Pristine, 12 February 2013
Ref.no.:MPM 378/13

Joint Dissenting Opinion

of

Judges Altay Suroy, Almiro Rodrigues, and Snezhana Botusharova

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

1. We take note of the judgment of the Majority of Judges of the Constitutional Court (hereinafter 'the Majority'). However, we cannot agree with it for the reasons that follow.

The Scope of the Referral

2. The Applicant complains about the fairness of the trial in which he was convicted of the offence of Endangering Public Traffic. The Applicant alleges that the criminal trial in his case violated Article 31 of the Constitution of Kosovo and Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

3. Specifically, the Applicant claims that the regular courts rejected his request to order supplementary expertise into certain circumstances surrounding the traffic accident in which he was involved. The Applicant alleges that, by rejecting this request, the regular courts violated his right to a fair trial. Specifically, the Applicant alleges that he did not benefit from 'equality of arms' with the prosecution in his trial, as required for a fair trial, because the District and Supreme courts refused to take additional expert testimony.

4. We note that the Applicant, during the various court proceedings in his case, did not raise any concerns about violations of the Rules of Evidence affecting the admissibility of evidence by the District and Supreme courts. We consider that the Majority expanded its review beyond the Referral to include a discussion of the validity of the evidence relied upon by the District and Supreme courts. In our opinion, this discussion is outside the scope of the Referral and thus out of the case before the Constitutional Court.

5. Furthermore, it is not the role of the Constitutional Court to assess the admissibility of evidence in criminal trials, but it must limit itself to reviewing the criminal proceedings as a whole for their compliance with the right to a fair trial.

As to the Facts in General

6. We consider that there are factual elements in the case-file as submitted by the Applicant which are not fully reflected in the Majority's judgment, but which could have led to different conclusions. Therefore, we re-state the facts of the case as they appear to us from the case-file.

As to the Indictment

7. The submitted Referral originates in a road traffic accident that occurred on 21 May 2009. At approximately 08:30, the Applicant was driving his official vehicle, Nissan Terrano, from Pristina to his place of work at Ferizaj. He was alone in the vehicle. Just outside of Pristina, at Veternik, the Applicant became involved in an accident also involving three other vehicles. One driver of another vehicle was killed, while several other occupants of vehicles suffered severe physical injuries.

8. Reportedly, the police gathered evidence at the site including taking photographs of the vehicles, their relative positions following the accident and marks on the road surface, as well as making sketches of the site. In the following days, the police gathered statements from the various persons involved in the accident, to the extent possible given their medical conditions. A number of witnesses, including the Applicant, remained unconscious in hospital for various periods of time ranging from a week to several weeks as a result of their injuries.

9. On 14 October 2009, a traffic expert commissioned by the District Public Prosecutor submitted a report based on the evidence collected by the police. The traffic expert's report detailed the causes of the accident, estimated the speeds and relative positions on the road of the several vehicles involved, and identified the actions of the Applicant as the cause of the accident.

10. On 24 November 2009, the Prosecutor submitted an indictment charging the Applicant with the criminal offence of Endangering Public Traffic, under paragraph 5 of Article 297 of the Provisional Criminal Code of Kosovo (PCCK).

11. On 1 March 2010, this indictment was confirmed by the District Court of Pristina (Ka. No. 438/09).

12. The indictment (PP. No. 565-1/2009) specifies that the indictment was based on the following evidence:

> *"The factual situation was ascertained in entirety based on submissions of the defence of defendant Bajrush Xhemajli, testimonies of damaged parties/witnesses, expert report of traffic expert, crime scene sketch, and photographic documentation, and forensic opinions and conclusions on the injured persons."*

13. On 1 March 2010, the Applicant filed an objection to the indictment with the Confirmation Judge at the District Court of Pristina. The Applicant objected to the findings of the traffic expert, claiming that this expertise formed almost the entire basis of the indictment and that it contained a number of deficiencies.

14. Specifically, the Applicant stated:

> *"The expertise contains a description of the accident and the crime scene, based on records obtained from the police. The expertise, amongst others, finds the*
>
> > ***'sole cause of the accident, which to my opinion is the driver of the vehicle Nissan, register plates 000-KS-035, who drove in a higher speed than allowed, by recklessly overtaking the VW van on the right side, and returning again recklessly to the left lane, thereby hitting the VW van, and by overtaking the van, he lost control, sliding to the opposite side of the road, and hitting other vehicles, Mercedes 124 and Ford Mondeo, driving on the opposite direction, in their traffic lanes, in a regular manner.***
> > ***From the case files and technical analysis of this accident, I have not found any other omissions of other participants, which would be contributing factors to the accident.'***
>
> *The expertise and the final opinion provided remain flawed and unclear, since no acceptable explanations were provided on causes and circumstances contributing to the accident.*
>
> *Therefore, the expertise has failed to provide any explanation on the VW van, which was driving on the left side of the road. The expertise should have provided explanations on these circumstances:*
>
> - *Should the Van have been moving-driving on the left lane, as it was moving, or should it have been on the right lane, which is used normally for slower vehicles;*

