SUPREME COURT OF KOSOVO

Pkl-Kzz 117/09

12 October 2010

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, with EULEX Judges Martti Harsia and Harri Katara and Kosovo Judges Salih Toplica and Gyltene Sylejmani as members of the panel, and in the presence of Legal Officer Andrea Chmieliński Bigazzi as recording clerk, in the criminal case Pkl-Kzz nr. 117/09 of the Supreme Court of Kosovo;

against the defendant **Selim Krasniqi**, nickname "Celiku" or "Celik", son of Abdyl Krasniqi and [redacted] born on 01 April 1970 in the [redacted] Vllashkidrenovc/Vlaski Drenovac, Malisheve/Malisevo Municipality, Kosovo Albanian, resident in Prizren, Ortokoll, Kosovo, married, father of two children, Commander of RTG2-TMK Prizren, General of Brigade, secondary education level and student at the faculty of Economy, of average economic status, KPC ID No. 00624, charged with commission of War Crime as defined by Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) as read in connection with Articles 22, 26 and 30 of the CC SFRY, based in the indictment dated 27 July 2004 as amended by the Public Prosecutor on 27 July 2007;

Convicted in the first instance by the Verdict of the District Court of Prizren, dated 10 August 2006, P. No. 85/2005 for having committed the criminal acts of the **War Crime of Inhumane Treatment and Immense Suffering** or Violation of the Bodily Health of Civilian Detainees thus applying measures of intimidation and terror in Violation of Article 142 of the CC SFRY as read with Articles 22, 26 and 30 of the CC SFRY
And sentenced to seven (7) years of imprisonment, with credit for the time served in detention on remand from 16 February 2004 until the Judgment would become final;

Convicted in the second instance by the Judgment of the Supreme Court of Kosovo, Ap.-Kz. No. 371/2008, dated 10 April 2009 for having committed the criminal acts of the **War Crime of Inhumane Treatment and Immense Suffering** or Violation of the Bodily Health of Civilian Detainees thus applying measures of intimidation and terror in Violation of Article 142 of the CC SFRY as read with Articles 22, 26 and 30 of the CC SFRY, thus confirming the first instance Judgment insofar,
And sentenced to a reduced punishment of six (6) years of imprisonment;

Acting upon the Request for Protection of Legality filed by the Defense Counsel of the defendant Selim Krasniqi, dated 24 August 2009, directed against both, the 1st Instance Judgment of the Prizren District Court dated 10 August 2006 (P. No. 85/2005) and the 2nd Instance Judgment of the Supreme Court of Kosovo, dated 10 April 2009 (Ap.-Kz. No. 371/2008);

Having seen the **Reply to the Defendant's Request, issued by the State Prosecutor of Kosovo** on 5 January 2010 (PPK no. 123/09), in which the EULEX Chief Prosecutor moves the Supreme Court to reject the Request as unfounded.

In the Name of the People

Pursuant to Article 456 of the KCCP, issues the following

JUDGMENT

The Request for Protection of Legality of the Defense Counsel of the defendant Selim Krasniqi dated 24 August 2009 against the 1st Instance Judgment of the Prizren District Court dated 10 August 2006 (P. No. 85/2005) and the 2nd Instance Judgment of the Supreme Court of Kosovo, dated 10 April 2009 (Ap.-Kz. No. 371/2008) is

Rejected as unfounded.

The costs of the proceedings shall be borne by the defendant Selim Krasniqi as provided for under the applicable rules.

The time spent in detention on remand by the defendant is to be included in the amount of punishment and calculated therein according to Article 139 of the KCCP.

REASONING

I. Procedural Background

(1) Against Selim Krasniqi – who was arrested on 16 February 2004 and put in detention on remand - as well as against other defendants the International Prosecutor filed an indictment dated 11 February 2005 for the charge of War Crimes against Civilian Population as set out in four different counts regarding detainees at a KLA detention centre in the village of Drenovc/Drenovac in Zatriq, Municipality of Rahovec/Orahovac. Allegations in this context were related to illegal arrest, unlawful detention, beating, torture and death of Kosovo Albanians.

