20 May filed an appeal dated with 20 May 2014 with the Basic Court on the grounds of:

- Substantial violation of provisions of criminal procedure;
- Erroneous and incorrect determination of the factual situation;
- Decision on the sanction.

The defense asserts that the decision of the Supreme Court (judgment Rev. no. 209/2005, dated 26 May 2006) could not be executed due to legal obstacles. Particularly according to Law no. 2003/25, dated 3 December 2003, Article 16 point 16.05, a transfer may be registered only if the parcel is free from mortgages and other guarantees, which was not the case with regard to disputed property. Secondly, there were court disputes which prevented him to execute the judgment. Moreover, he refers to Article 400 paragraph 1 of the LCP and stresses that revision against the appealed ruling of the court of second instance court is not permitted. It was impossible to execute the cadastral change as there was a technical error in the decision of the Supreme Court failing to refer to all the cadaster parcels. Parcel 8618 was not recorded where the three parcels were part of the disputed process involving the court proceedings.

Finally, he finds that the factual situation has erroneously and incomplete determined and refers to the testimony given by the public attorney E.M.

He proposes to amend the judgment and acquit the accused of the criminal liability.

5. **Defence Counsel Skender Morina on behalf of A.T.** on 20 May 2015 filed an appeal dated 20 May 2015 with the Basic Court on the grounds of:

- Violation of the provisions of the criminal procedure, as per Article 384 paragraph 1, item 1.10 and paragraph 2 item 2.1 of the KCCP;
- Violation of the Criminal Law, as per Article 385 paragraph 1, item 1.1 of the CPC;
- Erroneous and incomplete determination of the factual situation, Article 386 of the CPC;
- Criminal sanction – decision and sentence.

The defense submits that the judgment substantially violates Article 384 paragraph 1 item 1.10 of the criminal procedure as it exceeds the scope of the charge and therefore makes the same incomprehensible. It contradicts both itself and evidence deriving from the main trial so this constitutes a ground to be rejected. Furthermore, the judgment violates Article 384 paragraph 2, item 2.1 of the CPC, because the criminal law has erroneously been applied. The defendant has been convicted under the new criminal code. Instead the old code was supposed to be applied, respectively Article 339, paragraph 1 of the CPC. The judgment does contain a violation of Article 385, paragraph 1, item 1.1 of the CPC, because in the actions of the defendant there are no elements of the criminal offence, he was found guilty.

Moreover the defense remarks that the first instance court has determined the factual situation erroneously and incompletely, having exceeded the jurisdiction respectively the scope of the enacting clause of the indictment. The defendant has not taken any unlawful action. In particular there is no single decision or any other legal administrative act by which the defendant has prevented the experts not to go to the court. The finding of the first instance court is ungrounded and has no support in any material evidence. The defense refers to the civil proceedings and asserts that the rights of the parties with respect to their claims have not been violated. Therefore, the assessment and finding of the first instance court cannot stay because by implementation of the conclusion, the parties were not limited or disabled to realize their rights in litigation; the actions of the defendant in this respect had no impact to these cases which are pending for ages in court for decision. By no single evidence or document it has been proved that the defendant

has halted the experts to go to court. Finally the defendant was supposed to be found guilty for assistance to commission the criminal offence, and not as a perpetrator as found by first instance court.

He proposes to modify the judgment and to acquit the defendant, or to annul the contested judgment and to return for re-trial.

6. **Defence Counsels Pjetr Pergjoka and Bashkim Nevzati on behalf of M.K.** on 28 May 2014 filed an appeal with the Basic Court on the grounds of:

- Violation of provisions of criminal procedure;
- Violation of the Criminal Code;
- Erroneous and incomplete determination of the factual situation;
- Decision on the criminal action.

The defense finds that the trial panel has prejudged the case and has almost in the beginning reached the conviction that the accused has violated the law. This is evident from the reasoning of the judgment and from the fact that it took only three hours for the panel to render the judgment.

