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

Prishtina, on 22 April 2016
Rev. No.:RK926/16

RESOLUTION ON INADMISSIBILITY

in

Case KI114/15

Applicant

Feride Aliu-Shala

Constitutional review of
Judgment Pml. No. 95/2015 of the Supreme Court of Kosovo
of 12 May 2015

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Robert Carolan, Judge
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 Mrs. Feride Aliu-Shala from Mitrovica (hereinafter, the Applicant).

Challenged decisions

2. The Applicant challenges Judgment Pml. No. 95/2015 of the Supreme Court of Kosovo of 12 May 2015 which was served upon her on 21 May 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment Pml. No. 95/2015 of the Supreme Court of Kosovo of 12 May 2014.

4. The Applicant alleges violation of Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 54 [Judicial protection of Rights] of the Constitution in connection with Article 6 3 (d) of the European Convention on Human Rights (hereinafter, the Convention).

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Articles 47 and 48 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 3 September 2015 the Applicant submitted a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 14 October 2015 the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of judges Robert Carolan (presiding), Almiro Rodrigues and Arta Rama-Hajrizi.

8. On 8 December 2015 the Court notified the Applicant about the registration of the Referral and asked her to fill-in the referral form. On the same day a copy of the Referral was sent to the Supreme Court of Kosovo.

9. On 8 March 2016 the Review Panel considered the report of Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 16 August 2011 the Applicant - by occupation police officer – at the premise of the Police Station in the southern part of Mitrovica, in order to unlawfully appropriate material gains for herself, stole the amount of 12 Euros from injured parties NA and HN.

11. On 24 April 2012 the Basic Prosecution in Mitrovica filed indictment against the Applicant under the suspicion of having committed the criminal offence of "theft" as provided for by Article 325 of the Criminal Code of Kosovo (hereinafter, the CCK).

12. On 25 July 2013 the Basic Court in Mitrovica by Decision P. No. 40/12 held that: (i) the evidence supporting the indictment of the Public Prosecutor was not obtained in a legal manner, (ii) the certification on seizure of objects (banknote) and statements of injured parties and of the Applicant were declared inadmissible, (iii) the inadmissible evidence must be separated from the case-file and (iv) the proposal of the Applicant to reject the indictment shall be decided by a separate decision. The trial court reasoned that the evidence must be declared inadmissible because the Public Prosecutor and the Kosovo Police had acted without a court order and were thus in breach of Criminal Procedure Code of Kosovo (hereinafter, the CCCK) and the Law on Police.

13. On 1 August 2013 the Public Prosecutor filed an appeal against the decision of the trial court with the Court of Appeal of Kosovo. The Public Prosecutor complained that the decision of the trial court is marred by essential violations of the criminal procedural law in addition to erroneous and incomplete assessment of the factual situation.

14. On 4 October 2013 the Court of Appeal of Kosovo by Decision P. No. 573/2013: (i) approved the complaint of the Public Prosecutor with regard to admissibility of evidence and remanded the case for fresh reconsideration by the trial court and (ii) upheld the finding of the trial court with regard to the seizure of objects.

15. As to the admissibility of evidence, the relevant part of the decision of the Court of Appeal of Kosovo reads:

> *"By the Appeal of the Prosecution, the Decision is appealed due to the erroneous and incomplete ascertainment of the factual situation, alleging that based on the statements found in the case files, it results that the interview was conducted for the criminal offence, of 16 August 2011, and not in a selective manner, as the Court did as regards the focusing on the items of evidence for the seizure of the banknote, therefore based on the authorizations which the Police has, within the meaning of Article 70 of the CPCK, it has a series of authorizations, explaining the activity provided for in Article 70, paragraph 3, item 1.13 of the CPCK: "to undertake other necessary steps and actions provided for by the law", and based on this legal provision, it is clearly reached to the conclusion that after the receipt of the information on a suspected criminal offence, the Police undertakes all the actions within its authorizations, always acting within the framework of legal authorizations".*

16. As to the seizure of objects (banknote), the relevant part of the decision of the Court of Appeal of Kosovo reads:

> *"The Trial Panel considered the Appeal and the other case files and reached the conclusion that all the undertaken actions are acceptable in this stage of the procedure, except for the issue related to the certificate of the seizure of objects, of 17 August 2011, no. 2011-BC-1696, for which the Court decided to declare it as an inadmissible piece of evidence, because the procedure was not complied with in conformity with the relevant legal provisions, therefore the provision of Article 105, paragraph 5 of the CPCK was violated, which was declared inadmissible by the decision".*

