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

Pristine, 24 January 2013
Ref.No.:AGJ372/13

JUDGMENT

in

Case No. KI 78/12

Applicant

Bajrush Xhemajli

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

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Applicant is Mr. Bajrush Xhemajli, represented by the Lawyers' Association "Sejdiu & Qerkini", Limited Liability Company Prishtina.

Challenged decision

2. The Applicant challenges the Supreme Court Judgment, Pkl. No. 70/2012, of 22 June 2012, which was served on the Applicant on 26 July 2012.

Subject matter

3. The Applicant claims that the challenged Judgment violates his rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 31 [Right to Fair and Impartial Trial], the European Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter: "ECHR"), Article 6 (Right to a fair trial), and the Universal Declaration on Human Rights, Article 10.

4. Moreover, the Applicant requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") to impose interim measures because:

   a. *"[...] an execution of this unconstitutional judgment would deprive the Applicant of his freedom for months, and even years [...]" and "would cause irreparable damages to the Applicant, since he would be deprived of his freedom without enjoying due criminal trial, as guaranteed by the Constitution."*

   b. *"If a favourable judgment of the Constitutional Court would cause possible retrial of the case, where the Applicant would be acquitted of responsibility, then the absence of such an interim measure would subject the Applicant to serving an unlawful and undeserved sentence."*

   c. *"[...] deprivation of freedom cannot be turned over because [...] it would not compensate the time in which the Applicant would be serving his sentence, and the physical and psychic impact such sentence would leave on the Applicant. This is to be accentuated even more when considering the poor health condition of the Applicant, in which case, the Applicant would*

not enjoy adequate health care within a correctional institution."

Legal basis

5. Article 113.7 of the Constitution, Article 22 and 27 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (No. 03/L-121), (hereinafter: the "Law"), Rule 54 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

6. On 23 August 2012, the Applicant submitted his Referral to the Court.

7. On 4 September 2012, the President, by Decision No. GJR. KI 78/12, appointed Judge Kadri Kryeziu as Judge Rapporteur. On the same day, the President, by Decision No. K. SH. KI. 78/12, appointed the Review Panel composed of judges Altay Suroy (Presiding), Almiro Rodrigues and Snezhana Botusharova.

8. On 5 September 2012, the Court notified the Supreme Court and the State Prosecutor of the Referral.

9. On 21 September 2012, the Court granted the Applicant's request for an interim measure, until 31 December 2012.

10. On 21 September 2012, the Court requested the Supreme Court to submit the Case file of P. no. 485/09 of 26 November 2010, Ap. no. 134/2011 of 8 March 2012 and Pkl. no. 70/2012 of 22 June 2012, including also the minutes of the trial courts of all instances involved in this case.

11. On 19 November 2012, the Court once again requested the Supreme Court to submit the Case file of P. no. 485/09 of 26 November 2010, Ap. no. 134/2011 of 8 March 2012 and Pkl. no. 70/2012 of 22 June 2012, including also the minutes of the trial courts of all instances involved in this case.

12. On 20 November 2012, the Supreme Court replied to this Court submitting the Case file of P. no. 485/09 of 26 November 2010, Ap. no. 134/2011 of 8 March 2012 and Pkl. no. 70/2012 of 22 June 2012, including also the minutes of the trial courts of all instances involved in this case.

13. On 5 December 2012, the Court, bearing in mind the necessity to consider the response of the Supreme Court which was received on 20 November 2012, extended the time limit of the interim measure imposed by the Court in its original Decision of 24 September 2012 by a further period of three months until 31 March 2013.

14. On 24 January 2013, the Court deliberated and voted on the case.

Summary of facts

15. On 21 May 2009, a traffic accident occurred between four vehicles. As a result, one person died and others were injured. On the day of the traffic accident, the police, who were called to the scene of the traffic accident, had drawn up reports of the persons involved in the traffic accident, taken pictures of the traffic accident and drawn up a report on the data of the tracks on the road (i.e. measured the length of the brake tracks, the final position of the vehicles etc.).

16. On the same day, the police took a statement of one of the drivers, I.G., who was involved in the traffic accident.

17. On 22 May 2009, the police took statements of the witnesses, K.G. and K.Sh., who also were involved in the traffic accident.

18. On 23 May 2009, the police took the statement of one of the drivers, S.Gj., who also was involved in the traffic accident.

19. On 28 May 2009, the police took the statement of another of the drivers, D.B., who as well was involved in the traffic accident.

20. On 1 June 2009, the police submitted the case to the District Public Prosecutor in Prishtina.

21. On 9 June 2009, police officer, D.B., filed an additional report to the District Public Prosecutor notifying him/her that there has been a technical mistake in the case submitted on 1 June 2009, i.e. with the name of one of the drivers that was involved in the traffic accident. Instead of I.G. it should be I.H.

22. On 18 June 2009, the Traffic Investigation Unit of the Police submitted the autopsy report to the District Public Prosecutor.

23. On 7 July 2009, the police took the statement of the Applicant who was involved in the traffic accident.

24. On an unspecified date, the police officer, D.B., filed an additional rapport to the District Public Prosecutor in Prishtina notifying him/her that, on 9 July 2009, a statement was taken from the Applicant and a copy of his driver license was obtained from him.

25. On an unspecified date, the police officer, D.B., drew up a report on the investigation of the traffic accident including information as to: a) which vehicles were involved and who were involved, including the injuries; b) the condition of the road; c) statements of persons involved; d) the tracks on the road (the tracks on the road and the final position of the vehicles were explained); e) a description of the accident; f) undertaken actions (the police on the scene of the traffic accident, had drawn up sketches, had taken pictures and necessary measurements had been done); g) remarks (because the police had not been able to contact the Applicant, they did not have his driver license); h) conclusion (based on site inspection and evidence found on site of the traffic accident the police found that the Applicant was reasonable suspect of having committed the criminal offence under Article 297 paragraph 5 in conjunction with paragraph 1-3 [Endangering Public Traffic] of the Provisional Criminal Code of Kosovo (hereinafter: "PCCK") which 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."*

26. On 4 September 2009, the District Public Prosecutor in Prishtina took the decision (PP. no. 565/6/2009) to initiate investigation against the Applicant due to reasonable suspicion for having committed the criminal offence under Article 297 paragraph 5 in conjunction with paragraph 1-3 [Endangering Public Traffic] of the PCCK.

