REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, on 5 December 2016
Ref. No.:RK1009/16

RESOLUTION ON INAMDISSIBILITY

in

Case No. KI156/15

Applicant

Svetislav Stojković

Constitutional review of Judgment Pml. no. 217/2015 of Supreme Court of 10 November 2015

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral is submitted by Svetislav Stojković from Štrpce (hereinafter, the Applicant) represented by Goran Milenković, a lawyer practicing in Štrpce.

Challenged decisions

2. The Applicant challenges Judgment Pml. no. 217/2015 of the Supreme Court of 10 November 2015 in connection with Judgment PA1. No. 229/2015 of the Court of Appeal of 25 May 2015 and Judgment K. no. 129/2013 of the Basic Court in Ferizaj of 4 December 2014.

Subject matter

3. The subject matter is the constitutional review of the above-stated judgments rendered by the regular courts of Kosovo.

4. The Applicant alleges violation of Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in connection with Article 13 (Right to an effective remedy) of the European Convention of Human Rights (hereinafter, the Convention).

Legal basis

5. The Referral is based on Articles 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law).

Proceedings before the Constitutional Court

6. On 28 December 2015, the Applicant submitted the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 22 January 2016, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of judges Altay Suroy (presiding), Snezhana Botusharova and Arta Rama-Hajrizi (judges).

8. On 18 February 2016, the Court notified the Applicant about the registration of the Referral and a copy of the referral was sent to the Supreme Court.

9. On 20 October 2016, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 23 July 2013, the Public Prosecutor in Ferizaj filed an indictment against the Applicant charging him with commission of the criminal offence of damaging graves or corpses under Article 421.1 of the Criminal Code of Kosovo (hereinafter the CCK).

11. On 23 July 2013, the Applicant filed a request to dismiss the indictment with the Basic Court in Ferizaj. The Applicant, inter alia, asserted that the indictment was based on assumptions, arbitrary claims and imaginary story deprived of any material evidence and legal basis.

12. On 4 December 2014, the Basic Court in Ferizaj by Judgment K. no. 129/2013 found the Applicant guilty of commission of criminal offence of damaging graves and corpses under Article 421.1 of the CCK. The Applicant was sentenced to imprisonment in duration of 90 days. The Basic Court, inter alia, backed the finding of guilt of the Applicant by relying on testimonies of several witnesses, pictures of the scene where the criminal offence had occurred and the awareness of the Applicant that he was committing a criminal offence.

13. On 20 January 2015, the Applicant filed an appeal with the Court of Appeal against the above-stated judgment of the basic court due to erroneous and incomplete determination of the factual situation, erroneous application of the substantive law as well as violation of the procedural law. The Applicant alleged, inter alia, that: (i) he could not follow proceedings before the Basic Court in his native language, (ii) the Basic Court did not consider arguments and evidence adduced by the Applicant and (iii) the Basic Court did not establish the veracity of evidence upon which the Applicant was found guilty.

14. On 25 May 2015, the Court of Appeal by Judgment PA1. No. 229/2015 rejected the appeal of the Applicant and upheld the judgment of the basic court.

15. As to the Applicant's complaint that the minutes of the basic court were not delivered to him in his native language, the relevant part of the judgment of the Court of Appeal reads:

    "The allegations of the convict in the appeal that during the court hearing he was denied the right to the use of his native language. According to the assessment of this court is ungrounded, due to the reason that from the case file and the consideration of the first minutes K. no. 129/13 of 16.10.2014, second minutes of 20.11.2014, and the minutes of the court hearing of 27.11.2014 and the one of 04.12.2014, in which is determined and confirmed that in all these hearings, was present the court interpreter AZ, and that the convict followed the trial in a complete manner, where it was determined that in each case file requested from him was enabled the following in his native language, and all this is confirmed by signature by the court interpreter AZ and by signatures of the convict, who did not give any remarks. From this evidence is determined the fact that the court acted pursuant to Article 14 of CCK, by ensuring that the convict uses and speaks in his native language and to be informed through translation about the presented evidence and during the conduct of the proceedings and in this legal-criminal matter there was no essential violation of the criminal procedure provisions under Article 384 para. 1 item 1.3 of the CPCK, stated by the appeal of the defense of the convict".

16. As to the adversarial principle and the Applicant's right to adduce evidence and arguments in his favor, the relevant part of the judgment of the Court of Appeal reads:

    "In the opinion of this *court, the access of the first instance court on the presented evidence, namely by decisive facts, was fair and lawful. Therefore, such a position of the first instance court is accepted by this court too, because the presented reasons in the reasoning of the challenged*

judgment, as well as those facts, are accepted by this court. The first instance court assessed the presented evidence in accordance with provisions of Article 361 of CPCK and based on such an assessment presented its conclusions. Therefore, the defense counsel of the convict was the subject of assessment of the first instance court, within the framework of other evidence. As it acted based on the provisions of Article 370 para. 7 of CPCK, because for the contradictory evidence presented in a complete and clear manner for what facts and what reasons took as substantiated or unsubstantiated, giving the assessment for contradictory evidence".

