



REPUBLIKA E KOSOVËS – РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Concurring Opinion

of
Judge Robert Carolan

Case No. KI 78/12

Applicant

Bajrush Xhemajli

Constitutional Review of the Judgment of the Supreme Court of the Republic of Kosovo, Pkl.No. 70/2012, dated 22 June 2012

I concur with the opinion and judgment of the Majority in this case for all of the reasons cited in the opinion of the Majority and for several additional reasons.

In this case the Applicant was indicted for the criminal offence of Endangering Public Traffic in violation of Article 297, Paragraph 5 of the Provisional Criminal Code of Kosovo (hereinafter: “PCCK”) That law specifically provides:

“(1) Whoever violates the law on public traffic and endangers public traffic, human life or property on a large scale and thereby causes light bodily injury to a person or material damage exceeding 1.000 EUR shall be punished by a fine or by imprisonment of up to five years. (3) When the offence provided for in paragraph 1 or 2 of the present article is committed by negligence, the perpetrator shall be punished by a fine or by imprisonment of up to two years. (5) When the offence provided for in paragraph 3 of the present article results in serious bodily injury or substantial material damage, the perpetrator shall be punished by imprisonment of six months to five years and when such offence results in the death of one or more persons, the perpetrator shall be punished by imprisonment of one to eight years.”
(emphasis added.)

Before any defendant charged with violating this criminal law can be convicted of that offense it must be proven beyond a reasonable doubt that:

- (1) The defendant violated a traffic law; and,
- (2) The defendant's act(s) endangered public traffic, human life or property; and,
- (3) The defendant's act was "on a large scale" or the greatest cause of the injury or death.

This law recognizes that there can be multiple causes of a traffic accident. It does not punish or make criminal an act which simply may be one of many causes of an automobile accident unless it is the major cause of the accident. Simple negligence in driving an automobile resulting in injury or death is not a crime punishable by this statute. The negligence must be "large" or gross negligence before there is a violation of this statute.

To prove beyond a reasonable doubt that the Applicant's driving conduct was the major cause of the accident the first instance court, as the finder of fact in Applicant's case, was required to examine all the evidence and all of the possible causes of the accident. In this case, the first instance court did not make such an examination even after repeated requests by the Applicant for the first instance court to make such an examination. Indeed, the court appointed traffic expert in Applicant's case candidly admitted:

"From the case file we have only evidence as to the subjective causes, i.e. from the parties involved in the accident, while other evidence such as the road and the mean's for causing the accident we do not have. I have only analyzed the case file, I have not taken part on sight of the traffic accident."

According to the testimony of the traffic expert there are three factors that contribute to traffic accidents: (1) the human factor, (2) the road factor and (3) the vehicle factor. But the traffic expert in his report in the Applicant's case only ascertained the human factor, not the road factor or the vehicle factor even though he conceded that examining those additional factors would have been relevant to reaching an opinion as to the cause of the accident and whether such cause was on a "large scale." As a result it was never determined whether the Applicant's vehicle or those of the other three drivers involved in the accident had unknown mechanical problems at the time of the accident that might have contributed to the cause of the accident. It was never determined whether the road conditions might have contributed to the accident. In addition, the speed and driving conduct of the other drivers was never corroborated by examining the impact and damage to the other vehicles involved in the accident. None of the answers to any of these questions was

ever allowed to be submitted to the first instance court despite repeated requests by the Applicant to appoint an expert to perform a thorough investigation and examination in an attempt to answer these questions in determining whether the Applicant was the cause of the accident on “a large scale.”

In response to the Applicant’s repeated requests for another expert examination the first instance court stated:

“..... the court considered that the traffic expert report and the provided clarifications by the expert were enough to assess the factual situation.”

The first instance court never gave any reasons why it reached this conclusion even when its own traffic expert testified that the vehicle factor and the road factor can contribute to the cause of an automobile accident.

At the close of his trial in the first instance court on 23 November 2010 the Applicant admitted that he had some responsibility for the cause of the accident, but he never admitted or stated that he violated a traffic law, that he endangered human life or property or that his driving conduct was “on a large scale” the cause of the accident resulting in the death of another human being. He consistently maintained his innocence of the criminal charges and repeatedly asked the first instance court to appoint a traffic expert to thoroughly examine all the factors that could have caused the accident.

Some of have suggested that because the Applicant admitted that his driving conduct was a cause of the accident that it is irrelevant and immaterial whether the first instance court denied his request to have a thorough expert traffic investigation performed. This is an erroneous conclusion. Applicant did not plead guilty to the charges or admit that he was guilty of the charges. If he had so acted, there would have been no reason for a criminal trial.

Because there was a trial, all three elements of the charge against the Applicant had to be proven beyond a reasonable doubt. The Applicant repeatedly asked the first instance court to appoint a traffic expert who could perform a thorough investigation of the accident examining all of the factors that could contribute to an accident to render an expert opinion on the cause of the accident. This request was repeatedly denied, a denial that was a violation of the Applicant’s Constitutional rights pursuant to Article 31. 4 of the Constitution.

Some have suggested that this Court has impermissibly assessed the evidence in the Applicant’s case. This also is an erroneous conclusion. All this Court has done is conclude that procedurally the Applicant was not allowed to have relevant evidence and witnesses presented in his trial. Because the Applicant was not allowed to have

such evidence presented, he did not receive a fair trial as required by the Constitution. Indeed, because of the first instance court's refusal to allow an additional traffic expert to examine the evidence, the scene and the vehicles involved without any reasoned explanation, it is virtually impossible to assess the evidence in this case. As a result, this Court is not assessing the evidence. Rather, it is only assessing whether the Applicant's Constitutional procedural rights were violated. In this case, they were repeatedly violated.

Respectfully submitted,



Robert Carolan

Judge

Constitutional Court of the Republic of Kosovo