27. On 10 September 2009, the District Prosecutor questioned the Applicant as to the traffic accident (Minutes PP. no. 565-6/2009). The Applicant stated that he was driving 60-70 km/h on the left side of the road towards Ferizaj when a vehicle tried to drive by him on his right side and from that moment on he did not remember anything more. The Applicant states that he also remembered one vehicle 20 meters in front of him and another vehicle 20 meters behind him.

28. On 10 September 2009, the District Public Prosecutor interviewed a witness/injured party, D.B., who testified that he/she was on his/her way to Prishtina and that he/she did not remember the traffic accident or who hit him/her because after the collision he/she lost conscious and did not remember anything (Minutes PP. no. 565-1/2009).

29. On 10 September 2009, the District Public Prosecutor interviewed (Minutes PP. no. 565-1/2009) a witness/injured party, I.H., who testified that he/she was on his/her way to Hajvali driving 50-60km/h on the left side. I.H. further testified that in front of him/her was a vehicle on the right side and suddenly from nowhere came a vehicle who tried to drive by on his/her right side and tried to drive in front of his/her vehicle on the left side like a scissor between his/her vehicle and the other vehicle in front of him/her on the left side. I.H. states that his/her vehicle was hit by the vehicle in this moment. Pursuant to the minutes, I.H. does not know whether the vehicle who hit him/her had driven fast or not but he/she had heard that the vehicle that had hit him had driven very fast. I.H. also stated in the minutes that he/she did not remember how the events followed after his/her vehicle was hit.

30. On 25 September 2009, the District Public Prosecutor interviewed a witness/injured party, H.R., who is the father of the deceased person in the traffic accident but who himself was not there when the traffic accident happened (Minutes PP. no. 565-1/2009).

31. On 30 September 2009, the District Public Prosecutor in Prishtina filed a request (PP. no. 565-1/2009) with the District Court in Prishtina to order a traffic expert to investigate and prepare a report. The traffic expert was to provide an expertise on the circumstances of the accident, the speed of vehicle at the moment of accident, road and climate conditions, and validate other facts and circumstances relevant to the prosecution of this criminal offence.

32. On 7 October 2009, the District Court in Prishtina (GJPP. no. 246/09) ordered an expert to provide an expert witness report in the criminal case. The District Court further held that *"The Traffic expert must validate all circumstances in which the accident had occurred, the speed of vehicle at the moment of accident, road and climate conditions, and validate other facts and circumstances relevant to the prosecution of this criminal offence."*

33. On 14 October 2009, the traffic expert completed his report on the traffic accident and made his conclusion *"Based on the detailed analysis of the documentation in my possession, based on the investigative report, sketch and photographs of the site, photographs of damaged vehicles, and statements of involved parties and witnesses [...]."* the driver of the vehicle Nissan, i.e. the Applicant was the sole contributor to the accident.

34. On 24 November 2009, the District Public Prosecutor' Office filed indictment (PP. no. 565-1/2009) with the District Court in Prishtina against the Applicant for having committed the criminal offence under Article 297 paragraph 5 in conjunction with paragraph 1-3 [Endangering Public Traffic] of the PCCK. The District Public Prosecutor' Office proposed to the confirmation judge to read the opinion of the medical reports as to the injuries, the traffic expert report and the autopsy report, to look at the sketches of the traffic accident and the pictures.

35. On 1 March 2010, the Applicant submitted a statement to the confirming judge at the District Court objecting that the indictment and proposed that the confirming judge do not confirm the indictment. The Applicant argued that:

a. the indictment is general and does not contain any supportive evidence;
b. the indictment is not in conformity with Article 305 paragraph 1 and 4 of the Provisional Criminal Procedure Code of Kosovo (hereinafter: "PCPCK");
c. the indictment is mainly based on the traffic expert report which only contains a description of the traffic accident based on the information obtained by the police. The traffic expert report does not give acceptable clarification as to other factors and circumstances that might have contributed to the traffic accident. Hence, the Applicant proposed that another expertise be selected, i.e. a so called super expertise.

36. On 1 March 2010, the confirming judge confirmed the indictment against the Applicant (Ka. no. 438/2009).

37. On 1 October 2010, during the main trial hearing the Applicant once more contested the traffic expert report for having shortcomings, for being unclear and because there was still a dilemma as to other factors that might have contributed to the traffic accident. Consequently, the Applicant requested the court to summon the traffic expert to give further clarifications and if he did not give further clarifications to order a super expertise to perform an evaluation and to order an expert to look at the technical condition of the vehicle. Following, the Applicant's remarks, the District Court decided to summon the traffic expert to provide clarifications in respect to his traffic expert report. As to the Applicant's proposal to order an expert that will look into the technical condition of the vehicle, a decision will be taken during the main trial.

38. On 18 November 2010, the main trial continued whereby the traffic expert answered the Applicant's question. In this main trial hearing, the traffic expert held that *"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."* Following the questioning of the traffic expert, the Court rejected the Applicant's proposal to order a super expertise and to appoint an expert to look at the technical condition of the vehicle *"because the court considered that the traffic expert report and the provided clarifications by the expert were enough to assess the factual situation."*

39. On 23 November 2010, the Applicant in his final statement repeated once again his request for having a super expert evaluation done and to order an expert to look at the technical condition of the vehicle.

40. On 26 November 2010, the District Court in Prishtina (Judgment P. no. 485/09) found the Applicant guilty of having committed the criminal offence under Article 297 paragraph 5 in conjunction with paragraph 1-3 of the PCCK. The District Court in Prishtina held that the testimonies of the injured parties were without contradictions, and in accordance with the expertise and the testimony of the traffic expert, forensics expertise on injuries caused to the injured parties and the autopsy report on the deceased. Therefore, the District Court fully trusted their testimony. Moreover, the Court also relied on the autopsy report and the expertise of

the traffic expert. As to the Applicant's allegations the District Court stated *"[...] at no phase of the proceedings was verified the technical condition of the vehicle of the accused even though it was a legal obligation, according to the court's assessment, it was an irrelevant circumstance since [...] the traffic accident was caused as a consequence of actions of the accused after hitting the vehicle that was moving on the left side of the road, and of the injuries caused in this accident, as per the autopsy report, with fatal consequences and serious and light body injuries, as verified by the report of the forensics expert, while the report of the traffic expert found that there were no errors from other participants in the traffic that would be a contributing factor to this accident. Therefore, according to the court's assessment such a defense was aiming at justifying the incriminating actions of the accused as well as evading the criminal responsibility."*

41. Against this judgment the Applicant filed a complaint to the Supreme Court.

42. On 8 March 2012, the Supreme Court (Judgment Ap. no. 134/2011) rejected as ungrounded the complaint of the Applicant. The Supreme Court concluded that the place and time when the accident occurred, as well as the participants and the consequences had been verified in their entirety and in a fair manner. Furthermore:

"...