17. As to the veracity of evidence upon which the guilt of the Applicant was established, the relevant part of the Judgment of the Court of Appeal reads:

"The first instance court duly trusted the presented evidence, where through testimonies of the witnesses GT, FH, HR, MT, MI and SI, as well as the injured GN, determined that in the cadastral parcel, which was purchased by the convict Svetislav, there was a grave, and this is confirmed by the witness MI, where he stated *that this grave has existed since the second world war, that it was never damaged, either from flooding of 1979, or from the last war, and that the grave was located in a visible place, bordered by stone from head to legs, in height of 50 cm, as well as around of 20 cm, which is far from the road somewhere 6-8 m. The allegations that the convict did not know that in the parcel he purchased was located a grave, according to the assessment of the first instance court are ungrounded, to avoid the criminal liability. This fact, in a complete manner was confirmed by the testimonies of witnesses MM, a policeman of the police station in Shteprce, who in the court hearing stated that: "the injured party addressed the convict by the request to allow the building of a monument on the grave of the deceased, which was rejected by the convict, and gave a deadline of 10-15 days to perform exhumation by his expenses, and if they do not find anything, then the damage should be compensated by them and that at the place of event found old stone tiles, which were found under the stairs of the constructed building" that the convict precisely knew and that he took his actions without authorization during the digging and destruction of grave, by his will and contentiousness destroyed the grave, where was buried the deceased. This was found in a complete manner by the first instance court from the statements of the injured and the testimonies of the witnesses, as well as by the defense of the convict and other material evidence, which are in the case file, so that the conclusions that were drawn as fair and lawful are accepted by this court too".*

18. As to the proportionality of the sentence of the Applicant, the relevant part of the judgment of the Court of Appeal reads:

"The Court of Appeal assesses that the first instance court when imposing this type and duration of sentence took into account and assessed all circumstances in accordance with Article 75 of CCRK, and as mitigating circumstance took the age of the convict, good behavior in the court during the conduct of proceedings in the court hearing. As aggravating circumstance the court took the sensitiveness of the case and that the

family of the convict lost every trace of the remains of the deceased, and the degree of danger, which requires legal protection. This court assesses that with these circumstances, the imposed sentence on the convict by the first instance court is in accordance with degree of the criminal liability of the convict, as an executor and the intensiveness of the damage or destruction of the protected value, and that this judgment will affect on the convict that in the future does not commit criminal offences, as well as in the prevention of others to commit criminal offences, namely the purpose of the punishment provided by legal provision".

19. On 3 September 2015, the Applicant filed a request for protection of legality with the Supreme Court of Kosovo. The Applicant alleged violation of the substantive and procedural law by the courts of lower instance and proposed modification of the challenged judgments, acquittal from criminal liability and the matter to be referred to the trial court for a fresh consideration. The Applicant complained mainly: (i) that the courts of lower instance did not take into account the construction permit issued to him by the competent municipal authorities and (ii) the fact that the Applicant was outside the territory of Kosovo when the criminal offence in question was committed.

20. On 10 November 2015, the Supreme Court by Judgment Pml. no. 217/2015 rejected as ungrounded the request for protection of legality filed by the Applicant against the decisions of courts of lower instance. The Supreme Court adopted the reasoning and findings of the courts of lower instance in this criminal matter.

21. As to the Applicant's allegation on the construction permit issued to him by the competent authorities, the relevant part of the judgment reads:

    "*It is true that in the case file are also those documents submitted by the defense counsel of the* convict, *objection on the presented evidence, and the request to reject the indictment, then the construction permit, for which based on the case file is stated that it was attached to the request, but in any moment, neither the convict, nor the defense counsel, during the confirmation procedure, did not propose that the abovementioned document should be considered. The provision of Article 361 of LCP provides that the court bases its decision solely on the facts and evidence during the proceedings. In the present case, from the case file it follows that for the allegation above, there was no proposal that it should have been considered, and as such it is ungrounded*".

