



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

Prishtina, 8 January 2014
Ref.no.:RK535/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI61/13

Applicant

Blerim Shabi

**Constitutional Review
of the Decision Pkl. no. 119/2012 of the Supreme Court of Kosovo,
dated 21 December 2012**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

The Applicant

1. The Applicant is Mr. Blerim Shabi, resident of Peja. He is represented by the attorney Mr. Isa Osdautaj of Deçan.

Challenged decision

2. The Applicant challenges the Decision of the Supreme Court, Pkl.no.119/2012, dated 21 December 2012.

Subject matter

3. The Applicant alleges that the aforementioned Decision violated his rights guaranteed by the Constitution, namely Article 21 [General Principles], Article 23 [Human Dignity], Article 24 [Equality Before the Law], Article 30 [Rights of the Accused], and Article 31 [Right to Fair and Impartial Hearing]. The Applicant also alleges a violation of the European Convention on Human Rights in its entirety.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the Law), and Rule 56, paragraph 2, of the Rules of Procedure (hereinafter: the Rules).

Proceedings before the Constitutional Court

5. On 22 April 2013, the Applicant submitted the Referral to the Court.
6. On 25 April 2013, the Applicant submitted to the Court a completed Referral Form and copies of the judicial decisions in his case.
7. On 29 April 2013, the President appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (presiding), Snezhana Botusharova and Arta Rama-Hajrizi.
8. On 10 May 2013, the Constitutional Court notified the Applicant and the Supreme Court of Kosovo on initiated proceedings on constitutional review of judgments in case KI 61/13.
9. On 18 November 2013, after having considered the report of judge report, the Review Panel made a recommendation to the full Court on inadmissibility of the Referral.

The facts of the case

10. It appears from the file that, on 15 October 2009, at approximately 20:30 hours, a physical altercation, or 'brawl', took place in a neighborhood of Peja, involving the Applicant and several other persons. One person died at the scene as a result of injuries received from a knife.
11. On 15 October 2009, the Applicant was arrested and placed in detention on remand. Subsequently, the Applicant was indicted for the crime of murder and the case was transferred to the District Court in Prizren.

12. On 15 July 2011, the District Court of Prizren (P.no.59/2010) pronounced the Applicant guilty of the crime of murder under Article 146 of the Criminal Code of Kosovo, and sentenced him to 15 years imprisonment. The Applicant was absent when the verdict was pronounced, but his legal representative was present.
13. In its Decision, the District Court paraphrased further from the report of the forensic expert: *“According to the autopsy and description there are two penetrating injuries, cuts from the back side of the body – direction from back to front and up-down, right-left. From the sustained injuries, the deceased when suffering the injuries was unable to resist or fight further.”*
14. The Applicant submitted an appeal to the Supreme Court against this judgment. The Applicant requested the Supreme Court to either acquit him of the charge of murder, or to return the case for re-trial to the District Court. The Applicant alleged that the first instance court had committed violations of criminal law and procedure, and that its determination of the facts was erroneous and incomplete. The Applicant specifically stated that his own injuries sustained during the fight in Peja had not been taken into account by the District Court. The Applicant also requested to be present during the hearing at the Supreme Court and stated that he had not been present when the verdict and sentence were pronounced by the first instance court.
15. On 08 February 2012, the Supreme Court (Ap.no.446/2011) declared the Applicant’s appeal ungrounded, and confirmed the decision of the District Court (P.no.59/2010). The Applicant and his legal representative were present at the hearing conducted by the Supreme Court appeal panel. In its decision, the Supreme Court extensively reviewed the facts and the law in the case, as well as the specific grounds of appeal presented by the Applicant.
16. The Applicant submitted a request for protection of legality against this decision. He alleged substantial violations of criminal law and procedure. He again alleged that his own injuries had not been taken into account by the trial courts. He also explicitly referred to the fact that the first instance court had sentenced him to a very lengthy prison sentence without his presence in the court, despite the fact that he had been brought from his place of detention in Peja to the court in Prizren many previous times in order to attend hearings.
17. On 21 December 2012, the Supreme Court (Pkl.no.119/2012) rejected the request for protection of legality as ungrounded. In its decision, the Supreme Court reviewed the assessment of the facts of the case given by the first and second instance courts. The Supreme Court also assessed that the Applicant had not acted in self-defense, and concluded that the trial courts had not committed any violations of criminal procedural law. The Supreme Court did not address the question of the Applicant’s absence at the pronouncement of sentence by the first instance court.

Applicant's Allegation

18. The Applicant alleges that the District Court, and the Supreme Court on appeal, violated his rights as an accused person, and his right to a fair and impartial trial as guaranteed by Article 31 of the Constitution, in particular because the applicant was not present at the District Court when it pronounced his conviction and sentence.
19. The Applicant claims that he never received from the District Court a copy of a digital recording of the trial hearings that he had requested twice by letter. He alleges that this denial of access to the digital recording violated his rights as an accused person, as well as his right to the equal protection of his rights in proceedings before the courts, as guaranteed by Article 31 (1) of the Constitution.
20. The Applicant also alleges that both the District Court, and the Supreme Court on appeal, failed to take into account the injuries he had sustained during the fight in Peja, and the impact of these injuries on his ability to commit the murder of which he was convicted. The Applicant contends that his injuries were not treated equally by the trial courts with those of the victim and other persons involved in the fight, and that this violated his right to equality of treatment as guaranteed by Article 24 of the Constitution.