According to the findings of the Supreme Court, there were no indications that the vehicle of the accused was not in a regular condition, because he never claimed such a fact, while on the other hand, the traffic expert has found that the sliding of the vehicle may have been caused due to a malfunction in the braking system, but in this concrete case, the sliding of the vehicle was not due to that, but the vehicle of the accused slid after hitting/crashing with the vehicle which he tried to overtake. The first instance court has fairly found that the finding of the expert was fair [...] this evidence was in compliance with other evidence examined."

According to the complaint another factor - "road factor" had an impact in causing the accident, due to which fact the factual situation was erroneously assessed. Therefore, according to the complaint the cause of this accident is the lack of fences between the traffic lanes. However, this fact has been emphasized by the defense even "during the first instance proceedings and from the traffic expert was" requested a response and

the expert had clearly stated that the existence of fences might have had an impact in avoiding such an accident of such proportions but not that this was the cause of such an accident.

According to the assessment of the Supreme Court the complaint that the expert has given an unprofessional conclusion and opinion that are not substantiated by the administered evidence is ungrounded. However, at the time of the expertise, the expert, as he stated himself, had access to the entire case file and his conclusion and opinion confirm, that there is no ambiguity or contradictions with other administered evidence, such as, sketches and pictures of the place of occurrence, where one can see the tracks on the road, damages and the final positioning of the vehicles, as well as testimonies of the witnesses heard.

..."

Against this Judgment the Applicant submitted a request for protection of legality with the Supreme Court.

43. On 22 June 2012, the Supreme Court (Judgment Pkl. no. 70/2012) rejected as ungrounded the request for protection of legality. Moreover, the Supreme Court concluded 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."*

44. On 17 April 2012, the Municipal Court in Ferizaj (Resolution ED. no. 17/12) adopted the request of the Applicant to postpone the execution of the sentence of imprisonment for a 3 (three) months period.

45. On 18 July 2012, the Municipal Court in Ferizaj (Resolution ED. no. 17/12) approved the request of the Applicant again to postpone the execution of the sentence of imprisonment for a 2 (two) months period. The Applicant was obliged to show up on 19 September 2012 to start serving the sentence.

Applicant's allegations

46. The Applicant alleges the following:

(i) Violation of the principle of equality of arms between the parties in the procedure.

- The Applicant alleges that *"[...] the regular courts, without any firm reasoning, did not examine the evidence proposed by the defense. The evidence that the regular courts did not administer is relevant to determine whether he is guilty or innocent. In the proceedings before the District Court in Prishtina the Applicant's defense requested from the court to also examine the evidence related to the share of responsibility of other actors in the traffic accident, in particular the speed of the vehicle which was hit by the Applicant's vehicle, [...], as well as the technical examination of the vehicle that the Applicant was driving that day. This was requested by the defense, based on the statements of the traffic expert [...], according to whom there were three factors that contribute to traffic accidents: the human factor, the road factor and the vehicle factor. Having in mind the fact that on the concrete criminal-legal issue, a traffic expert was engaged to examine the relevant facts, he tried to give an answer on the existence and nonexistence of the two first factors and their contribution to causing the traffic accident. For this reason, always having in mind the vehicle factor could have been the contributor to the concrete accident, the court should have examined this evidence as well, by engaging a vehicle expert, in order to confirm the impact or nonimpact of this factor to cause such accident. By denying this the Court violated Applicant's rights."*

(ii) The District Court in Prishtina based its decision on the testimony of a person, who could not provide information on the accident.

- The Applicant alleges that *"Mr. [...] was not a direct observer of the event and therefore he should not have been heard in the capacity of a witness."*

(iii) The assessment of the District Court in Prishtina, regarding the expertise of the traffic expert.

- The Applicant alleges that *"In the reasoning part of the Judgment (page 7), the Court finds that "the Court relied upon the expertise, with the reasoning that the expert report provided an explanation as to the data examined from the case file, on which such expertise was grounded, but also on scientific methods used by the expert in his expertise". This assessment of the expertise by the Court is very superficial and non-critical. The expertise is a piece of evidence, similar to any other evidence in a criminal proceeding, and consequently, the Court must examine such evidence by reasoning on its logical sequence. The Court cannot conclude that the expertise is in compliance with scientific methods, because if the Court was aware of the scientific methods, it would not need to hire an expert. There are many scientific rules in relation to determining the speed of a vehicle before causing an accident. Therefore, we consider that the request of the Applicant's (now the convicted) defence to repeat the expertise, or another expertise by another traffic expert, was reasonable and aimed at verifying the scientific methods used in this criminal case."*

(iv) Judgment of Supreme Court Ap. no. 134/2011.

- The Applicant alleges that *"The Supreme Court of Kosovo, acting as a second instance court, has not provided accurate legal/constitutional reasons in the aspect of all facts which are relevant for rendering a lawful decision, but in explicit manner, without any assessment, found as ungrounded the appealed allegations of the Applicant."*

(v) Judgment of Supreme Court of Kosovo Pkl. no. 70/2012.