- *Could the Van have seen, and has the driver seen the vehicle Nissan taking over, and has it taken proper measure (reduce speed) to allow unimpeded overtake? This circumstance required specific addressing, since according to the crime scene report, and the simulated accident, as part of expertise, it is clear that the vehicle Nissan, driven by the accused, hit the Van with his rear left side, so only a little remained to complete the overtake.*

The expertise is flawed and unclear also on the circumstances of speed of driving of other vehicles in the accident. The expertise does not speak of the parameters used by the expert in finding that the vehicle Nissan was speeding at 100 km/h.

In consideration of the statement of the accused, that the speed of his vehicle at the time of the accident was 60-70 km/h, and the fact that the traffic was dense at that part of the road, the opinion and the finding of the expert is ungrounded on this circumstance as well.

15. Based on these assertions, the Applicant requested the District Court to commission another expert report. The applicant stated:

"For these reasons I consider that the indictment could not have been grounded upon this piece of evidence, and to eliminate these flaws and uncertainties, and always with a view of full and accurate ascertainment of the factual situation, I hereby propose that another expert, or team of experts, is hired to provide a super-expertise."

As to the Trial

16. On 1 October 2010, the District Court of Prstina conducted a hearing where testimony was taken from witnesses, and reports were read out of forensic experts and of the traffic expert. The Applicant requested clarifications on the traffic expert report, and the traffic expert was summoned to appear in Court.

17. On 18 November 2010, the Court continued with the taking of evidence and heard the traffic expert. The traffic expert explained how he had reached his conclusions, what methodology he had used to calculate the speeds of the various vehicles, and responded to specific questions put to him when cross-examined by the Applicant.

18. In particular, the expert clarified that he had not found evidence to suggest any malfunction of the Applicant's vehicle. The expert clarified his assessment that the Applicant's vehicle had been overtaking another vehicle on the right hand side before moving to the left and hitting the other vehicle. The expert also confirmed that he had compiled his report based on the investigation files, and had not visited the crime scene himself.

19. At this point, the Applicant requested the Court to appoint supplemental expertise. The Applicant sought clarifications on two points:

    a. The expertise was confusing, and a super- expertise was needed to come to the truth as to the causes and/or causing persons of the accident; and
    b. A technical-expertise was needed to make an assessment of the condition of the Applicant's vehicle in order to determine whether a technical malfunction had contributed to the accident.

20. The District Court denied this request, explaining its ruling in the following terms:

    "In relation to the proposal of defence on hiring a super-expertise on traffic, and expert of machinery, the Court considers that the traffic witness report and the explanation provided by the expert are sufficient for ascertaining the factual situation, and hereby renders the following:

    DECISION

    Rejecting the proposal of defence of the accused to hire super-expertise and expert of machinery to assess the technical condition of the Nissan vehicle before the accident."

21. The Court continued with the taking of evidence, and read out the autopsy report and the crime scene report compiled by the Kosovo Police. The photographic evidence taken at the crime scene was viewed.

22. At this point the Court asked the Applicant if he had any statements to make in his defence, and he expressed his wish to remain silent at this time, pending his closing arguments on defence.

23. On 23 November 2010, the Applicant submitted his closing arguments on defence regarding the charges against him. In this submission the Applicant declared that he had always accepted his liability and/or guilt for this accident, but he refuted that he was *"the sole cause of the accident"*.

24. The Applicant considered that the Court had exclusively relied upon the report of the traffic expert, and that this report was confusing on a number of points. Specifically, the Applicant considered that the Court was obligated to seek further expert evidence as to (1) the speed his vehicle was travelling; (2) the behaviour of the driver of the vehicle he was overtaking; and (3) the technical condition of his vehicle.

25. On 26 November 2010, the District Court of Pristina convicted the Applicant of the criminal offence of Endangering Public Traffic, as per paragraph 5 of Article 297 of the PCCK. The Applicant was sentenced to a term of imprisonment of 2 years and 6 months, and a 3 year prohibition of driving upon completion of his prison sentence.

26. Regarding the Applicant's objections to the traffic expertise, the Court stated:

> *"The Court also assessed the expert report by expert Yll Koshi, and his statement to the court hearing, on elaborating his conclusions and opinions in the report, and after a full and comprehensive elaboration, it found that this expertise is precise, objective, and grounded upon scientific and professional rules, due to the reason that the expert has detailed the records as per the case files, on which he had grounded his expertise, and therefore, the Court gave full trust to the expertise, while finding the remarks of defence unclear, hypothetical and ungrounded upon any concrete evidence."*

27. Subsequently, the Applicant filed an appeal to the Supreme Court against the District Court judgment.

28. Specifically, the Applicant complained that the District Court had not taken into account whether other factors and/or persons could have contributed to causing the accident. The Applicant claimed that, because additional expertise was not taken to clarify these other factors, this should have led to a conclusion that there was a reasonable doubt as to whether the applicant was the sole cause of the accident.