(2) The main trial against Selim Krasniqi and other defendants, thus containing 44 sessions, started on 29 September 2005 and lasted until 10 August 2006, when the Judgment was announced. Meanwhile, in the course of the main trial on 27 July 2006

the Prosecutor amended the indictment against Selim Krasniqi and six other defendants, charging each of them with War Crimes of Inhumane Treatment, whilst dropping the charges against two other defendants.

(3) Selim Krasiqi - as well as two other defendants - was found guilty of War Crimes of Inhumane Treatment in Immense Suffering or Violation of the Bodily Health of the respective civilian detainees thus having constituted an application of measures of intimidation and terror in violation of Article 142 of the CC SFRY as read with Articles 22, 26 and 30 of the CC SFRY, as in particular committed between 01 May and 31 August 1998. Selim Krasniqi – as well as the other two defendants – was sentenced with seven (7) years of imprisonment.

(4) Selim Krasniqi was released on bail from detention on remand by Ruling of the District Court of Prizren dated 10 August 2006, along with other conditions. Selim Krasniqi was released on 11 August 2006. The International Public Prosecutor appealed against this Ruling, and the Supreme Court of Kosovo granted the appeal with a Ruling dated 2 September 2006 ordering the re-arrest of Selim Krasniqi and another defendant until the judgment would become final. Selim Krasniqi remained on the run until 23 November 2007, when he was arrested in Drenovc/Drenovac village. Since then, he was kept in detention on remand until 10 April 2009.

(5) The 1st Instance Judgment was served to the Defendant and his Defence Counsel on 5 March 2008. On 21 March 2008 the Defense Counsel of the defendant Selim Krasniqi timely filed an appeal against the 1st Instance Judgment as well as additional supplement to this appeal, which was filed 07 April 2008. The Defense Counsel in his appeal challenged the 1st Instance Judgment due to essential violations of criminal proceedings, erroneous and incomplete corroboration, violation of the criminal law and the decision on the conviction and therefore proposed to either change the Verdict finding that the charged commission of criminal offenses by the defendant is not established and to consequently acquit the defendant, or send the case back to the 1st Instance Court for re-trial, or to impose a more lenient punishment to the defendant.

(6) After the handover of UNMIK files to EULEX Judges in January 2009, the Supreme Court of Kosovo scheduled an appeal session on 01 April 2009 and deliberated on the case on 01 and 10 of April 2009. The Supreme Court of Kosovo in the case of Selim Krasniqi upheld the decision of the 1st Instance Court in terms of the guilt of the defendant, but partially granted the appeal of the Defense Counsel considering the long time elapsed between the announcement of the Judgment and the compilation of the verdict as well as an inconsistency between the enacting clause and the evidence taken by the 1st Instance Court on participation of the defendant in arrest and unlawful detentions. Therefore, the punishment was reduced to an imprisonment of six (6) years.

(7) Dated 04 August 2009 the Defense Counsel of the defendant Selim Krasniqi timely filed a Request for Protection of Legality against the 1st and 2nd Instance

Judgments alleging essential violations of provisions of the criminal procedure, in particular of Article 403, paragraph 1, items 8 and 12 of the Kosovo Code of Criminal Procedure (KCCP) and of Article 415, paragraph 1 of the KCCP. Therefore, he proposes to either:

- **modify the Judgments of the 1st and 2nd Instance Courts and acquit the judged Selim Krasniqi from all charges, or**
- **to annul the challenged Judgments and send the case back to the 1st Instance Court for re-trial.**

(8) The Office of the State Prosecutor of Kosovo (OSPK) filed an opinion on 6 January 2010 and proposed to refuse the Request for Protection of Legality as ungrounded, since violation of the law on criminal proceedings could not be observed.

(9) The Supreme Court of Kosovo scheduled a session and deliberated on 12 October 2010.

II. Supreme Court Findings

The Supreme Court of Kosovo finds the following:

1. Admissibility of the Request for Protection of Legality

The Request for Protection of Legality is admissible. It was filed with the competent court pursuant to Article 453 of the KCCP and within the deadline set by Article 452, paragraph 3 of the KCCP.

2. Procedures followed by the Supreme Court

The Supreme Court panel has decided in a session as described by Article 454, paragraph 1 of the KCCP. Parties have not been notified of the session, since according to Article 451 through 460 of the KCCP there is no obligation for the Supreme Court to notify the parties when deciding on Requests for Protection of Legality.