- The Applicant alleges that *"the Supreme Court does not provide any reason for which it would consider the traffic expert report as fair, but only gives trust to the assessment of the District Court in Prishtina, without any critical assessment of such an appealed allegation."*

47. Furthermore, the Applicant refers to Kraska v Switzerland, where the *"European Court stated that the effect of Article 6.1 is to make possible to the competent court to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision" (see Kraska v. SUISSE, Application no. 13942/88, Judgment of 19 April 1993).*

48. According to Applicant, *"the court should conduct a proper examination of the arguments and evidence of the parties, while assessing their relevance to the decision to be delivered." (see Quadrelli v. Italy, Application no. 28168/95, Judgment of 11 January 2000).*

49. In addition, the Applicant refers to Bonisch v Austria, where *"the European Court found violation of Article 6.1 of the European Convention where it was difficult for defense to obtain appointment of a counter-expert" (see BÖNISCH v. AUSTRIA, Application no. 8658/79, Judgment of 6 May 1985).*

50. The Applicant alleges also that *"This court (ECtHR) also found violation of Article 6.1 of the European Convention where hearing of other experts (including a private expert who had come to different results) was refused by the court, since only an expert of the Institute, who concluded to the detriment of the defendant was heard (see Brandstetter v. Austria, Application no. 13468/87, Judgment of 28 August 1991, G.B. v. France, Application no. 44069/98, Judgment of 2 October 2001 and Benderskiy v. Ukraine, Application no. 22750/02, Judgment of 15 November 2007).*

Applicable legal provisions regarding investigation and evidence

Provisional Criminal Procedure Code of Kosovo (UNMIK Regulation 2003/26) of 6 July 2003

51. Article 152 of the PCPCK:

"...
(1) The rules of evidence set forth in the present Chapter shall apply in all criminal proceedings before the court and, in cases provided for by the present Code, to proceedings before a prosecutor and the police.

(2) The court according to its own assessment may admit and consider any admissible evidence that it deems is relevant and has probative value with regard

to the specific criminal proceedings and shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility.

(3) The court may reject an application to take evidence:

1) If the taking of such evidence to supplement other evidence is unnecessary or is superfluous because the matter is common knowledge;

2) If the fact to be proven is irrelevant to the decision or has already been proven;

3) If the evidence is wholly inappropriate or unobtainable; or

4) If the application is made to prolong the proceedings.

..."

52. Article 153 of the PCPCK:

"...

(1) Evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Code or other provisions of the law expressly so prescribe.

(2) The court cannot base a decision on inadmissible evidence.

..."

53. Article 154 of the PCPCK:

"...

(1) The court shall rule on the admissibility of evidence upon an application by a party or ex officio.

(2) A party shall raise an issue relating to admissibility of evidence at the time when the evidence is submitted to the court and in particular in the proceedings on the confirmation of the indictment. Exceptionally it may be raised later, if the party did not know such issue at the time when the evidence was submitted or if there are other justifiable circumstances. The court may request that the issue be raised in writing. In the absence of an application by a party, the court must rule on the admissibility of evidence ex officio if at any time during the proceedings a suspicion arises about the legality of evidence.

(3) The court shall give reasons for any ruling it makes on the admissibility of evidence. If a ruling on the admissibility of evidence is rendered in the pre-trial stage of the proceedings it can be challenged by a separate appeal to a three-judge panel within forty-eight hours of the receipt of the ruling.

(4) Inadmissible evidence shall be excluded from the file and sealed. Such evidence shall be kept by the court, separated from other records and evidence. The excluded evidence may not be examined or used in the criminal proceedings, except in an appeal against the ruling on admissibility.

(5) At all stages of the proceedings, the court has a duty to ensure that no inadmissible evidence, or reference to or testimony of, such evidence is included in the file or presented at the main trial or at hearings before the main trial.

(6) Evidence which has been found by a ruling to be inadmissible may be found by a ruling at a later stage in the proceedings to be admissible.

..."

54. Article 155 of the PCPCK:

"...

(1) In any questioning or examination it is prohibited to:

1) Impair the defendant's freedom to form his or her own opinion and to express what he or she wants by ill-treatment, induced fatigue, physical interference, administration of drugs, torture, coercion or hypnosis;

2) Threaten the defendant with measures not permitted under the law;

3) Hold out the prospect of an advantage not envisaged by law; and

4) Impair the defendant's memory or his or her ability to understand.

(2) The prohibition under paragraph 1 of the present article shall apply irrespective of the consent of the subject of the questioning or examination.

(3) If questioning or examination has been conducted in violation of paragraph 1 of the present article, no record of such questioning or examination shall be admissible.

..."

55. Article 156 of the PCPCK:

"...

(1) A statement by the defendant given to the police or the public prosecutor may be admissible evidence in court only when taken in accordance with the provisions of Articles 229 through 236 of the present Code. Such statements can be used to challenge the testimony of the defendant in court (Article 372 paragraph 2 of the present Code).

(2) A statement of a witness given to the police or the public prosecutor may be admissible evidence in court only when the defendant or defence counsel has been given the opportunity to challenge it by questioning that witness during some stage of the criminal proceedings.

..."

56. Article 176 of the PCPCK:

"...

(1) An expert analysis shall be ordered in writing by the court on the motion of the public prosecutor, the defence or ex officio. The order shall specify the facts to be established or assessed by an expert analysis, as well as the persons to whom the expert analysis shall be entrusted. The order shall be served on the parties.

(2) If a particular kind of expert analysis falls within the domain of a professional institution or the expert analysis can be performed in the framework of a particular public entity, the task, especially if it is a complex one, shall as a rule be entrusted to such professional institution or public entity. The professional institution or public entity shall designate one or several experts to provide the expert analysis.

(3) If the court designates an expert witness, it shall as a rule designate one expert witness, but if the expert analysis is complicated, it shall designate two or more expert witnesses.

(4) If there are at the court certain expert witnesses who have been permanently designated for some kind of expert analysis, other expert witnesses may only be

designated if there is danger in delay or if the permanent expert witnesses are prevented from attendance or if other circumstances demand it.

..."

57. Article 185 of the PCPCK:

"...

If the opinion of expert witnesses contains contradictions or deficiencies, or if a reasonable doubt arises about the correctness of the presented opinion, and the deficiencies or doubt cannot be removed by a new hearing of expert witnesses, the opinion of other expert witnesses shall be sought.

..."

58. Article 200 of the PCPCK:

"...

(1) The police shall investigate criminal offences and shall take all measures without delay, in order to prevent the concealment of evidence.

(2) As soon as the police obtain knowledge of a suspected criminal offence prosecuted ex officio either through the filing of a criminal report or in some other way, they shall without delay, and no later than twenty-four hours from the receipt of this information, inform the public prosecutor and thereafter provide him or her with further reports and supplementary information as soon as possible.

(3) The public prosecutor shall direct and supervise the work of the judicial police in the pre-trial phase of the criminal proceedings.