29. On 8 March 2012, the Supreme Court refused the appeal as ungrounded.

30. Subsequently, the Applicant filed a request for protection of legality with the Supreme Court.

31. Both in his appeal and in his request for protection of legality to the Supreme Court, the Applicant relied upon the same arguments in his defence that he had made to the District Court.

32. On 22 June 2012, the Supreme Court refused the request for protection of legality as unfounded, reasoning that:

> *"the defense of the accused during all phases of the proceedings has repeated the same allegations, also now with this extraordinary legal remedy, respectively alleging that the factual situation was not fairly assessed, because of the fact that according to them the court did not manage to accurately assess who contributed to causing this accident with fatal consequences: human factor, road factor, or technical factor (eventual technical failure), therefore, according to them, in such circumstance, it was necessary to order the performance of a super expertise. All these allegations that were sufficiently answered by the panel of this court are ungrounded. The Court may appoint another expert or conduct a super expertise in case of a contradiction on experts' opinions, failures or reasonable doubts as to the accuracy of the given opinion, if the data in the experts' conclusions (when we*

have two) differ profoundly or when their conclusions are ambiguous, not complete and in contradiction with itself or the reviewed circumstances and when all these cannot be avoided by repeated interviews of the experts. In this concrete situation, none of these circumstances would force the court to request performance of a super expertise."

33. We consider that the decision of the Supreme Court thoroughly analysed the arguments submitted by the Applicant, it is based on a reasonable and reasoned assessment of the evidence, and it is within its competence and discretion.

As to the case-law of the European Court of Human Rights

34. Regarding the assessment of evidence by the regular courts, we recall the case-law of the European Court of Human Rights (Elsholz v. Germany, No. 25735/94, 13 July 2000, para. 66):

> *"The Court recalls that the admissibility of evidence is primarily a matter for regulation by national law and that, as a general rule, it is for the national courts to assess the evidence before them. The Court's task under the Convention is rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, mutatis mutandis, the Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45 and 46, and the H. v. France judgment of 24 October 1989, Series A no. 162-A, p. 23, §§ 60-61).*

35. In consequence, it is not up to the Constitutional Court to determine whether the District and Supreme courts had correctly assessed the evidence presented in the Applicant's case. It is the duty of the Constitutional Court to determine whether the proceedings as a whole were fair.

36. We disagree with the finding of the Majority, as stated at paragraph 105 of the Judgment, that:

> *"[...] when viewing the fairness of the criminal proceedings in the Applicant's case as a whole, it cannot be said that he has benefitted from a 'fair trial' within the meaning of Article 6 ECHR and Article 31 of the Constitution".*

37. In fact, we note that the Applicant did not dispute his liability for the traffic accident on the basis of which he was convicted, but merely contests that he was the sole cause. He had consistently asked for additional expertise to determine whether or not there may have been any other contributing causes, whether human or technical, of which he suggested a number of possibilities.

38. We further note that the Applicant has been given the opportunity to raise his concerns regarding these various other possible contributing factors with the traffic expert, and with the District and Supreme courts. We note that the traffic expert had responded to his concerns regarding the factors raised by the Applicant, and had explained why each of these factors did not apply to the actual accident.

39. In addition, we note that both the District and Supreme courts in turn had considered the Applicant's concerns, and had determined that the report of the traffic expert, the responses of the traffic expert to the applicant's questions, coupled with the other evidence presented, had adequately and completely addressed those concerns.

40. As such, it cannot be said that the Applicant was not afforded ample opportunity to question the evidence and to have his questions be taken seriously. Nor can it be said that the Applicant was prevented in any way from presenting an expertise or any other evidence in his defence, on his own initiative.

41. With respect to the refusal of the courts to order additional expertise, which is not the same as a refusal to admit evidence presented on the Applicant's behalf, the Majority refers specifically to paragraph 4 of Article 31 of the Constitution, which states:

> *"4. Everyone charged with a criminal offence has the right to examine witnesses and to obtain obligatory attendance of witnesses, experts and other persons who may clarify the evidence."*

42. The Majority also refers to paragraph 3(d) of Article 6 of the European Convention, which states:

> *"3. Everyone charged with a criminal offence has the following minimum rights:*
>
> *d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"*

43. The Majority relied on a number of judgments of the European Court of Human Rights (ECtHR) in support of their conclusions. However, the cited judgments are misplaced and, as such, cannot logically support the conclusion of the Majority.