Assessment of the admissibility of the Referral

21. First of all, in order to be able to adjudicate the Applicant's Referral, the Court has to examine whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and the Rules.
22. Article 113 of the Constitution establishes the general frame of legal requirements for a Referral being admissible. It provides:

"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."
23. Article 48 of the Law on the Constitutional Court also establishes 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 a public authority is subject to challenge".
24. In addition, Rule 36 (2) of the Rules provides that

“The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:

[...]

(b) [...] the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or

[...], or

(d) [...] the Applicant does not sufficiently substantiate his claim;”

25. The Court notes that the Applicant has raised his arguments with the Supreme Court concerning his absence in court when the District Court pronounced his conviction and sentence. The Court notes also that the Applicant raised the issue of the factual assessment of his injuries during the appeal and the proceedings for protection of legality.
26. Therefore, the Court concludes that the Applicant has exhausted all legal remedies available to him regarding his claims, not only formally, but also in substance.
27. However, the Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by the regular courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see *Avdyli v. Supreme Court of Kosovo*, KI 13/09, 18 June 2010; see *mutatis mutandis* *García Ruiz v. Spain* [GC], no. 30544/96, para. 28, European Court of Human Rights 1999-1).
28. The Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see, *inter alia*, European Commission of Human Rights, *Edwards v. United Kingdom*, App. No. 13071/87, 10 July 1991).
29. In the present case, the Applicant was afforded ample opportunities to present his case and to contest the interpretation of the facts and the law which he considered incorrect, both before the Supreme Court on appeal and in the protection of legality proceedings.
30. The Court notes that the text of the decisions of the Supreme Court on his appeal, and the Supreme Court on his request for protection of legality, do not explicitly refer to the Applicant’s absence from the District Court when his conviction and sentence were pronounced.
31. The Court notes, however, that the Applicant was present during other hearings in his trial before the District Court, as well as at a hearing before the Supreme Court on his appeal. Furthermore, the Applicant’s legal representative was present at the hearing where his conviction and sentence were pronounced.

32. In these circumstances, the Court finds that the absence of the Applicant at the hearing when his conviction and sentence were pronounced cannot be said to have violated his rights to a fair hearing.
33. Regarding the alleged refusal to supply the Applicant's legal representative with a copy of a digital recording of the trial hearings, it appears from the Applicant's submissions to the Supreme Court, and the detailed decision of the Supreme Court on appeal, that the Applicant was present during the court hearings in his case and was represented by a lawyer throughout the proceedings.
34. In these circumstances, the Court finds that the Applicant's rights to adequate facilities for the preparation and conduct of his defense, as guaranteed by Article 30 (3) of the Constitution, were sufficiently met by the trial courts, whether or not a digital recording of the hearings was made available to the Applicant.
35. Regarding the alleged failure of the regular courts to take into account the physical injuries the Applicant had sustained in the abovementioned brawl when assessing his responsibility for the death of the victim, the Court notes that the Supreme Court in the protection of legality proceedings explicitly rejected the argument that the Applicant may have been acting in self-defense.
36. Regarding the alleged failure of the trial courts to fairly assess the actions of other parties to the events, both as perpetrated against the Applicant and as contributory factors towards the death of the victim, the Constitutional Court finds that this is outside the scope of the authority of the Constitutional Court to review based on Article 113 (7) of the Constitution, as stated in paragraphs 28 and 29 above.
37. Having examined all of the criminal proceedings as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, *Shub v. Lithuania*, ECtHR App. No. 17064/06, 30 June 2009).
38. The Court considers that there is nothing in the Referral which indicates that the courts hearing the case lacked impartiality or that the proceedings were otherwise unfair. The mere fact that the Applicant is dissatisfied with the outcome of the case cannot raise an arguable claim of a breach of Article 31 of the Constitution (see *Memetoviq v. Supreme Court of Kosovo*, Application no. KI 50/10, Resolution of 21 March 2011; see *mutatis mutandis* *Mezotur-Tiszazugi Tarsulat v. Hungary*, ECtHR App. No. 5503/02, Judgment of 26 July 2005).
39. Based on these considerations, the Court finds that the Applicant has not been a victim of a denial of equal judicial protection of his rights.
40. Therefore, the Constitutional Court finds that the Applicant's claims have not been substantiated and must be dismissed as manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 (7) of the Constitution, Article 48 of the Law and Rule 36 (2) of the Rules of Procedure, in its session held on 18 November 2013, unanimously

DECIDES

- I. TO REJECT the Referral as inadmissible;
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law; and
- III. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Ivan Čukalović



Prof. Dr. Enver Hasani