



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

Prishtina, 4 September 2017
Ref. No.:RK 1121/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI17/17

Applicant

Alfred Bobaj

**Constitutional review
of Decision Pzl. No. 182/16 of the Supreme Court
of 30 January 2017**

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 Gërzhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral was submitted by Alfred Bobaj, from village Korishe, Municipality of Prizren (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision [Pzl. No. 182/16] of the Supreme Court of 30 January 2017, in relation with the Decision PAKR. No. 87/16 of the Court of Appeal, of 15 March 2016 and Judgment [P. No. 82/15] of the Basic Court in Prizren, of 05 January 2016.

Subject matter

3. The Applicant does not specifically state what rights and freedoms guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and by the European Convention on Human Rights (hereinafter: ECHR) have allegedly been violated by the Judgment of the Supreme Court. However, the crux of the Applicant's Referral is related to fair trial, which is guaranteed by Article 31 of the Constitution (Right to Fair and Impartial Trial) and Article 6 (Right to a fair trial) of the ECHR.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 21 February 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 20 March 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Selvete Gërzhaliu-Krasniqi.
7. On 28 March 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
8. On 5 July 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility.

Summary of facts

9. On 21 May 2008, in the course of an attempted robbery, one person was killed.
10. On 29 January 2014, due to a reasonable suspicion that the Applicant had committed the criminal offense of aggravated murder under Article 147, paragraph 1, sub paragraph 7, in conjunction with Article 23 of the Criminal Code of Kosovo, the Basic Prosecution in Prizren - Serious Crimes Department, filed the Indictment PP. No. 4/2013.

11. In the hearing before the Basic Court, the state prosecutor made a proposal for negotiating a guilty plea. Based on the case file it follows that the proposal was supported by the defense counsel of the accused and the accused.
12. On 31 December 2015, a hearing was held in the Basic Court on the guilty plea agreement in the presence of all parties to the proceedings, and the agreement was officially approved by the Municipal Court.
13. On 05 January 2016, the Basic Court rendered Judgment [P. No. 82/2015] which found the Applicant guilty of a criminal offense and sentenced him to imprisonment of 17 (seventeen) years, in which was counted the time served in detention on remand.
14. In the reasoning of the Judgment [P. No. 82/2015], the Basic Court stated, "*In measuring the type and length of sentence, taking as the basis the recommendations made in the guilty plea agreement, the court took into account all the circumstances which affect the type and the length of sentence under Articles 73 and 74 of the Criminal Code, from aggravating circumstances for the accused (as it is about a returnee recidivist who has already been convicted for criminal offenses), the court also assessed the degree of social danger and protected values, as well as mitigating circumstances ...*"
15. The Applicant filed an appeal with the Court of Appeals of Kosovo - Serious Crimes Department (hereinafter: the Court of Appeals), due to the length of sentence, with the proposal that the judgment of the Basic Court be modified, so that he be imposed a more lenient punishment than the one agreed by plea agreement.
16. The Appellate Prosecution filed a response to the Applicant's appeal, in which it proposed to reject the appeal as ungrounded.
17. On 15 March 2016, the Court of Appeal rendered Decision [PAKR. No. 87/16] which rejected the Applicant's appeal as inadmissible, reasoning that, "*In the plea agreement submitted in writing before the court, among other things, the parties envisaged also the provision which specified the limits of sentence for criminal offenses for which the accused pleaded guilty - it is understood on the basis of plea agreements where the parties have agreed also on the limits of punishment, so that the sentence that will be imposed by the court will be the imprisonment of 17 (seventeen) years.*"
18. The Applicant submitted to the Supreme Court a request for extraordinary mitigation of sentence on the grounds that, "*... after the judgment became final, new circumstances appeared which did not exist during the time of rendering judgment, which could affect the length of sentence ...*"
19. On 30 January 2017, the Supreme Court rendered Decision [Pzd. No. 182/2016], which rejected the request for extraordinary mitigation of punishment as ungrounded. The Supreme Court reasoned that, "*The court considers that the circumstances specified in the request, as far as the overall*

economic condition, could be considered as new circumstances that were not assessed when calculating the sentence. However, they are not of such a nature that would justify the extraordinary mitigation of punishment, taking into account the gravity of the offense and the degree of criminal liability of the convict, and particularly the manner of committing the criminal offence.”

Applicant’s allegations

20. The Applicant alleges that the courts did not take into account the newly created circumstances that could affect the length of sentence and if they were known at the time of imposing the imprisonment sentence.
21. The Applicant requests the Court, “[...] to remand the case for retrial from the very beginning.”

Admissibility of the Referral

22. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution, as further specified in the Law and the Rules of Procedure.
23. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

“1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

(...)

7. 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.”
24. The Court notes that the Applicant is an authorized party, the Referral was submitted in accordance with the deadlines specified in Article 49 of the Law, and the Applicant has exhausted all legal remedies.
25. However, the Court also refers to Article 48 of the Law [Accuracy of the Referral], which stipulates that:

“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.”
26. The Court further refers to Rule 36 (1) d) and (2) (b) of the Rules of Procedure, which provides:

“(1) The Court may consider a referral if:

[...]

d) the referral is prima facie justified or not manifestly ill-founded.