17. On 2 October 2014 the Basic Court in Mitrovica by Judgment P. no. 40/2012 found that:

> *"INDICTMENT IS REJECTED BECAUSE on 16 August 2011 in the premises of the police station in southern Mitrovica (the Applicant) in order to gain material benefit unlawfully had taken the amount of 12 euro from injured parties NA and HN by taking advantage of the fact that the injured parties were not in their offices.*
>
> *IS FOUND GUILTY because (the Applicant) on 17 August 2011 at 10:00 o'clock in the police station in southern Mitrovica by taking advantage of the fact that cleaning personnel were not in the office has extracted the amount of 5 euro with serial number X25186104209 from the personal bag of the injured HN".*

18. The Basic Court in Mitrovica held that the Applicant is guilty due to commission of the criminal offence of theft under Article 352 of the CCK and sentenced her to a term one (1) year of imprisonment whose execution was postponed for three (3) years under condition that the Applicant does not commit another offence within the stated period.

19. On 20 October 2014 the Applicant filed an appeal against the above-stated decision of the trial court with the Court of Appeal of Kosovo. The Applicant, inter alia, pleaded before appellate court essential violations of the procedural and substantive criminal law, erroneous and incomplete assessment of the factual situation and sentence of the Applicant.

20. On 10 December 2014 the Court of Appeal of Kosovo by Judgment PA1. No. 1407/2014 approved the complaint of the Applicant and modified the judgment of the trial court with regard to the sentence of the Applicant thereby sentencing the Applicant to four (4) month imprisonment which will not be executed within one (1) year under condition that the Applicant does not commit another offence within the stated period.

21. As to the admissibility of evidence, the relevant part of the judgment of the Court of Appeal reads:

> *"The allegation of the Defense Counsel of the Defendant that the first instance court, for the ascertainment of the factual situation, substantiated the judgment only on the statement of the injured person NA and partially on the one of Defendant Feride Shala, according to the assessment of this court, the allegation that the judgment is substantiated only on the testimony of the injured person and the witnesses, and on the statement of the Defendant, is ungrounded because these are not the only evidence in this legal – criminal matter, but the first instance court substantiated its decision also in other evidence, mainly on the statements of witnesses SR and AR, but also on a series of other material evidence which are in the case files".*

22. As to the commuting of the sentence, the relevant part of the judgment of the Court of Appeal court reads:

> *"According to the assessment of this court, the first instance court has correctly ascertained the mitigating circumstances, but the approach to and assessment of them was not correct, since a sentence beyond the foreseen legal limit foreseen for this criminal offense was imposed on the Defendant, therefore, taking into account this as well as the fact that it has been a long time since the time when the criminal offense was committed, this court imposed the punishment as in the enacting clause of this judgment on the Defendant, convinced that the imposed sentence is in harmony with the degree of the criminal liability of the Defendant as perpetrator and with the intensity of the endangering or damage done to the protected value and that by this sentence, the purpose of the punishment, foreseen by the provisions of Article 41 of the CCRK, will be achieved".*

23. On 31 March 2015 the Applicant filed a request for protection of legality with the Supreme Court of Kosovo. The Applicant alleged essential violations of procedural and substantive criminal law by the courts of lower instance. The Applicant complained, inter alia, that: (i) there is a considerable contradiction between the rationale of the decisions rendered by the lower courts and the content of the minutes with regard to the statements made in this criminal matter (ii) that the impugned decisions are based on inadmissible evidence and do not contain reasons on the crucial facts of this criminal matter and (iii) the court of lower instance did not summon witnesses proposed by the Applicant.

24. On 12 May 2015 the Supreme Court of Kosovo by Judgment Pml. No. 95/2015 rejected the Applicant's request for protection of legality filed against decisions of the courts of lower instance.

25. As to the admissibility of evidence, the relevant part of the judgment of the Supreme Court reads:

> *"According to the assessment of this court, the fact that the abovementioned evidence was declared inadmissible and as such it was separated from the case files is grounded, but by reviewing the case files and especially the minutes of the court sessions of the first instance court, this court assessed that the confirmation on confiscation of the banknote of 5 Euros, with serial number X25186104209, was not considered as evidence and the judgment was not substantiated on this evidence at all, but the judgment was substantiated on a multitude of other evidence administered in the court trial.*
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> *The fact that the first instance court has never decided on the validity of the abovementioned evidence is also grounded, since the Court of Appeals of Kosovo by Decision Ap.no.573/13, of 04.10.2013, decided to annul the decision of the first instance court as regards the statements of witnesses HN, NA and Convicted Feride Shala, given to the police on 17.08.2011, and to remand the case for reconsideration, but these statements have never been read anymore and they have not been administered as evidence in*

the court trials of the first instance court, but the witnesses and the Convicted have been heard in the court trial, therefore, the factual situation has been confirmed by these statements and other evidence administered in the court trial".