22. As to the Applicant's allegation that he was outside of the territory of Kosovo when the criminal offence was committed, the relevant part of the judgment reads:

    "*In this legal matter by any examined evidence cannot be questioned the criminal liability, but it* is *undoubtedly confirmed that the convict Svetislav Stojkovic during the time of commencement of works-digging was present in the village. Even if he knew that near the building was the graveyard which existed even after the second world war for which testified all witnesses, even those proposed by the defence. The witness GT*

was the last one, who saw the grave near the place and who participated in the digging of the foundations for the building that was constructed. He stated that the convict told him to level the grave and he refused that and immediately after this he terminated the contract on extension of performing the works. If the convict knew about the existence of the grave was confirmed also by the witness MM, a police officer in the Police Station in Shtime, who, as he stated, performed the role of a mediator between the parties, talked to the convict Svetislav Stojkovic about the graveyard and its possible transfer to another location, for which the convict gave a deadline to the injured from 15-30 days. It was in 2012 when the works have begun in vicinity of the place where the grave is located, while on 20 March 2013, until the injured GN submitted request for transfer of remains of his grandfather upon the agreement with the convict, and after this he went to visit the grave in the village of Bitina, he noticed and saw that in the contested location was constructed a building and that there was no grave there anymore. He reported the case to the police immediately. Therefore, all this speaks how the convict knew about the existence of a grave, and despite of that he continued and finished the construction works, although in the similar situations, in spite of possession of the construction permit, he did not have right and he should not have begun the construction works without previously respecting the procedural law regarding the transfer of the remains. Due to this, the legal conclusion of both courts is fair and lawful, and as such were admitted by this court".

Applicant's allegations

23. The Applicant alleges violation of Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in connection with Article 13 (Right to an effective remedy) of the European Convention of Human Rights (hereinafter, the Convention).

24. As to the finding of guilt, the Applicant alleges that: "*the Applicant filed request to dismiss the indictment in which he stated that there is no grave or any gravestone monument in the immovable property that is under his private ownership, nor any place that could be like a grave. He stated that he purchased that parcel from his neighbor who did not inform him that there was any grave sometimes. He stated that on 10.07.2012 from the competent authority of the Municipality of Shterpce, he duly obtained the construction permit for the construction of the motel. He stated that when the alleged criminal offence was committed he was in Switzerland, and that he was not at all in Kosovo, namely at the place of commission of the criminal offence".*

25. As to the construction permit issued by the competent authority, the Applicant alleges: "*Against Judgment of the Basic Court in Ferizaj, Branch in Shterpce, on 20.01.2015, he filed appeal with the Court of Appeal of Kosovo due to all legal reasons, in particular stating the fact that he submitted to the first instance court as evidence the certificate on rights over the immovable property, the construction permit from which can be seen that the Municipality of Shterpce issued to Applicant the permit for construction of the building in the parcel in which allegedly was a graveyard, the certificate from*

the Department of Urbanism of the Municipality of Shterpce, by which the Municipality confirms that it does not have any interest regarding the subject parcel. In the appeal it was concluded that the first instance court failed to administer the proposed evidence, therefore, by that determined factual situation, was violated the substantive law to the detriment of the accused".

26. As to the possibility of the Applicant to follow proceedings in his native language, the Applicant alleges: "*He stated that he did not have a possibility to follow in his language the course of first instance proceedings. On 25.05.2015, the Appeal Court of Kosovo rendered the Judgment, by which the appeal of the accused was rejected and the Judgment of the first instance court was upheld".*

27. As to the fairness of proceedings before the Supreme Court, the Applicant alleges: "*Against Judgment of the Court of Appeal of Kosovo, the defence of the accused on 09.09.2015 filed extraordinary legal remedy-the request for protection of legality, in which emphasized the fact that the judgments of the first and second instance courts were rendered with essential violation of the criminal procedure provisions, as the first and second instance court did not present as evidence during the procedure: Certificate on rights over the immovable property, for KP. No. 1458 CZ Donje Bitina, the construction permit, issued by the Municipality of Shterpce, the certificate of the Municipality of Shterpce that the Municipality does not have any interest regarding that parcel. It was proposed that both judgments be quashed and the defendant be acquitted of criminal liability. On 10.11.2015, the Supreme Court of Kosovo rendered Judgment Pml. no. 217/2015, by which rejected the request for protection of legality".*

28. Finally, the Applicant requests the Court to annul decisions rendered by the regular courts.

Assessment of admissibility

29. The Court first will examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

30. In this respect, the Court refers to Article 113.7 of the Constitution which establishes:

    "Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."

31. The Court also refers to Article 48 of the Law, which provides:

    "In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".

32. The Court further takes into account Rule 36 2 (d) of the Rules of Procedure which foresee:

> *(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
>
> ...
>
> *(d) the Applicant does not sufficiently substantiate his claim*

33. The Court notes that in the instant case, the Applicant alleges violation of his rights and freedoms as guaranteed by the Constitution and the Convention because the regular courts have not allowed him to follow proceedings in his native language, the arguments and evidence adduced by him were not considered by the regular courts, and that, the veracity of evidence establishing the finding of guilt was not proven by the regular courts.