The court performed an essential violation of the provisions of criminal procedure under Article 384 par. 1.8 of CP. Signing a supplementary document does not have any legal power and the evidence has to be considered as inadmissible. The evidence of G.S. is inadmissible as well as the minutes of the Board of Directors as discussions in an informal forum present the free opinion of the participants. He accused did not participate in the negotiations related to the allocation of the land. Registering changes in the cadaster records does not have any link with the official activities of the accused.

The judgment presents an erroneous and incomplete application of Article 370, para. 2, because it does not contain name and surname of the State prosecutor, defense counsels of the accused and representatives of the injured parties as well as the date of drafting the judgment. Essential violations are present under Article 384 par. 1.12 due to the failure to apply Article 370, para. 5 related to imposition of punishments for each separate offense and joinder of these offenses in order to pronounce an aggregate punishment. The enacting clause does not indicate whether the

criminal offense has been committed in continuation or it should be accountable for each of the counts as an aggregate punishment.

The defense further submits that witness G.S. received the decision of the president of the municipality and then he drafted the supplementary document and signed it. Instead of witness S. the defendant was not directly involved in this matter. There is no evidence that the accused participated in negotiations related to the allocation of land that he has received the decision of the president and in the decision for allocating the land. The letters 03/3 dated with 24 November 2010 and 11 February 2011 can only be assessed as correspondence between administrative bodies.

Finally, neither the president of the municipality nor any other officials prohibited the geodesy experts to participate in court expertise. The prosecutor did not provide evidence as to which form the mentioned "proposal" was submitted, when it was submitted and to whom it was addressed. The minutes from the meeting of the board of directors can be considered as expression of free opinion of the participants but not as a decision taking. But even if the issued were presented as proposal it cannot oblige the authorized persons. The president of the municipality issued a conclusion. The mentioned conclusion and its content were not properly interpreted by the judges.

He proposes to quash the challenged judgment and to return the case back for re-trial and to acquit the accused due to the lack of evidence.

Response to the Appeal

The prosecution finds that the enacting clause of the judgment provides a clear and complete description of the decisive facts; there are no discrepancies between the statement of facts and the content of the reasoning of the judgment. He submits that the appeals basically contain the same arguments raised several times during the main trial and properly addressed by the prosecutor in her closing speech. Taking the collected evidence into consideration there is no ground for challenging the judgment. The enacting clause of the judgment provides a clear and complete description of the decisive facts and there are no discrepancies between the statement of facts in the enacting clause and the content of the reasoning of the judgment. The enacting

clause together with the reasoning provides a comprehensive assessment of the evidence and an accurate determination of the factual situation. The first instance court further has thoroughly established the relevant factual state and circumstances. Finally the court has written a well-reasoned evaluation of the evidence, including the credibility of witnesses and the weight of their statements to find the defendants guilty. The court imposed sentences proportionate to the gravity of the offences and the conduct of the offences.

The prosecution proposes to reject the appeals and to affirm the judgment entirely.

The Motion of the Appellate Prosecutor

With regard to defendant R.M. the Appellate Prosecutor finds that the description of the facts of the indictment and the establishment of the facts in the enacting clause are clearly distinguished. Contrary to what is asserted in the appeal, the enacting clause clearly describes the facts for which the defendant was found guilty. Referring to the assertion of the defense the defendant did not know all those benefited from the offence the Appellate Prosecutor remarks that the accused knew at least one of the beneficiaries – defendant **K.** The municipality further does not have the right to dispose with its property although the assets of the organization nevertheless were under administration of the Privatization Agency of Kosovo. The fact that the beneficiary of the offence is a foreign investor does not lift the obligation of the officials to follow the rule of law. Regarding those who sustained the violation of their rights did not seek any remedy the prosecution finds that the defence fails to make any reference whether these persons were duly notified in order to pursue lawsuits against the municipality. Secondly, some of the injured parties filed civil claims. Thirdly, the inaction of the injured parties to initiate legal remedy proceedings has no bearing on the fact that their rights had been violated.