(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:

[...]

b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights.“

27. The Court recalls that the Applicant has not stated what rights were directly violated by the Judgment of the Supreme Court, however, the Applicant in the Referral stated that *“the courts did not take into consideration the new circumstances that could affect the sentence,”* by which he raises the issue of guarantees provided by Article 31 of the Constitution and Article 6 of ECHR.
28. The Court notes that in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, *„Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.“*
29. In this regard, the Court recalls that the European Court of Human Rights (hereinafter: the ECtHR) has found that, *“the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law”* (see: *mutatis mutandis, García Ruiz v. Spain* [GC], No. 30544/96, paragraph 28, European Court for Human Rights [ECtHR] 1999-1).
30. The Court also reiterates that the complete determination of the factual situation is within the full jurisdiction of the regular courts and that the role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Court cannot act as *“fourth instance court”*. (See ECtHR Judgment of 16 September 1996, *Akdivar v. Turkey*, No. 21893/93, para. 65; see also, *mutatis mutandis*, Constitutional Court case KI86/11, Applicant *Milaim Berisha*, of 5 April 2012).
31. In this regard, the Court states that in determining the grounds of the Applicant’s appealing allegations it will comply with the principle established in the ECHR case law according to which *“the fairness of a proceeding is assessed on the basis of the proceedings as a whole”* (see ECtHR, *Barberá, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988, series A, number 146, paragraph 68).
32. Accordingly, in the present case, the Court notes that the Special Prosecution proposed to the Applicant an agreement to plead guilty to the criminal offence he is suspected of having committed, to which he and his attorney agreed, and the Court concluded this based on the examination of the case file.
33. The Court further notes that all the parties to the proceedings were familiar with the content of the plea agreement, as well as the restrictions and conditions which such an agreement entails.

34. The Court also notes that all the parties to the proceedings have had the opportunity to negotiate the terms, modality and the length of the prescribed punishment, with which, according to the case file, they agreed in the agreement. The parties could also voluntarily refrain from signing such an agreement if they did not agree with the conditions provided therein.
35. The Court further notes that such an agreement reached in writing was proposed to the first instance court, which then acted in accordance with the provisions of Article 233, paragraph 18 of CPC, where it determined that, “*in the present case, the Applicant understood the nature and consequences of a guilty plea, that the guilty plea was committed voluntarily after sufficient consultations with his defense counsel.*”
36. The Court also notes that the Applicant was dissatisfied with the length of the imposed prison sentence which, according to the plea agreement, he voluntarily agreed to. The Applicant appealed to the Court of Appeals, and later the Supreme Court, on the basis of alleged, “*new circumstances that could affect the length of the imposed sentence.*”
37. Precisely those allegations were dealt with by the Court of Appeals and the Supreme Court, where they concluded that, “*... the new circumstances are not of such a nature that would justify the extraordinary mitigation of punishment ...*”
38. The Court reiterates that it is beyond its competence to assess the quality of the conclusions of the regular courts regarding the assessment of evidence and interpretation of laws, unless they are manifestly arbitrary. The Court has already assessed that the regular courts completed an extensive and comprehensive presentation of evidence where the evidence presented by the defense and prosecution was adduced, and that the imposed sentence resulted from a plea agreement.
39. The Court reiterates that the task of the Court is to assess whether the regular courts' relevant proceedings were in any way unfair or arbitrary (see: *mutatis mutandis*, ECtHR cases: *Shub v. Lithuania*, Decision on admissibility, application of 30 June 2009, paragraph 16; *Edwards v. United Kingdom*, Judgment of 16 December 1992, paragraph 34; *Barberá, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988, paragraph 68).
40. In this respect, the Court considers that nothing in the case presented by the Applicant indicates that the proceedings before the regular courts were unfair or arbitrary such that the Constitutional Court would be convinced that the essence of the right to fair and impartial trial was impaired or that the Applicant was denied any procedural guarantees, which would lead to a violation of the right enshrined on Article 31 of the Constitution and paragraph 1 of Article 6 of the ECHR.
41. The Court recalls that the Applicant is obliged to substantiate his constitutional allegations and submit *prima facie* evidence indicating a violation of his rights guaranteed by the Constitution and the ECHR. That assessment is in line with

the jurisdiction of the Court (see: case of the Constitutional Court No. KI19/14 and KI21/14 Applicants *Tafil Qorri and Mehdi Sylja*, of 5 December 2013).

42. In sum, the Court considers that the Applicant did not substantiate his allegations nor has he submitted any *prima facie* evidence indicating a violation of his rights guaranteed by the Constitution and the ECHR.
43. Therefore, the Referral is manifestly ill-founded on a constitutional basis and is to be declared inadmissible, in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 47 of the Law and Rules 36 (1) (d) and (2) (b) of the Rules of Procedure, in the session held on 5 July 2017, 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 paragraph 4 of the Law; and
- IV. This Decision is effective immediately.

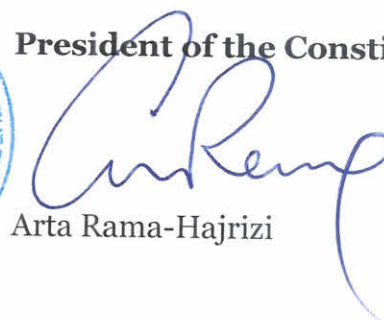
Judge Rapporteur



Bekim Sejdiu



President of the Constitutional Court



Arta Rama-Hajrizi