PARTLY DISSENTING OPINION OF THE JUDGE NESRIN LUSHTA IN THE CRIMINAL MATTER PML.-KZZ. No.170/2014

On 18.11.2014, we completed deliberation and voting in the case PML.170/2014 upon request for protection of legality filed against the judgment of the District Court of Peja P. no. 477/11, dated 24.05.2012, and judgment of the Court of Appeals PAKR. no.112/2012, dated 25.04.2013.

I have expressed a dissenting opinion from the panel members, with regard to:

1. **Composition of the panel**
2. **Possibility to modify the judgment regarding the decision on punishment.**

1.

Composition of the panel

I consider that the panel should have been composed by the majority of local judges, and I base this in the following facts:

According to article 3 of the Law amending and supplementing the law nr.03/L-053 on jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo, which added the article 1.A.3, for purpose of this law an ongoing case means:

1.1 Cases for which the decision to initiate investigations has been filed before 15 April 2014 by EULEX prosecutors in accordance with the law;

1.2 Cases that are assigned to EULEX judges before 15 April 2014.

Article 3.3 of the present Code prescribes that Panels in which EULEX judges exercise their jurisdiction in criminal proceedings will be composed of a majority of local judges and presided by a local judge. Upon the reasoned request of the EULEX competent authority Kosovo Judicial Council will decide that the panel to be composed of majority of EULEX judges

According to article 2 of the Agreement between the Head of EULEX Kosovo and Kosovo Judicial Council regarding relevant aspects of the activity and cooperation of EULEX judges with the Kosovo judges working in the local courts,

cases which according to article 1.A.2 were assigned to EULEX judges based on article 25.1 and 242.2 Criminal Procedure Code (CPC) before 15 April 2014, shall be

treated as an ongoing case in relevant stages of the criminal proceedings and instances of the trial. This means that all ongoing cases with trial panels composed by majority of EULEX judges shall continue with the majority of EULEX judges of the trial panels for continuation of all stages of the trial and remainder of the proceedings.

I fully agree that the case at hand is an “ongoing case”.

However, I do not agree that the case should be treated by a penal composed by the majority of EULEX judges.

The abovementioned provision always talks about “trial panels”, Therefore, this is how I also understand this provision. Ongoing cases with *trial panels* composed by majority of EULEX Judges shall continue with trial panels composed by majority of EULEX judges in compliance with this provision.

In the case at hand we have not adjudicated in a “trial panel” but in a “panel”.

The meaning of these terms is defined in CPCK and

according to article 19.1.22 of the CPCK, trial panel is a panel of a presiding trial judge and two (2) professional judges who hear the evidence and adjudicate during the main trial.

That the trial panel acts only at the main trial is also prescribed for by articles 25 and 26 of the CPC.

The term “panel”, according to article 28 of the CPCK refers to the panel which adjudicates appeals, and when it concerns extraordinary legal remedies, as in the case at hand, according to the provisions of the article 435.1 of the CPCK: “A request for protection of legality shall be considered by the Supreme Court of Kosovo *in a session of the panel*”

I think that from these provisions it clearly results that the case at hand does not concern a trial panel but a panel and for this reason provision of the agreement on composition of the trial panel by majority of EULEX judges may not be applied.

I also reviewed the part of the abovementioned provisions which says that in these cases the trial panel composed by majority of EULEX judges shall continue in all stages of the trial in the remainder of the proceedings.

The provision is contradictory because it talks about “trial stages” in the “remainder of proceedings”. The word trial never refers to the session of the panel. For this reason I understand that this refers to the first instance, whereas the remainder of the proceedings, if the intention was to refer to the proceedings with extraordinary legal remedies, it should have been specified.

2.

Possibility to modify the judgment regarding decision on punishment, upon request for protection of legality

Request for protection of legality, according to the provision of the article 432 of the CPCK may be filed on the ground of violation of the criminal law and essential violation of the criminal procedure specified under points 1.2 and 1.3 of the present article.

Essential violations of the provisions of the criminal procedure are mentioned in the provision of the article 384 of the CPCK, whereas violations of the criminal law in the provision of the article 385 of the CPCK.

Here, I will quote article 385 of the CPCK.

1. There is a violation of the criminal law:

1.1. The act for which the accused is prosecuted is not a criminal offence;

1.2. Circumstances exist which preclude criminal liability;

1.3. Circumstances exist which preclude criminal prosecution and, in particular, whether criminal prosecution is prohibited by the period of statutory limitation or precluded due to an amnesty or pardon, or prior adjudication by a final judgment;

1.4. An inapplicable law was applied to the criminal offence which is the subject matter of the charge;

1.5. in rendering a decision on punishment, alternative punishment or judicial admonition, or in ordering a measure of mandatory rehabilitation treatment or the confiscation of material benefit acquired by the commission of a criminal offence, the court exceeded its authority under the law; or

1.6. Provisions were violated in respect of crediting the period of detention on remand and an earlier served sentence.

Therefore, decision on punishment may be challenged with request for protection of legality only if the court upon rendering of the decision exceeded its legal competencies (i.e. imposed a suspended sentence even though such sentence could not have been imposed even with mitigation of punishment; imposed a sentence of 8 of imprisonment when for the criminal offense in question the maximum sentence foreseen by the law is 5 years imprisonment and when there are no possibilities for its increase,

etc.). Nevertheless, this constitutes a violation of the criminal law and not decision on punishment which the court renders without exceeding its authorizations provided by the law. This is made clear by provisions of the article 387 of the CPCK, which I will also quote:

Article 387

Appeal against the judgment related to the decision on criminal sanction and other decisions

1. Judgment may be challenged in respect of a decision on a punishment or a judicial admonition on the grounds that the court, while not exceeding its authority under the law, has nevertheless failed to determine the punishment or judicial admonition correctly, having regard to all the relevant.

2. The judgment may also be challenged on the grounds that the court has applied or failed to apply the provisions on the mitigation or waiver of punishment or on judicial admonition.

3. A decision on a measure of mandatory rehabilitation treatment of persons addicted to drugs or alcohol or on confiscation of the material benefit acquired by the commission of a criminal offence may be challenged on the grounds that the court, while not violating Article 385 subparagraph 1.5 of the present Code, has nevertheless rendered that decision incorrectly, or failed to impose the measure of mandatory rehabilitation treatment of persons addicted to drugs or alcohol or the measure of confiscation of the material benefit acquired by the commission of a criminal offence even though there were legal grounds for this.

I understand that here it concerns the amount of the punishment or its type which the court has imposed, but according to the appellant, the type and amount of the punishment are determined as severe or lenient, as a consequence of none valuation or inadequate evaluation of circumstances from article 73 of the CCK.

My conclusion is that judgment may not be challenged regarding the decision on punishment pursuant to article 387 by the request for protection of legality, but only pursuant to article 385. 1.5 of the CPCK, and I do not agree with the members of the panel that judgment may be modified to impose a more lenient punishment against the convicted, because the request was not filed with the allegation for violation of the criminal law pursuant to article 385. 1.5 of the CPCK.

Judge

Nesrin Lushta