He further submits that the issue with the obstacles preventing the execution the decision of the Supreme Court has already been raised during the trial and has already been addressed at length. He concurs with the reasoning of the judgment in this regard. The material benefit, obtained by **K.**, Q. and A., is correct. The prosecutor refers to the maxim of *nemo plus iuris ad alium transferre potest quam ipse habet*. Owner of the land was the Labour Organisation of Forestry Sharri – OPB Economy of Forests and the Federal Secretariat for the People`s Defence of Yugoslavia. He finds it is irrelevant that these organisations do not longer exist and this does not

make their assets derelict. The municipality did not have a legal authorization to dispose over assets or to transfer the right of use over these parcels. Insofar, the argument of the defence the defendant was only executing the decision of the municipal when he disposed the land to "Gulistan" cannot stand. Regarding count 3 it is not necessary for the commission of the criminal offense to transfer the use of land and to obtain material benefit. Article 422 para. 1 requires only the special intent to obtain material benefit and does not require that this material benefit materializes.

The fact that apart from **M.** others participated in the rendering of the decision does not elevate his personal criminal responsibility. Furthermore the enacting clause refers to specific civil cases. The ban caused delays in these cases and interfered with the normal progress of court proceedings. This constitutes the violation of the rights of the parties involved.

The Appellate Prosecutor finally does not share the conclusion of the defense on the violation of the criminal law concerning the establishment of the criminal liability of the accused and the imposing of criminal sanction against him.

With regard to defendant P. the Appellate Prosecutor notes that the first instance court has addressed the arguments of the defense counsel in the judgment. He finds that the private firm "Kamila" materially benefitted from obtaining the right of use the land parcel no. 688/2 free of charge for ten years. The fact that the accused did not benefit from the offence has been evaluated as a mitigating factor by the trial judge. The contract was further not in harmony with the law and violated the law on Local Governance, the Law on Public-Private Ownership and the Law on Allocation and Exchange of Immovable Property of municipality. The court sufficiently established the criminal responsibility of the defendant when he circumvented the municipality of Prizren. The private firm "Kamila" further did not meet the criterion to be exempted from the procurement procedure as it is not a central institution of Kosovo.

The defense errs in the substantial law when he finds it necessary for the establishing the commission of the criminal act of abusing official position or authority that material benefit has to be obtained for self or for third parties. Article 422 para. 1 of the CPC requires only the special *intent* to obtain material benefit but not the receiving of the benefit. The Appellate Prosecution finally challenges the assertion of the defense the defendant had no knowledge about the unlawfulness of the contract.

With regard to defendant A. the Appellate Prosecutor finds that the enacting clause clearly states the acts of defendant **A.** by which he substantially contributed the commission of the offense. The defense failed to refer to any authority in his appeal. Article 31 of the CC RK does not require an initial plan or prior agreement along with the co-perpetrators act with each other. The defense failed to raise new arguments which have not been addressed by the court. Moreover, the suggestion of the defense for an aggregated punishment is incomprehensible.

With regard to defendant U. the Appellate Prosecutor refers to the raised obstacles to execute the decision of the Supreme Court. According to her opinion the first instance court has addressed this line at length.

With regard to defendant T. the Appellate Prosecutor remarks that the first instance court did not exceed the charge. Neither did the court find that the defendant participated in the decision-making or the rendering of the conclusion. The defendant in fact distributed the "conclusion" amongst the geodesy experts of his directorate by way of which he consented to it and substantially contributed to its implementation. He was convicted for the criminal offense as per Article 339 para. 2 of the CCK, because the court explicitly established that in this case the new criminal code is not more favorable.