..."

59. Article 221 of the PCPCK:

"...

(1) The investigation shall be initiated by a ruling of the public prosecutor. The ruling shall specify the person against whom an investigation will be conducted, the time of the initiation of the investigation, a description of the act which specifies the

elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, and evidence and information already collected. A stamped copy of the ruling on the investigation shall be sent without delay to the pre-trial judge.

(2) The result of investigative actions (such as collection of evidence) shall be made part of the file on the investigation.

(3) The investigation shall be conducted and supervised by the public prosecutor.

(4) The public prosecutor may undertake investigative actions or authorize the judicial police to undertake investigative actions relating to the collection of evidence.

..."

60. Article 254 of the PCPCK:

"...

(1) The public prosecutor or the court can order a site inspection or a reconstruction to examine the evidence collected or to clarify facts that are important for criminal proceedings.

(2) Such site inspection or reconstruction shall be conducted by the pre-trial judge or the presiding judge, by the public prosecutor or by the police. The public prosecutor and police may conduct such site inspection or reconstruction for their own knowledge to assist in their determination of credibility or fact-finding, but in such case, where notice to the defendant or his or her defence counsel is not given, the results are inadmissible in court. The public prosecutor may repeat such site inspection or reconstruction with notice as required by the present article. If so, the results shall then be admissible.

(3) The defendant and his or her defence counsel have the right to be present at the site inspection or reconstruction.

(4) A reconstruction shall be conducted by recreating facts or situations under the circumstances in which on the basis of the evidence taken the event had occurred. If facts or situations are presented differently in testimonies of individual witnesses, the reconstruction of the event shall as a rule be carried out with each of the witnesses separately.

(5) In reconstructing an event care must be taken not to violate law and order, offend public morals or endanger the lives or health of people.

(6) In conducting a site inspection or a reconstruction, the assistance of specialists in forensic science, traffic and other fields of expertise may be obtained to protect or describe the evidence, make the necessary measurements and recordings, draw sketches or gather other information.

(7) An expert witness may also be invited to attend a site inspection or reconstruction, if his or her presence is considered of service by the public prosecutor or the court.

..."

61. Article 387 of the PCPCK:

"...

(1) The court shall base its judgment solely on the facts and evidence considered at the main trial.

(2) The court shall be bound to assess conscientiously each item of evidence separately and in relation to other items of evidence and on the basis of such assessment to reach a conclusion whether or not a particular fact has been established.

..."

Admissibility of the Referral

62. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution, the Law and the Rules of Procedure.

63. The Court needs to determine first whether the Applicant is an authorized party within the meaning of Article 113.7 of the Constitution, stating that *"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."* In this respect, the Referral was submitted with the Court by an individual.

64. Furthermore, an Applicant, in accordance with Article 49 of the Law, must submit the Referral within 4 months after the final court decision. On 22 June 2012, the Supreme Court took the Judgment Pkl. no. 70/2012, whereas the Applicant received the Judgment on 26 July 2012. The Applicant submitted the Referral to the Court on 23 August 2012. Therefore, the Applicant has met the necessary deadline for filing a referral to the Constitutional Court.

65. In addition, the Supreme Court is considered "as a last instance court to adjudicate the issue in this criminal proceeding". As a result, the Court also determines that the Applicant has exhausted all the legal remedies available to him under Kosovo law.

66. Finally, Article 48 of the Law establishes: *"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."* In this respect, the Court notes that the Applicant challenges the Supreme Court Judgment, Pkl. no. 70/2012, whereby, he alleges that his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the ECHR and Article 10 of the Universal Declaration of Human Rights have been violated. Therefore, the Applicant has also fulfilled this requirement.

67. Since the Applicant is an authorized party and has met the necessary deadlines to file a referral with the Court, the Court determines that the Applicant has complied with all requirements of admissibility.

The merits

68. Since the Applicant has fulfilled the procedural requirements for admissibility, the Court needs to examine the merits of the Applicant's complaint.

69. With reference to the submissions of the Applicant, the Court notes that the Applicant's claim relates to the manner in which the various trial courts handled the evidence in the proceedings against him. The principle claim of the Applicant concerns the consistent refusal of the regular courts to authorize a supplementary expertise to verify the contribution of technical and roadway factors to the accident. However, this claim also includes the broader issue of assessment of the evidence as a whole. Specifically, the Court notes that the report of the expert witness formed the predominant foundation for the Applicant's conviction. As such, the

expert's report was entirely based upon police reports, sketches and photographs taken at the accident site prior to the involvement of the Public Prosecutor. This complex of elements relating to the handling of evidence by the trial courts raises questions as to the fairness of the trial proceedings.

70. In this respect, the Court notes that the Applicant requested additional evidence to be examined by the regular courts because, in his opinion, it would have been relevant and persuasive to properly determine his guilt or innocence. According to the Applicant, the evidence to be administered concerns the share of responsibility of other actors in the traffic accident, in particular the speed of the vehicle which was hit by the Applicant's vehicle, as well as the technical examination of the vehicle that the Applicant was driving that particular day. This was requested by the Applicant, based on the testimony of the traffic expert, according to whom there were three factors that contribute to traffic accidents: the human factor, the road factor and the vehicle factor.

71. In this case the Applicant was involved in a four automobile traffic accident on 21 May 2009 with the automobile he was operating being one of the automobiles involved in this accident where one person died as a result of injuries sustained in the automobile accident. The District Public Prosecutor alleges in its indictment of the Applicant that the Applicant violated the following criminal law: "Whoever violates the law on public traffic and endangers public traffic, human life or property on a large scales [...]" (see Article 297 paragraph 5 in conjunction with paragraph 1-3 [Endangering Public Traffic] of the Provisional Criminal Code of Kosovo).

72. In this respect, the Court notes that the District Public Prosecutor then has the burden of proving beyond a reasonable doubt that on 21 May 2009 that the Applicant: (1) violated the public traffic laws; (2) that this violation endangered public traffic and human life or property; and, (3) that the violation was large or more than a minor violation. The Applicant, however, does not have to prove anything because he is presumed innocent of the charges until and unless the District Public Prosecutor proves him guilty beyond a reasonable doubt of all three elements of this charge. (*see* Article 3 of the Provisional Criminal Procedure Code of Kosovo).