3. On the merits of the Request for Protection of Legality

The Request for Protection of Legality is unfounded.

a. Alleged violations of Article 403, paragraph 1, item 8 of the KCCP

There is no violation of Article 403, paragraph 1, item 8 of the KCCP. This consideration refers to the Judgment of the 1st Instance Court as well as to the Judgment of the 2nd Instance Court.

The Defense Counsel in his Request for Protection of Legality, has stressed in particular that both Judgments were based on inadmissible evidence, such as the testimony obtained from "Witness A" as given before the Investigative Judge on 26 April 2004. According to the Defense, the witness statement should have been separated from the case file as submitted already during the 1st Instance main trial on 25 May 2006 and later in context of the appeal. The Defense also moves that it would be clearly understood from Articles 164, paragraph 2; 162, paragraph 2, and 87, paragraphs 2 and 3 of the KCCP that witness statements with *"such omissions"* can not be used as evidence in the criminal proceedings. The Defence concludes that even if the consequences of *"such shortcomings"* are not regulated by the KCCP, in the interest of the defendant the challenged evidence should be separated from the file.

The Supreme Court in this context finds that the issue has been raised by the Defense Counsel already during the 1st Instance main trial in the course of the session held on 25 May 2006. The related proposal of the Defense to declare inadmissible the statement of "Witness A" given to the Investigative Judge on 26 April 2004, was rejected by that Court. In this context, it needs to be stressed that the District Court of Prizren had before admitted the contested witness statement as admissible evidence by a Ruling dated 22 June 2006, therein giving the following reasoning:

"... After deliberation, the panel ruled that although it was not disputed that the witness had not been warned, this violation of the Law does not result in the inadmissibility of his/her investigative statement (Article 153 paragraph 1 of the PCPCK). As to the manner the witness had been interviewed, the panel ruled that it was a matter of assessment of evidence".

Article 153, paragraph 1 of the KCCP rules as follows:

(1) Evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Code or other provisions of the law expressively so prescribe.

In the context at hand, this panel of the Supreme Court fully refers to the reasoning given in the Ruling dated 22 June 2006 (P.No.85/2005) and shares the position as taken by the respective ruling. It in particular needs to be stressed again that Article 153, paragraph 1 of the KCCP does not allow interpreting the provision in a broader sense but requires strict interpretation as oriented at its wording. On this background it is important to be mentioned that the KCCP does not contain any provisions indicating the inadmissibility of a witness statement just because the witness has not received proper legal instruction as provided by the law, in particular by Article 164, paragraph 2 of the KCCP.

b. Alleged violations of Article 403, paragraph 1, item 12 of the KCCP

No violation of Article 403, paragraph 1, item 12 of the KCCP was established, neither was committed by the 1st Instance Court or by the 2nd Instance Court.

The Defense Counsel has challenged that the reasoning of the 1st Instance Judgment would fail listing the reasons about decisive facts and that the reasons given would be confusing and contradictory to a considerable extent.

It at first needs to be underlined that in relation to the defendant, the 1st Instance Judgment lists reasoning on consideration and evaluation on decisive facts throughout 75 out of a total of 102 pages of that judgment. Also, the evidence considered is listed in detail on pages 8-11 of the 1st Instance Judgment. Therefore, the Supreme Court considers the respective argument of the Defense as being unfounded.

In general, it in this context needs to be mentioned that the Defense is obliged to give specific reasons regarding the alleged essential violations of the law instead of referring in general to his arguments as already raised in the appeal, as it is done in the case at hand. The possibility given by the KCCP to parties for the filing of Requests for Protection of Legality has not to be considered, used, or even abused as a way to drag the Court deciding a request on facts instead of on pure procedural shortfalls which could have amounted to serious violations of the rights of the defendant (or of the prosecution on the reverse sense).

Notwithstanding this, the Supreme Court finds that with respect to an alleged inconsistency of the 1st Instance Judgment the issue was already raised by the Defense in his appeal and thus was discussed by the 2nd Instance Court at length. The latter in particular has found that *"...there is no inconsistency between the enacting clause of the 1st Instance Judgment, where the defendant is convicted for having participated in the arrest and unlawful detention of the victims, thus making himself responsible for the War Crime of Inhumane Treatment and Immense Suffering or Violation of the Bodily Health of the civilian detainees..."* and the reasoning of the 1st Instance Judgment as given on page 73, where indeed no single evidence are brought of acts of arrest made by the defendant. The 2nd Instance Court has made clear in this regard that the alleged contradiction is not given due to the fact that the 1st Instance Judgment has held the defendant responsible in some cases for direct conduct and in other cases for his participation in a joint criminal enterprise *(2nd Instance Judgment, p. 19 of the English version)*..