34. As to the Applicant's allegation of not being able to follow proceedings in his native language, the Court notes that the Court of Appeal explained that the Applicant had signed the minutes verifying that he was able to follow proceedings in his native language before the basic court, and that, he did not have any remarks about that particular allegation at the material time.

35. As to the Applicant's allegation that his arguments and evidence were not considered by the regular courts, the Court notes that the Supreme Court explained that the Applicant did not submit such evidence before the Basic Court during the confirmation procedure - and that in that respect- the regular courts are bound by the law to assess only the evidence which is adduced before them for consideration.

36. As to the Applicant's allegation with regard to the veracity of evidence establishing his finding of guilt, the Court notes that the Court of Appeal explained that based on testimonies of witnesses including the ones proposed for by the Applicant and other material evidence the Applicant was aware that he was acting without authorization, i.e., committing a criminal offence.

37. In the light of the foregoing considerations, the Court reiterates that the Applicant had the benefit of adversarial proceedings; that he was able, at various stages of those proceedings, to adduce the arguments and evidence he considered relevant to his case; that he had the opportunity of challenging effectively the arguments and evidence adduced by the opposing party; that all his arguments which, viewed objectively, were relevant to the resolution of the case were duly heard and examined by the courts; that the factual and legal reasons for the impugned decisions were set out at length; and that, accordingly, the proceedings taken as a whole were fair. (See the Case of *Garcia Ruiz v. Spain,* application no. 30544/96, [GC], Judgment of 21 January 1999, paragraph 29).

38. It should be borne in mind – since this is a very common source of misunderstandings on the part of applicants – that the "fairness" required by Article 31 of the Constitution and Article 6 of the Convention is not "substantive" fairness (a concept which is part-legal, part-ethical and can only

be applied by the trial judge), but "procedural" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (See the case of *Star Cate – Epilekta Gevmata and Others v. Greece,* application no. 54111/07, ECtHR, Decision of 6 July 2010).

39. On the question of admissibility of evidence, the Court reiterates that while Articles 31 of the Constitution and 6 of the Convention guarantee the right to a fair hearing, they do not lay down any rules on admissibility of evidence as such, which under the applicable law in Kosovo is primarily a matter of legality. In particular, it is not the function of the Court to deal with errors of fact or law allegedly committed by regular courts unless and in so far as they may have infringed rights and freedoms protected by the Constitution (See the case of *Schenk v. Switzerland,* [GC], application no. 10862/84, Judgment of 12 July 1988, paras. 45-46).

40. In this respect, the Court reiterates that the Applicant only quotes provisions of the Constitution and of the Convention without substantiating how those constitutional norms and provisions were violated to his detriment as is required by Article 48 of the Law.

41. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of facts or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). (See, for example, Case No. KI89/15, *Applicant Fatmir Koci,* Resolution on Inadmissibility of 22 March 2016, paragraph 38).

42. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, *García Ruiz v. Spain [GC],* no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

43. The Constitutional Court recalls that it is not a fact-finding Court and thus the correct and complete determination of the factual situation is within the full jurisdiction of regular courts. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "fourth instance court" (See case, *Akdivar v. Turkey,* No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, Applicant *Milaim Berisha,* Resolution on Inadmissibility of 5 April 2012).

44. The fact that the Applicant disagrees with the outcome of the case it cannot serve him as a right to raise an arguable claim on the violation of Articles 24, 31 of the Constitution and Article 13 of the Convention (See, for example, Case No. KI125/11, *Shaban Gojnovci,* Resolution on Inadmissibility of 28 may 2012, paragraph 28).

45. In these circumstances, the Court considers that the Applicant has not substantiated the allegations of a violation of fundamental human rights and freedoms as guaranteed by the Constitution and the Convention. The facts of

the case do not reveal that the regular courts acted in breach of procedural safeguards established by the Constitution and the Convention.

46. Consequently, the Referral, on constitutional grounds, is manifestly ill-founded and must be declared inadmissible as established by Article 113.7 of the Constitution, provided for by Article 48 of the Law and further specified by Rule 36 (2) (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rule 36 (2) (d) of the Rules of Procedure, on 20 October 2016, unanimously

DECIDES

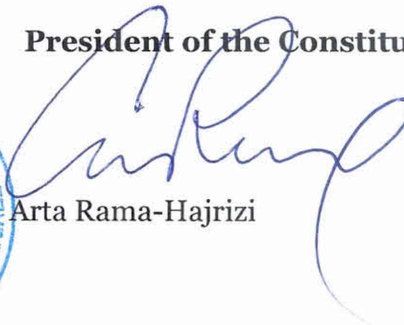
I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur | **President of the Constitutional Court**



Ivan Čukalović | Arta Rama-Hajrizi