With regard to defendant K. the Appellate Prosecutor finds that the submission of the counsels on the alleged prejudice of the trial panel is belated and it is also groundless as their submission lacks any legal grounds as required by Article 41 para. 5. The submissions related to the inadmissibility of some evidence also lacks legal basis. The absence of the names and surnames of the state prosecutor, the defense counsels and the representatives does not make the entire judgment null and void and does not amount to substantial violation. The defendant was found guilty for the commission of the criminal offense of abusing official position or authority *in continuation*. Therefore, only one criminal sanction could be imposed against him. He does not see the rationale behind the submission that an aggregated punishment should have been imposed against the defendant. Finally, the agenda for the meeting on 2 August 2011 did not envisage the geodesy expert`s participation. It was *ad hoc* put forward by the defendant.

The Appellate Prosecution concurs with the response filed by the prosecution and proposes to reject the appeals of all defendants as unfounded and to affirm the judgment in its entirety.

III. Findings

The challenged judgment contains substantial violations of the provisions of the Criminal Procedure Code (CPC) and had to be annulled. Therefore, the case is returned for retrial.

Competence of the Court of Appeals

The Court of Appeals is the competent court to decide on the appeals pursuant to Article 17 and Article 18 of the Law on Courts (Law no. 03/L-199).

The Panel of the Court of Appeals is constituted in accordance with Article 19 Paragraph (1) of the Law on Courts and Article 3 of the Law no. 03/L-053 on Jurisdiction and Competencies of EULEX Judges and Prosecutors in Kosovo.

Admissibility of the Appeals

The appeals are admissible. The contested judgment was announced on 13 March 2014 and served in written form to defendant **R.M.** on 13 May 2014, to defendant **S.P.** on 13 May 2014, to defendant **A.A.** on 14 May 2014, to defendant **K.U.** on 16 May 2014, to defendant **A.T.** on 16 May 2014 and to defendant **M.K.** on 15 May 2014. The appeals were filed by defence counsel Ruzhdi H. Berisha on behalf of defendant **M.** on 27 May 2014, by defence counsel Sahit Bibaj on behalf of defendant **P.** on 27 May 2014, by defence counsel Rexhep Hasani on behalf of defendant **A.** on 27 May 2014, by defence counsel Brahim Sopa on behalf of defendant **U.** on 20 May 2014, by defence counsel Skender Morina on behalf of defendant **T.** on 20 May 2014 and by defence counsels Pjeter Pergjoka and Bashkim Nevzati on behalf of defendant **K.** on 28 May 2015. The appeals of the defense counsels were timely filed within the 15-day deadline pursuant to Article 380 (1) CPC and by the authorized person.

Essential violation of Article 370 par. 1 and 2 of the CPC

Pursuant to Article 370 par. 1 of the CPC, the judgment shall have an introduction, an enacting clause and a statement of grounds. The introduction shall contain the data prescribed in paragraph 2 of the present article, the legal designation of the criminal offence as per the

Criminal Code as well as the data of each of the participants in the main trial, whose first names and surnames should be put down along with their criminal procedural functions in the proceeding.

From the first instance judgment it can be noticed that the introductory part of the judgment does not fully contain those elements which are stipulated by the Criminal Procedure Code, since the entire indictment filed by the prosecution has been incorporated into it, which is not in compliance with the provisions of the CPC. Article 370 par. 2 of the CPC clearly stipulates: "The introduction shall include: an indication that the judgment is rendered in the name of the people; the name of the court; the first name and surname of the single trial judge or presiding trial judge, members of the trial panel and the recording clerk; the first name and surname of the accused; the criminal offence of which the accused was convicted and an indication as to whether he or she was present at the main trial; the day of the main trial; whether the main trial was public; the first name and surname of the state prosecutor, counsel, legal representative and authorized representative present at the main trial; the day of the announcement of the judgment that has been rendered; and the date when the judgment was drawn up."

The impugned judgment is lacking some of the aforementioned elements such as: the first name and surname of the recording clerk whether or not the defendants were present at the main trial, the first name and surname of the state prosecutor, the names of the defense counsels of the accused and the date when the judgment was drawn up.