73. In the present case the Court notes from the case file that none of the eye witnesses to the accident could recall what happened on 21 May 2009. This is reaffirmed from the minutes with the testimony of the injured parties:

a. the injured party D.B. stated that *"I do not remember the moment when the accident occurred, I did not see who hit me. After the crash, I lost my conscience, and I do not remember anything."*
b. H.R. was heard as a witness although he was not present when the accident occurred.
c. the injured party B.B. stated that *"I do not remember anything because I lost my conscience and I regained conscience at the hospital."*
d. the injured party V.B. stated that *"I do not remember how it came to the crash, and I do not know on what lane of the road we were driving. I only remember the moment after the crash,"*
e. the injured party I.H. stated that he *"[...] does not know whether the vehicle who hit him/her had driven fast or not but he/she had heard that the vehicle that had hit him had driven very fast. He/she, also, does not remember how the events followed after his/her vehicle was hit."*

74. The Court further notes that the traffic expert appointed by the regular trial court never examined any of the vehicles, including the one driven by the Applicant, involved in this accident. He also did not examine the conditions of the road where the accident happened. The court's traffic expert merely examined the police reports that were prepared several days after the accident happened.

75. In addition, the Court notes from the case file that the traffic expert testified that there were three factors that can contribute to the cause of an automobile accident: (1) the human factor; (2) the road factor; and, (3) the vehicle factor. He agreed that he did not examine either the road factor or the vehicle factor even though he rendered an opinion which resulted in the trial court finding beyond a reasonable doubt that the Applicant's driving conduct on 21 May 2009 violated the public traffic law and that his conduct "[...] on a large scale [...]" was the proximate cause of the accident and death of one of the persons involved in the accident.

76. The Court further notes that repeatedly and in a timely fashion, the Applicant asked the regular courts to allow another expert to examine the vehicles, the road conditions and the police reports and to then give his or her expert opinion with respect to the cause of the accident or whether there were more than one contributing factors to the cause of the accident. This request was made by the Applicant for the purpose of determining whether any of the automobiles involved in the accident had mechanical malfunctions that would have caused them to not operate properly at the time of the accident. If the automobiles or the road conditions created

conditions making it impossible or more difficult to control the automobiles that evidence would according to the Applicant be a factor in determining whether he could have controlled the conditions that caused the accident. If he could not have controlled those conditions, that would be a relevant factor for the trial court to consider in deciding whether the District Public Prosecutor had proved beyond a reasonable doubt that the Applicant was responsible "on a large scale" for the traffic accident. (*see* Judgment of the Supreme Court, Pkl. no. 70/2012).

77. The Court, however, notes that in response to the Applicant's request the District Court merely concluded that it had enough evidence without ever considering the condition of the automobiles or the road conditions and without ever giving a reason for this conclusion. (*see* Judgment of the District Court, P. no. 485/09).

78. Similarly, the Court notes that, the Supreme Court, while admitting that the traffic expert testified that the sliding of the Applicant's vehicle on the day of the accident may have been caused due to a malfunction in the brake system, concluded that the opinion of the trial court expert was fair without giving any detailed reasons for its conclusion. (*see* Judgment of the Supreme Court, Ap. no. 134/2011).

79. The Supreme Court further held that another expert may be appointed or a super expertise may be conducted in case of a contradiction of experts' opinions, or reasonable doubts on the accuracy of the given opinion in accordance with Article 152 paragraph 3 of the PCPCK, which provides: *"The court may reject an application to take evidence: 1) If the taking of such evidence to supplement other evidence is unnecessary or is superfluous because the matter is common knowledge; 2) If the fact to be proven is irrelevant to the decision or has already been proven; 3) If the evidence is wholly inappropriate or unobtainable; or 4) If the application is made to prolong the proceedings.".*

80. In this regard, the question before this Court is whether in this context the trial court and the Supreme Court violated Applicant's constitutional "[...] right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence." However, this Court cannot, and will not attempt to determine whether under the law or the evidence there is sufficient evidence to find the Applicant guilty of the crime. It will only attempt to answer whether procedurally the regular courts violated the Applicant's rights pursuant to the Constitution.

81. In this connection, the Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which, as far as relevant, provides:

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

and Article 6 [Right to a fair trial] of the ECHR which, as far as relevant, provides:

"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;"

82. The Court observes that Article 6 (3.d) consists of three distinct elements, namely: a) right to challenge witnesses for the prosecution (or test other evidence submitted by the prosecution in support of their case); b) right, in certain circumstances, to call a witness of one's choosing to testify at trial, i.e. witnesses for the defence; and c) right to examine prosecution witnesses on the same conditions as those afforded to the defence witnesses.

83. Moreover, as to the elements relating to the handling of evidence by the trial courts, the Court notes that although the admission of unlawfully obtained evidence does not in itself violate Article 6, but the ECtHR has held in the Schenk case (*see* Schenk v. Switzerland, 12 July 1988) that it can give rise to unfairness on the facts of a particular case.

84. In this regard, in the Vidal case, (*see* Vidal v. Belgium, Application no. 12351/86, Judgment of 22 April 1992), there was a claim that by failing to call the four defence witnesses Vidal had requested, the Court of Appeal in Belgium had deprived him of his only means of establishing his innocence. In the concrete case, the applicant had originally been acquitted after several witnesses had been heard. When the appellate court substituted his conviction, it had no fresh evidence; apart from the oral statements of the applicant and the prisoner, it based its decision entirely on the documents in the case-file. The ECtHR held that *"As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. More specifically, Article 6 para. 3 (d) (art. 6-3-d) leaves it to them, again as a general rule,*

to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system; it "does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter". The Brussels Court of Appeal did not hear any witness, whether for the prosecution or for the defence, before giving judgment. The concept of "equality of arms" does not, however, exhaust the content of paragraph 3 (d) of Article 6 (art. 6-3-d), nor that of paragraph 1 (art. 6-1), of which this phrase represents one application among many others. The task of the European Court is to ascertain whether the proceedings in issue, considered as a whole, were fair as required by paragraph 1 (art. 6-1)."