26. As to the examination of witnesses, the relevant part of the judgment of the Supreme Court reads:

> *"This court considers that the judgment of the first instance court has been substantiated on the evidence administered in the court trials and that the statements of the witnesses have been given in conformity with the criminal procedure provisions, whereas the fact that they have undertaken actions which then have served as evidence against the Convicted cannot be considered as unlawful because they are events which have preceded the flow itself of the incriminating actions of the Convicted. The fact that the court did not invite other witnesses, who were aware of the entire event, does not mean that the first instance court did not have sufficient evidence to confirm the guilt of the Convicted".*

27. Whether the law was violated to the detriment of the Applicant, the relevant part of the judgment of the Supreme Court reads:

> *"It should be mentioned that the first instance court, by rendering the decision on the sentence, made violations to the detriment of the Convicted, when it imposed the sentence of imprisonment of 1 (one) year, conditioning with 3 (three) years, since for the criminal offense for which she was found guilty – Theft, provided by Article 325, paragraph 2 of the CCK, the maximum of the foreseen punishment is the sentence of imprisonment of 6 (six) months. But, the second instance court, by approving the appeal of the Defense Counsel of the Convicted and by modifying the judgment of the first instance court only as regards the decision on the sentence and by imposing the sentence of imprisonment of 4 (four) months on her, a sentence which shall not be executed if the Convicted does not commit another criminal offense within the time limit of 1 (one) year, has reviewed this violation, therefore, this allegation that the law has been violated to the detriment of the Convicted is not grounded anymore".*

28. Whether the offence was negligible so as to warrant exculpatory judgment to the benefit of the Applicant, the relevant part of the judgment of the Supreme Court reads:

> *"The allegation that the criminal law has been violated to the detriment of the Convicted, since she was found guilty for the criminal offense of "Theft", provided by Article 325, paragraph 2 of the CCK, with the amount of money stolen being 5 Euros and we are dealing with a criminal offense of minor significance under Article 7 of the CCK, is ungrounded. In fact, the criminal code has been violated to the detriment of the Convicted by the first instance court when re-characterizing the criminal offense and finding her guilty for the criminal offense of "Theft", provided by Article 325, paragraph 2 of the CCK, due to the fact that she stole the amount of 5*

Euros from the bag of the Injured person, and this is not an act of minor significance because the legal qualification of this criminal offense depends on the manner how it was committed and not on the amount of money unlawfully benefited. The Convicted could not have known the amount of money which were in the bag at the moment when she stole them from the bag of the injured person, therefore, in the present case, the amount of money is irrelevant for committing this criminal offense".

The Law

The relevant part of the Criminal Code of the Republic of Kosovo reads:

Article 325
Theft

"Whoever takes the property of another person valued at fifty (50) EUR or more with the intent to unlawfully appropriate it for himself, herself or for another person shall be punished by a fine and by imprisonment of up to three (3) years.

If the value of the stolen property taken is less than fifty (50) EUR, the perpetrator shall be punished by a fine or by imprisonment of up to six (6) months".

The relevant part of the Code of Criminal Procedure of the Republic of Kosovo reads:

Article 70
Police Investigation Steps

"After receiving information of a suspected criminal offence, the police shall investigate whether a reasonable suspicion exists that a criminal offence prosecuted ex officio has been committed.

The police shall investigate criminal offences and shall take all steps necessary to locate the perpetrator, to prevent the perpetrator or his or her accomplice from hiding or fleeing, to detect and preserve traces and other evidence of the criminal offence and objects which might serve as evidence, and to collect all information that may be of use in criminal proceedings.

In order to perform the tasks under the present Article the police shall have the power:

[...]

to detect, collect and preserve traces and evidence from the scene of the incident a suspected criminal offence and to order forensic testing of that evidence by the forensic laboratory in accordance with Article 71 of this Code;

to interview witnesses or possible suspects in accordance with Article 73 of this Code;

to undertake other necessary steps and actions provided for by the law".

Applicant's allegations

29. The Applicant alleges violation of Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 54 [Judicial protection of Rights] of the Constitution in connection with Article 6 3 (d) of the European Convention on Human Rights (hereinafter, the Convention).