Article 403, paragraph 1, item 12 of the KCCP reads that:

There is a substantial violation of the provisions of criminal procedure if: [...] The enacting clause of the judgment was incomprehensible or internally inconsistent or inconsistent with the grounds for the judgment; the judgment lacked any grounds.

there was no statement of grounds relating to material facts; the statement of grounds was wholly unclear or inconsistent in a large part; or in regard to material facts there was a considerable discrepancy between the statement of grounds relating to the content of documents or records of testimony given in the proceedings on the one hand and these documents or records themselves on the other hand.

This Article is similar to Article 364, paragraph 1, item 11[1] of the Law on Criminal Proceedings applied until 6 April 2004. Therefore, this Supreme Court refers to its Commentary[2] as a viable source of interpretation of the kind of violations that the Defence could have revealed to ground its Request. Indeed, none of the relevant violations described under the jurisprudence cited in that Commentary are presented and analyzed with a clear reasoning by the Defence.

The space of manouvre given to the Defence to file a Request based on Article 403, paragraph 1, item 12 of the KCCP has in any case to be balanced with the more general and preponderant rule given by the first sentence of Article 451, paragraph 2 of the KCCP which clearly states that: "*A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation* [...]". Upon a Request for Protection of Legality, the Supreme Court can not be called to evaluate again the facts and statements of witnesses. The Supreme Court can be requested to verify: that the enacting clause is severely affected as to the fluent and harmonious composition of its essential elements; that within the enacting clause and the judgment there is a dichotomy as to the grounds of the decision; that those grounds are absolutely absent in the judgment or completely discrepant with the facts of the case as they are presented in the main trial; that finally the grounds of the decision misinterpret, change, confuse, modify the blatant simple nature of the facts as they are presented at the main trial (i.e., through documents submitted and entered into the record, statements given in front of the Court or read out in Court, other evidence acquired to the record of the main trial).

c. Alleged violation of Article 415, paragraph 1 of the KCCP by the 2nd Instance Judgment:

The Defence Counsel has stressed that the 2nd Instance Court should review the Judgment of the 1st Instance Court in the part for which the appeal was filed. Still the Defence holds that since the 2nd Instance Judgment would read like a faithful description of the 1st Instance Judgment, Article 415, paragraph 1 of the KCCP would

[1] Which reads: "[...] *if the enacting clause of the verdict was incomprehensible, internally inconsistent or inconsistent with the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive fact or if those reasons were altogether unclear or contradictory to a considerable extent, or if there is a considerable discrepancy concerning the decisive fact between what is cited in the grounds of the verdict concerning the content of documents or records concerning testimony given in proceedings and those documents or records themselves*".

[2] Branko Petrić, Commentary on the Law on Criminal Procedure, 1986, 2nd Edition, Fifth Book, Official Gazette of the SFRY, Belgrade.

have been violated by the Supreme Court in the 2nd instance. In particular, the Defence Counsel points out on his Request that the witness of the defense Vehbi Muharremi never was heard or at least his statement as given to the Investigating Judge on 6 July 2004 never was read out by the 2nd Instance Court, although this was proposed by the Defense on 23 May 2006. Moreover, the Defence Counsel stresses in the respective context that the evidence given in particular as collected from the witnesses was not evaluated in the proper and correct way. Especially the witnesses of the Defense [redacted] as well as "anonymous witnesses X and Z" and witnesses [redacted] had not been considered at all or the 1st Instance Court did not follow them. The Defence Counsel concludes that these witnesses had not been elaborated on by the 2nd Instance Court.

In general, it needs to be pointed out that in the course of a Request for Protection of Legality it is not under the competence of the Supreme Court re-evaluating and/or re-placing the evidence as taken by the 1st and 2nd Instance Courts. A Request for Protection of Legality is limited by the law to the matters as listed in Article 451, paragraph 1 (and as under the competence of the public prosecutor also paragraph 3) of the KCCP. In particular, a Request for Protection of Legality may not be filed on the ground of an – alleged – erroneous or incomplete determination of the factual situation (Article 451 paragraph 3 of the KCCP).