85. The ECtHR further held that, *"The applicant had originally been acquitted after several witnesses had been heard. When the appellate judges substituted a conviction, they had no fresh evidence; apart from the oral statements of the two defendants (at Liège) or the sole remaining defendant (at Brussels), they based their decision entirely on the documents in the case-file. Moreover, the Brussels Court of Appeal gave no reasons for its rejection, which was merely implicit, of the submissions requesting it to call Mr Scohy, Mr Bodart, Mr Dauphin and Mr Dausin as witnesses. To be sure, it is not the function of the Court to express an opinion on the relevance of the evidence thus offered and rejected, nor more generally on Mr Vidal's guilt or innocence, but the complete silence of the judgment of 11 December 1985 on the point in question is not consistent with the concept of a fair trial which is the basis of Article 6 (art. 6). This is all the more the case as the Brussels Court of Appeal increased the sentence which had been passed on 26 October 1984, by substituting four years for three years and not suspending the sentence as the Liège Court of Appeal had done. In short, the rights of the defence were restricted to such an extent in the present case that the applicant did not have a fair trial. There has consequently been a violation of Article 6 (art. 6)."*

86. Moreover, in the V.D. case (*see* V.D. v. Romania, Application no. 7078/02, Judgment of 28 June 2010) a Romanian national was sentenced to ten years' imprisonment for rape, five years for incest and six months for armed robbery. The decision was based mainly on statements given to the village police by the applicant's grandmother and her neighbor. It was further based on the statements of five indirect witnesses and on a forensic medical report which did not include a DNA test, despite the applicant's requests to that effect. The court further gave judgment without hearing

evidence from a defence witness whom the applicant sought to have examined, as the witness had failed to appear when summoned, and without any prints being taken at the scene of the alleged crime.

87. In this case, the ECtHR held that *"A DNA test would at least have confirmed the victim's version of events or provided V.D. with substantial information in order to undermine the credibility of her account. However, the courts had not authorised any such test."* The ECtHR further held that *"There had also been other shortcomings in the investigation conducted on 1 April 2001, including the failure of the police to search for any traces of assault at the scene."* Consequently, the ECtHR held that there had been a violation of Article 6 (1) and (3.d) of ECHR. In the instant case, V.D. had not been afforded an opportunity to defend his case and his conviction had been based mainly on a statement by the victim, which had not been read out to him at any point during the proceedings. Nor had any other steps been taken to enable him to challenge the victim's statements and her credibility.

88. Also in the Case of Elsholz (Elsholz v. Germany, Application no. 25735/94, Judgment of 13 July 2000), the ECtHR held that *"[...] because of the lack of physiological expert evidence and the circumstance that the Regional Court did not conduct a further hearing although, in the Court's view, the applicant's appeal raised questions of fact and law which could not adequately be resolved on the basis of the written material at the disposal of the Regional Court, the proceedings taken as a whole, did not satisfy the requirements of a fair and public hearing within the meaning of Article 6. There has thus been a breach of this provision."*

89. Following the above mentioned, the Court notes that the "Equality of arms" principle requires that each party be afforded a reasonable opportunity to present its case under the conditions that do not place it at a substantial disadvantage vis-à-vis another party. Although, there is no exhaustive definition as to what are the minimum requirements of "equality of arms", there must be adequate procedural safeguards appropriate to the nature of the case and corresponding to what is at stake between the parties. These may include opportunities to adduce evidence.

90. In this respect, the Court notes that the refusal by a court to nominate an expert, hear a witness or to accept other types of evidence might in certain circumstances render the proceedings unfair unless such limitations are consistent with the principle of "equality of arms", the full realization of

which is the essential aim of Article 6 (3) (d) and also Article 31 of the Constitution.

91. Further, persons alleging a breach of Article 6 (3) (d) must prove not only that they were not permitted to call a certain witness, but also that hearing the witness was absolutely necessary in order to ascertain the truth, and that the failure to hear the witness prejudiced the rights of the defence and fairness of the proceedings as a whole.

92. The Court notes that in the instant case the regular courts found the Applicant guilty of having committed the criminal act of Article 297 paragraph 5 in connection with paragraph 1 of the PCCK, relying exclusively on the testimony of the injured parties, the report of the traffic expert, forensics expertise on injuries caused to the injured parties and the autopsy report on the deceased proposed by the prosecution.

93. As to whether the Applicant was or was not permitted to call a certain witness, the Court notes that, after examining the traffic expert, the Applicant raised the issue of undertaking a "super expertise", i.e. appointing a vehicle expert. However, this was rejected because the regular courts considered that *"the report of the traffic expert and the explanation provided by the traffic expert were sufficient for ascertaining the factual situation"* and there was no *"case of a contradictory experts' opinions, or reasonable doubts on the accuracy of the given opinion"*. The Court, however, notes that there was only one expert opinion on which the courts based their assessment. Hence, the question of contradictory opinions could not arise.

94. The Court, furthermore, notes that the Applicant considered the testimony of the traffic expert to be insufficient for ascertaining the factual situation, because according to the testimony of the traffic expert there were three factors that contribute to traffic accidents: the human factor, the road factor and the vehicle factor. However, the traffic expert in his report only ascertained the human factor and according to the Applicant it would have been relevant and persuasive to properly determine his guilt or innocence to ascertain also the other two factors, i.e. the road factor and the vehicle factor.

95. In this respect, the Court also notes that Article 185 of the PCPCK foresees that *"If the opinion of expert witnesses contains contradictions or deficiencies, or if a reasonable doubt arises about the correctness of the presented opinion, and the deficiencies or doubt cannot be removed by a*

new hearing of expert witnesses, the opinion of other expert witnesses shall be sought." This provision with the word *shall* oblige the Court to seek another expert witness if the criteria are met. As to the question whether the criteria are met or not, the Court notes that the traffic expert himself stated that the technical factor could indeed be a relevant factor, but that such a factor could not be ascertained because no investigation of the vehicle was done. Moreover, the Court also notes that Article 176 of the PCPCK foresees the possibility of appointing one or several experts if the expert analysis is complicated or if other circumstances demand it.

96. If a super expertise would have been ordered by the regular courts, it may have either confirmed the initial report of the traffic expert or confirmed the version of the Applicant that there were other underlying factors involved in the cause of the traffic accident.

97. Furthermore, the Court observes that the traffic expert based his opinion only on the case file, such as sketches and photo documents of the place of the accident and the testimonies of the witnesses heard, and did not form his own independent opinion.