The Court of Appeals stresses that if the violation of the criminal procedure would be only limited to these omissions there would be no reason to send the case back for retrial since all relevant elements are still present in the case files. These violations could have been solved best by modifying the first instance judgment. However, the Court of Appeals observes further violations as mentioned below. Taking all violations into account the Court of Appeals concludes that the overall outcome makes it necessary to annul the judgment and to return the case to the first instance court for retrial and reconsideration.

Essential violation of Article 384 par. 1 item 1.12 in conjunction with Article 370 par. 6 and 7 of CPC

The judgment contains an essential violation of Article 384, par. 1, item 1.12, in conjunction with Article 370 par. 6 and 7 of the CPC due to the fact that the enacting clause is incomprehensive, unclear and inconsistent with the statement of grounds and decisive facts presented by the first instance court. Specifically it is unclear which facts and actions have been determined by the basic court by which evidence as there is no factual description that could clarify the specific incriminatory actions of the accused.

According to Article 370 par. 6 of the CPC and related to the statement of grounds for a judgment, the court shall present the grounds for each individual point of the judgment. According to Article 370 par. 7 of the CPC the court shall state clearly and exhaustively which facts it considers proven or not proven, as well as the grounds for this. The court shall also make an evaluation of the credibility of conflicting evidence, the grounds for not approving individual motions of the parties, and the reasons by which the court was guided in settling points of law and, in particular, in establishing the existence of a criminal offence and the criminal liability of the accused, as well as in applying specific provisions of criminal law to the accused and his or her act.

The Court of Appeals outlines that the first instance court has failed to provide reasoning about the accuracy of the contradictory evidence as well as the supporting grounds on which the court did not approve the concrete proposals of the parties. In particular, there is a lack of reasoning when affirming the existence of the criminal offence as well as the criminal liability of the accused and when applying relevant provisions of the criminal law for the accused and their acts.

From the enacting clause it is not apparent who and to what extent the defendants benefited from the actions and who is the damaged party. The enacting clause of the judgment fails to clearly identify the damaged parties, which is the reason why such damaged parties are instructed to file a legal property claim, a legal remedy they are entitled to seek in the civil procedure or to oblige the accused to compensate the damage to them, pursuant to Article 463, par. 1 and 2 of the CPC. It cannot be seen from the first instance judgment whether any of the representatives of injured parties have been summoned to state whether they are willing to criminally prosecute them or not and whether they are filing legal property claims or not (pursuant to Articles 458 and 459 of

the CPC); and if this is the case – then what is the purpose of filing such claims – compensation for damage, recovery of an object or annulment of a particular legal transaction (Article 458, par. 2 of the CPC). Therefore, the court of the first instance during the retrial, should identify the damaged parties, the manner in which they were damaged and to summon them and take their statements about the circumstances referred by Article 458 of the CPC.

In addition to this, the enacting clause is in contradiction with the statement of grounds also due to the fact of amounts or sums determined as damages or value of the properties claimed to have been acquired by certain persons through the abuse of official positions of the accused. The enacting clause describes actions which have occurred, including material benefits in amount of € 30,050 in point I of the judgement; € 100,600 in point II, and € 40,000 in point III. From such judgment one cannot understand who obtained such profit. Did the defendants make profit for themselves or for someone else? When making the assessment the court refers to lost profit using it for the overall calculation. It is not clear what expertize the court applied when doing the assessment to determine the value of the damages or of the lost profit. In other words: From the judgment it is not comprehensible how the first instance court made the assessment to determine the values or properties and the lost profit. However, it is the obligation of the court to order an expert for an in-depth analysis and, based on his opinion, to make an own assessment indicating whether it gives trust to such expertise or not. It finally has to provide a detailed justification. The Court of Appeals finds that the first instance court has partially not adhered to these proceedings.