Notwithstanding this, the Supreme Court finds in relation to the witness statements as stressed by the Defense Counsel in his Request for Protection of Legality the following:

aa. Statement of witness V[redacted]M[redacted]:
The Supreme Court finds that the testimony of the witness V[redacted] was discussed at length by the 1st Instance Court as well as by the 2nd Instance Court. Both Courts have given clear and exhaustive reasoning on why this statement was not taken into consideration.

In particular, the 2nd Instance Judgment insofar reads as follows:

"... the First Instance Court had refused the hearing of the witness V[redacted] who, before the Investigating Judge, stated that at that time the defendant was not listed to any unit but went to the places where the fight were taking place. ... To be officially listed or not listed in a specific group of combatants is an important issue but not so important to exclude the criminal responsibility of somebody who concretely acts as a part of a group, sharing with the others the actions and their risks, giving and receiving orders, assuming responsibilities of direction. That's why the testimony of V[redacted] as quoted in the appeal seems to be completely irrelevant" (2nd Instance Judgment, p. 25 of the English version).

bb. Statements of other witnesses, not considered by the 1st and 2nd Instance Courts

Both, the 1st and 2nd Instance Courts have elaborated extensively on the witnesses indicated by the Defense Counsel in his Request for Protection Legality, in particular on witnesses "X" and "Z" as well as on witnesses M[redacted] J[redacted] Ra[redacted] R[redacted] and R[redacted] L[redacted]

Both instances in particular have found that *"... the witnesses of the defendant Selim Krasniqi, upon which relies the alibi of the latter can not be considered neutral to him ..."* since *"...they were former comrades in arms, close friends or current TMK officers with whom he had been serving at the time of his arrest" (1st Instance Judgment, p. 87 and 2nd Instance Judgment, p. 20, both in the English version).*

Both Judgments moreover have elaborated in detail on the question, whether or not each of the witnesses would be reliable and his/her testimony could be followed. Nevertheless, the decision at hand is not the place to get all arguments repeated as already weighted and pointed out by the 1st and 2nd Instance Court. Insofar, reference is made to the 1st Instance Judgment, pp. 87- 89 of the English version and the 2nd Instance Judgment, pp. 21-25 and 49-50 of the English version.

Can not be finally considered as gounded the Defense Counsel's claims that witnesses N[redacted] E[redacted] and H[redacted] R[redacted] had not been considered by the previous Courts. The 1st Instance Court has clearly made use of their testimonies as to the victim M[redacted] R[redacted] and the 2nd Instance Court has made reference to this as well *(1st Instance Judgment, p. 87 ff and 2nd Instance Judgment, p. 45 f, both in the English version).*

In the same manner, also the witnesses F[redacted] K[redacted] and F[redacted] B[redacted] – together with Mu[redacted] J[redacted] – have been duly considered by the previous Courts as to the importance of their statements. Insofar, reference is made in particular to the 2nd Instance Judgment, p. 24 of the English version.

III. Conclusion of the Supreme Court of Kosovo

For the abovementioned reasons, the Supreme Court concludes that the Request for Protection of Legality is unfounded and that therefore it needs to be rejected.

Consequently, the Supreme Court of Kosovo decides on the OSPK Request for Protection of Legality as in the enacting clause, based on Article 456 of the KCCP.

SUPREME COURT OF KOSOVO IN PRISHTINË/PRIŠTINA
Pkl-Kzz 117/09; 12 October 2010

REPUBLIKA E KOSOVËS • GJYKATA SUPREME E KOSOVËS-PRISHTINË • VRHOVNI SUD KOSOVA-PRIŠTINA • REPUBLIKA KOSOVO

Panel Member

Martti Harsia

Panel Member

Harri Katara

Panel Member

Salih Toplica

Panel Member

Gyltene Sylejmani

Recording Clerk

Andrea Chmieliński Bigazzi

Presiding Judge

Gerrit-Marc Sprenger

Legal Remedy

Against this Judgment it is not possible to file another request for protection of legality (Article 451.2 of the KCCP).