44. The first such judgment is the case of Vidal v. Belgium, No. 12351/86, 22 April 1992. In that case, the ECtHR stated: *"As a general rule, it is for the national courts to assess evidence before them as well as the relevance of the evidence which defendents seek to adduce." [...] "...it does not require the attendance and examination of every witness on the accused's behalf; its essential aim, as indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter."*

45. In that case, the Court of Appeal in Belgium had based its decision entirely on the case file and had refused to summon four named witnesses presented by the defence.

Furthermore, the Court of Appeal gave no reasons for its rejection of this request. The complete silence of the court on this request, coupled with the court's verdict increasing the sentence, was found to be incompatible with the concept of a fair trial under Article 6 ECHR.

46. In contrast, in the Applicant's case, the District and Supreme courts all considered the Applicant's request for supplementary expertise, and they each provided detailed reasons for their rejection. No witnesses or other evidence presented by the defence were refused. Furthermore, the Supreme Court on appeal did not alter the Applicant's sentence or otherwise modify the verdict of the District Court. As such, the Applicant's case must be differentiated from the Vidal case mentioned above.

47. The second case mentioned by the Majority is the judgment in V.D. v. Romania, No. 7078/02, 28 June 2010. That case concerned a refusal by the courts to order a DNA test, as requested by a suspect in a case of rape. The findings of a DNA test would have provided information which could have been crucial to a finding of guilt for the criminal offense of rape. As such, this expertise went to the heart of the matter of proving guilt or innocence.

48. In contrast, in the Applicant's case, the responsibility for the accident giving rise to the criminal charges is not essential under the appeal scrutiny, as the Applicant did not dispute his liability for the traffic accident on the basis of which he was convicted. The Applicant has merely raised the possibility that there could have been other contributory factors. As such, the requested expertise is incidental to the finding of guilt or innocence, rather than central. Therefore, the Applicant's case must also be differentiated from the case of V.D. v. Romania.

49. The third case mentioned is Elsholz v. Germany (cited above). This case concerned a father seeking visiting rights with his minor son. The father had requested a psychological evaluation of his son, in order to clarify the boy's state of mind in relation to certain statements that the boy had made regarding his father. The ECtHR in that case found that the refusal by the national courts to award any visiting rights to the father had already violated his right to respect for his family life. As such, the fair trial issue of the rejected request for a psychological expertise contributed to the ultimate violation of the father's rights to respect for his family life.

50. In contrast, in the Applicant's case, no other violations of the Applicant's rights have been found. As such, the rejection by the District and Supreme courts to order any supplemental expertise did not affect the Applicant's other rights. Again, the Applicant's case must be differentiated from the case Elsholz v. Germany.

Conclusion

51. In conclusion, we find that, in contrast with the Majority decision, the Applicant was afforded adequate opportunity to question the evidence presented in his case. At the Applicant's request, the traffic expert was called to clarify his report, and the Applicant had the opportunity to raise his concerns about the expertise. From the court file, it can be observed that the traffic expert responded to each of the Applicant's questions with reasoned replies. As such, we cannot agree with the Majority that there has been any infringement of the applicant's rights to 'equality of arms' with the prosecution in the trial against him.

52. In particular, we find that the Applicant's justification for his request for additional expertise was not founded on the argument that he was not responsible for the accident which led to his conviction for Endangering Public Traffic.

53. Rather, his request for additional expertise was founded on the argument that other factors could have contributed to the accident, and he sought to have these possible other factors explored in order for them either to be accepted or ruled out by the courts.

54. Indeed, the traffic expert had taken note of the Applicant's concerns and had conceded that these concerns could 'in principle' have contributed to the accident, but that in the concrete circumstances of the case they did not.

55. We further find that it is not the role of the criminal courts to explore and examine every possible alternative explanation for an event, but to reach a reasonable finding on guilt or innocence.

56. Finally, we find, within the facts of the case, that the trial against the Applicant was conducted in a fair manner and that the conclusion of his case was based on a reasonable and reasoned assessment of the evidence by the District and Supreme courts.

57. In addition, we find that it is not up to the Constitutional Court to determine whether the District and Supreme courts had correctly assessed the evidence presented in the Applicant's case, as the Majority has done.

58. In all, the Applicant was provided the opportunity of examining the witnesses against him, and he was not prevented from presenting witnesses and expert witnesses on his behalf, under the same conditions as those against him.

59. Therefore, we conclude that there has been no violation of the Applicant's right to a fair and impartial trial under Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a Fair Trial] of the European Convention on Human Rights. Consequently, the Referral should have been refused as unfounded.

Respectfully submitted,

Altay Suroy
Judge

Almiro Rodrigues
Judge

Snezhana Botusharova
Judge