Pursuant to Article 370, par. 6 of the CPC, the court shall present the grounds for each individual point of the judgment. The statement of grounds shall be supported with free assessment of evidence and their individual examination, including their entirety and mutual relation between the pieces of evidence. It has to be clearly specified which evidence were admissible for what reasons and which of them were not, whereas with regard to the legal side, relevant legal provisions should be interpreted and specified. The first instance court, as it can be seen from the judgment, i.e. on its page 5 in Albanian version, has administered eleven (11) pieces of evidence from the file no. 3; twenty two (22) of them from file no. 4; thirty (30) from file no. 5; thirty six (36) from file no. 6; and four (4) pieces of evidence from the main trial file; testimonies from the witnesses and defendants were only listed but they were not elaborated, reviewed and checked by providing the grounds about their relevance and their causal link with the entire

criminal matter in general and with the accused persons in particular. The first instance court should have given its own assessment on the credibility of each and every piece of administered evidence. In particular, it should have clarified what was affirmed with which piece of evidence and what correlates with other pieces of evidence for the sake of complete and correct determination of the factual situation. By just listing the pieces of evidence it cannot be concluded what the first instance court has determined with which evidence and what incriminatory actions of one of the accused or perhaps of all of them were confirmed by the testimonies. As a matter of fact, the first instance court does not have to summon the same witnesses who have already been heard in the main trial for the second time. The court should rather review all the testimonies one by one and then should assess the credibility of these testimonies. It should assess the causal link of these testimonies with the actions of the accused and the facts which are proven by such evidence. Finally, the court should harmonize them with other evidence and, depending on their outcome, render a correct and lawful decision.

Essential violation of Article 384, item 1.12, in conjunction with Article 370 par. 8 of the CPC

The judgment additionally contains an essential violation of the provisions of the criminal procedure pursuant to Article 384, item 1.12, in conjunction with Article 370 par. 8 of the CPC, as it does not mention the circumstances taken into consideration by the court when determining the punishment. It is unclear how the first instance court has justified the punishment. Which mitigating and aggravating circumstances do exist and have to be taken into account when individualizing the punishment? According to Articles 73 and 74 of the CCRK, it is especially required to justify the circumstances based on which the punishment given in the enacting clause of the judgement has been imposed. The Court of Appeals finds that in the conviction part of the impugned judgment the first instance court has failed to give and assess the mitigating and aggravating circumstances for the accused. The court has given a description of the incriminatory actions of the accused without specifying the mitigating and aggravating circumstances which necessarily have an impact on the amount of the punishment.

The first instance court is free in its decision when assessing the evidence while the Court of Appeals shall reassess it only if it finds legal mistakes in the assessment conducted by the court.

The Court of Appeals finds that the judgment in question does not contain a sufficient assessment as well as a sufficient factual description and statement of grounds.

Final Remarks

From the reasons mentioned above, the impugned judgment is legally inconsistent and as such it should have been annulled. The case therefore has to be sent back to the first instance court for retrial. At the retrial it is up to the first instance court to comply with the aforementioned remarks and to eliminate all the violations referred to above, to administrate 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 administered evidence before rendering a proper decision.

Summarized, the first instance court failed to provide the grounds related to the mitigating and aggravating circumstances and therefore the panel is unable to agree or disagree with the punishment making it thus not acceptable for the Court of Appeals. The appeals therefore have been granted and the judgment of the first instance court of Prizren P. no. 171/13, dated 13 March 2014 is annulled. The Case returns back to first instance court for retrial

From what has been mentioned above, it was decided as in enacting clause of the present ruling.

Reasoned written ruling was completed on 27.08.2015.

Presiding Judge

Piotr Bojarczuk
EULEX Judge

Panel Member

_____

Abdullah Ahmeti
Kosovo Judge

Panel Member

_____

Dr. Driton Muharremi
Kosovo Judge

Recording Officer

_____

Dr. Bernd Franke
EULEX Legal Officer

Court of Appeals
Pristina

PAKR 349/14
22.07.2015