30. The Applicant alleges that: *"The Court grounded the judgment on inadmissible pieces of evidence, such as the certification on the confiscation of objects – 5-Euro banknote, its serial number being X25186104209, which was declared an inadmissible piece of evidence, by the Decision of the first instance court, of 25 July 2013".*

31. The Applicant alleges that: *"In the decisions of the regular courts it is mentioned that reports police officers ZX and AZ were read, however they should have been summoned to declare themselves in compliance with Article 329 paragraph 4 of the CPCK".*

32. The Applicant alleges that: *"When deciding on the Appeal of the Defendant, the Court of Appeals did not see it reasonable to go into more details as regards the ascertainment of the factual situation".*

33. The Applicant alleges that decision rendered by the Supreme Court of Kosovo is unfair and thus in contravention with Article 31 of the Constitution and Article 6 of the Convention.

34. Finally the Applicant asks the Court: (i) to declare her referral admissible, (ii) to find violation of Articles 21, 24, 31, 33, 54 of the Constitution, Article 7 of the Universal Declaration of Human Rights (hereinafter, the UDHR) and Article 6 of the Convention and (iii) establish any right or responsibility for the parties in this referral which this honored Court deems as legally grounded and reasonable.

Assessment of admissibility

35. The Court first examines 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.

36. 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."

37. 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".*

38. 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".*

39. As to the allegation on admissibility of evidence, the Court considers 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 regard, the Court reiterates that its task is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way in which evidence were taken (See case *Edwards v. United Kingdom,* No. 13071/87, Report of the European Commission of Human Rights of 10 July 1991).

41. As to the allegation of a breach of Article 6 § 3 (d) of the Convention, the Court recalls that as a general rule, it is for the regular courts to assess the evidence before them as well as the relevance of the evidence which the defendants seek to adduce. Article 6 § 3(d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses. It does not require the attendance and the examination of every witness in the accused's behalf; its essential aim, as is indicated by the words *"under the same conditions"*, is full *"equality of arms"* in the matter. It is accordingly not sufficient for the Applicant to complain that she has not been allowed to question certain witnesses; she must, in addition, support her request by explaining why it is important for the witnesses concerned to be heard, and their evidence must be necessary for the establishment of the truth and the rights of the defense (see, among other authorities, *Perna v. Italy,* [GC], application no. 48898/99, Judgment of 6 May 2003, para. 29).

42. In this regard, the Court notes that the Applicant alleges: *"In the decisions of the regular courts it is mentioned that reports police officers ZX and AZ were read, however they should have been summoned to declare themselves".*

43. In respect to the above-stated allegation, the Court refers to the reasoning of the Court of Appeal: "*... the statement of the Defendant, is ungrounded because these are not the only evidence in this legal – criminal matter, but the first instance court substantiated its decision also in other evidence, mainly on the statements of witnesses SR and AR, but also on a series of other material evidence which are in the case files*".

44. In the light of the allegations of the Applicant and the reasoning of the Court of Appeal, the Court must examine two key questions: (i) whether the Applicant has been given an adequate and proper opportunity to challenge the depositions of witnesses ZX and AS and (ii) whether the statements of witnesses ZX and AS are the sole or decisive evidence against the Applicant. (See, for example, the case of *Luca v. Italy,* [ECtHR] application no. 33354/96, Judgment of 27 February 2001, paragraph 40 and also see *mutatis mutandis* the case of *Scholer v. Germany,* [ECtHR] application no. 14212/10, Judgment of 18 March 2015, paragraphs 48-49).

45. The Court considers that the content of the Referral reveals that: (i) the Applicant was given the opportunity to challenge the deposition of witnesses ZX and AS in all trial and appellate proceedings before regular courts and (ii) the statements of witnesses ZX and AS were important but were not the sole or decisive to the outcome of the Applicant's case, and moreover, the depositions of witnesses were to the detriment of the Applicant, and (iii) that the regular courts - in addition - have also based their conclusions on statements of other witnesses and on a series of other material evidence contained in the case files.

46. Moreover, the Court notes that in the context of this case the absence of witnesses ZX and AS and admission of their depositions as evidence will not automatically result in a breach of Article 6 § § 1 and 3 (d) of the Convention (See *Scholer v. Germany).*

47. The Court notes that errors of fact and of law allegedly committed in the course of regular proceedings before the trial courts were later redressed in the appellate proceedings by the Court of Appeal and the Supreme Court respectively, namely by addressing to a considerable degree questions of admissibility of evidence, examination of witnesses, the nature of the offence committed by the applicant and the altitude of the applicant's sentence which were all central questions to that case.

48. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact 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).

49. 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).

50. 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, and that the role of the Constitutional Court is solely 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).

51. In these circumstances, the Court considers that the Applicant has not substantiated her allegations of a violation of her fundamental human rights guaranteed by the Constitution, the Convention or the UDHR because the facts presented by her do not show in any way that regular courts had denied her the rights guaranteed by the Constitution.

52. Consequently, the Referral is manifestly ill-founded and must be declared inadmissible pursuant to 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 8 March 2016, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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