98. The Court further notes that another guarantee of the PCPCK for ensuring a right to fair trial and for ascertaining the factual situation is provided by Article 254 of the PCPCK: *"The public prosecutor or the court can order a site inspection or a reconstruction to examine the evidence collected or to clarify facts that are important for criminal proceedings. The defendant and his or her defence counsel have the right to be present at the site inspection or reconstruction. A reconstruction shall be conducted by recreating facts or situations under the circumstances in which on the basis of the evidence taken the event had occurred. If facts or situations are presented differently in testimonies of individual witnesses, the reconstruction of the event shall as a rule be carried out with each of the witnesses separately. In conducting a site inspection or a reconstruction, the assistance of specialists in forensic science, traffic and other fields of expertise may be obtained to protect or describe the evidence, make the necessary measurements and recordings, draw sketches or gather other information."* However, the Court notes, that the regular courts did not order a reconstruction in order to clarify facts that were important for the criminal proceedings.

99. Additionally, as to the admission of unlawfully obtained evidence which can give rise to unfairness on the facts of a particular case, the Court notes that Article 200.2 of the PCPCK foresees that *"As soon as the police obtain*

knowledge of a suspected criminal offence prosecuted ex officio either through the filing of a criminal report or in some other way, they shall without delay, and no later than twenty-four hours from the receipt of this information, inform the public prosecutor and thereafter provide him or her with further reports and supplementary information as soon as possible." This is done because the PCPCK, Article 200.4 oblige the public prosecutor to direct and supervise the work of the judicial police in the pre-trial phase of the criminal proceedings. The Court notes that also Article 221.4 foresees the direct engagement of the public prosecutor: *"The public prosecutor may undertake investigative actions or authorize the judicial police to undertake investigative actions relating to the collection of evidence."*

100. In this respect, the Court has no evidence in the case file that the police complied with Article 200.2, i.e. notifying the public prosecutor within 24 hours from the receipt of a suspected criminal offence or whether the Public Prosecutor supervised the investigative actions especially since the accident was a fatality. The Court notes that the police collected evidence on 21 May 2009, on the day of the traffic accident, and took statement of witnesses. On 1 June 2009, the police submitted the case to the District Public Prosecutor in Prishtina (*see paragraph 15 and further of this Judgment*). The Court notes that the police officer, D.B. who, on an unspecified date, drew up a report on the investigation of the traffic accident mentioned that *"In respect to the case, the Municipal Public Prosecutor was informed, Prosecutor on duty D.H., who did not visit the site but has authorized to undertake investigative actions [...].* However, the Court does not have any evidence that this was done.

101. The Court further notes, based on the case file that the only evidence that was taken through the order of the Court and by the request of the prosecutor was the traffic expert.

102. In addition, the Court notes that the District Public Prosecutor only on 4 September 2009 took the decision to initiate the investigation for the purposes of securing evidence pursuant to Article 221.1 of the PCPCK which provides: *"The investigation shall be initiated by a ruling of the public prosecutor. The ruling shall specify the person against whom an investigation will be conducted, the time of the initiation of the investigation, a description of the act which specifies the elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, and evidence and information already collected. A*

stamped copy of the ruling on the investigation shall be sent without delay to the pre-trial judge." This action was taken after three (3) months and after the Police had already gathered evidence. The Court notes that after this decision, the only evidence that was secured was the taking of the statement of the parties involved and the request for a traffic expert. Notwithstanding this, the regular courts took also into consideration the gathering of the evidence made by the police, which was done as stated above without the direct supervision of the Public Prosecutor (*see trial hearing of 18 November 2010*) and as can be seen from the case file without the police or the public prosecutor notifying the Applicant about the evidence that was gathered.

103. In this respect, based on Article 153 of the PCPCK *"Evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Code or other provisions of the law expressly so prescribe."* and *"The court cannot base a decision on inadmissible evidence."* Notwithstanding this, the regular courts took into consideration all the above mentioned evidence when deciding the Applicant's guilt.

104. The Court finds that the manner in which the evidence was handled in the Applicant's case demonstrates a complex of decisions which are mutually reinforcing in their impact on the fairness of the Applicant's trial. Firstly, the regular courts consistently refused to authorize a supplemental expertise into contributory factors in the accident. Secondly, the regular courts justified this refusal on the basis that the situation was sufficiently clear to them on the basis of the existing expert report. However, the expert report in question was based on the police report, sketches and photographs, without the expert proceeding to verify by his own, individual efforts any of the information contained in the police reports. The validity of the police reports also were not corroborated at any stage of the proceedings by an authorized judicial official or court. It is questionable to what extent the Applicant was ever in any position to challenge the contents of the police reports themselves, even if he was able to challenge the expert report based on these police reports.

105. In the light of these deficiencies in the handling of the evidence in the Applicant's case, the Court finds that, when viewing the fairness of the criminal proceedings in the Applicant's case as a whole, that 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.

106. Consequently, the Court holds that the right to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6 of ECHR has been violated because the failure to grant the requests of the Applicant for a supplementary expertise prejudiced the rights of the defence and fairness of the proceedings as a whole and deprived the Applicant of the opportunity to put forward arguments in his defense on the same terms as the prosecution.

FOR THESE REASONS

The Constitutional Court, in its session of 24 January 2013,

I. DECLARES, unanimously, the Referral admissible.

II. HOLDS, by majority, that there has been a breach of Article 31 [Right to Fair and Impartial Trial] and Article 6 [Right to a Fair Trial] of the European Convention on Human Rights.

III. DECLARES, by majority, invalid the Judgment of the Supreme Court of Kosovo Pkl. no. 70/2012 of 22 June 2012.

IV. REMANDS, by majority, the Judgment of the Supreme Court for reconsideration in conformity with the judgment of this Court;

V. GRANTS, by majority, the request for interim measure until the time the Supreme Court of Kosovo reconsiders the matter as per *ratio decidendi* of this Court.

VI. REMAINS seized of the matter pending compliance with this order;

VII. ORDERS this Judgment to be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VIII. DECLARES that this Judgment is effective immediately.

In addition Judges Almiro Rodrigues and Altay Suroy and as well as Judge Snezhana Botusharova announced that they would issue dissenting opinions which will be published, in so far as it is possible to do so, together with this Judgment.

Judge Rapporteur | **President of the Constitutional Court**

Kadri Kryeziu | Prof. Dr. Enver Hasani