



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

Prishtina, 20 December 2013
Ref. no.:RK529/13

RESOLUTION ON INADMISSIBILITY

in

Case no. KI 97/13

Applicant

Tahir Bytyqi

**Constitutional review of Judgment of the Supreme Court of Kosovo, Pml.
no. 13/2013 of 30 April 2013**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Applicant is Mr. Tahir Bytyqi from the village Shkoza, Municipality of Malisheva (hereinafter: the "Applicant"), who is represented before the Constitutional Court by lawyer Mr. Rexhep Hasani from Prizren.

Challenged decision

2. The applicant challenges the decision Judgment of the Supreme Court of Kosovo Pml. no. 13/2013 of 30 April 2013 served on him on 23. May 2013, which rejected the request for protection of legality, submitted by the Applicant.

Subject matter

3. The subject matter of the Referral is the constitutional review of the Judgment of the Supreme Court of Kosovo Pml. no. 13/2013 of 30 April 2013. The Applicant alleges that these Judgment have violated his right to a fair and impartial trial.
4. The Applicant requests from the Constitutional Court of Kosovo the imposition of interim measures: *“halt-suspension of the beginning of serving the sentence until the final decision of the Constitutional Court is rendered.”*

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 27 and 48 of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (hereinafter: the Law) and Rules 28 and 54 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules).

Proceedings before the Constitutional Court

6. On 8 July 2013, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 5 May 2013, by Decision of the President (no. GJR. KI 97/13), Judge Kadri Kryeziu was appointed as Judge Rapporteur. On the same day, by Decision of President no. KSH. KI 97/13, the Review Panel was appointed, composed of judges: Altay Suroy (Presiding), Almiro Rodrigues and Ivan Čukalović.
8. On 30 August 2013, the Constitutional Court notified the Applicant and the Supreme Court of Kosovo that the procedure for the constitutional review of the judgment in the Case no. KI 97/13 has been initiated.
9. On 16 October 2013, after having considered the report of the Judge Rapporteur Kadri Kryeziu, the Review Panel made a recommendation to the full Court on the inadmissibility of the Referral.
10. At the same time, the Review Panel proposed to the full Court to reject the Applicant’s request for interim measure with the reasoning that the Applicant has not attached any convincing evidence that would justify the imposition of the interim measure as being necessary to avoid any irreparable damage, or any proof that such measure is in the public interest.

Summary of the facts

11. On 17 November 2011, the District Public Prosecutor's Office in Prizren filed the indictment P.P. no. 256/2011 against the Applicant due to grounded suspicion that on 27 September 2011, he committed the criminal offences of attempted murder under Article 146, in conjunction with Article 20, and unauthorized ownership, control, possession or use of weapons under Article 328 paragraph 2 of CCK.
12. On 2 February 2012, the District Court in Prizren, by Judgment P. no. 283/2011 confirmed the indictment P.P. no. 256/2011 of 17 November 2011 and the Applicant was found guilty of the criminal offences of attempted murder under Article 146, and of unauthorized ownership, control, possession or use of weapons under Article 328 paragraph 2 of CCK and he was punished by an aggregate imprisonment in duration of 3 (three) years and 6 (six) months.
13. On 23 March 2012, against the Judgment of the District Court in Prizren P. no. 283/2011, of 2 February 2012, the Applicant timely filed an appeal through his defense counsels Hysen Gashi and Rexhep Hasani, challenging the judgment on several legal grounds.
14. On 26 September 2012, acting upon the appeal, the Supreme Court of Kosovo, by Judgment A.P. no. 162/2012, rejected the appeal filed by the Applicant as ungrounded and upheld the Judgment of the District Court in Prizren P. no. 283/2011, of 2 February 2012.
15. On 15 January 2013, the Applicant filed an extraordinary legal remedy, the request for protection of legality with the Supreme Court of Kosovo, due to substantial violations of the provisions of the CPCK due to erroneous application of the provisions of the CCK, with a proposal to approve the request protection of legality as grounded, as well as to quash the challenged judgments (P. no. 283/2011, of 2 February 2012 and A. P. br. 162/2012) and to return the case for retrial.
16. On 30 April 2013, the Supreme Court of Kosovo, by Judgment Pml. No. 13/2013, rejected the request for protection of legality – the extraordinary legal remedy - as ungrounded. The Supreme Court held that the questions raised by the Applicant in his request for protection of legality on violation of law to the detriment of the convict were ungrounded.

“The allegations of the convict’s defense T. B. do not stand the same did not have intention to deprive of life unknown person R.T., but undertook actions due to negligence and in the affect, since as it is seen from the photo-documentation and other evidence the target of the attack was not vehicle first of all but the injured R.T. For the intent of the accused also speak the facts that being unable to stop the vehicle by hitting it with an axe, the convict fired with gun several times in direction of the vehicle, which was in move, on which occasion hits him in different parts of his head, in the most vital body and as a consequence causes him serious injuries, therefore in the present case we cannot talk about the actions of

the convict due to negligence and in the condition of mental distress, as alleged by the convict's defense."

"As far as the allegations of the convict defense Tahir Bytyqi that the injured was not heard at any stage of criminal proceedings when he would testify about all facts and circumstances of the case with much weight, this court assesses that in this aspect neither, were made procedure violations neither by the first, nor by the second instance court due to the fact that the convict Rrahman Telaku was impossible to be questioned and make a statement before the prosecution, be that in the courts sessions, due to his serious health condition, while by other evidence that are in the case file, it was determined the factual situation for what was given sufficient reasons on the page nine of the first instance judgment, approved by the second instance court and as such were approved by the panel of this court too."

Applicant's allegations

17. The Applicant requests:

"that the abovementioned judgments, attached to this Referral, be annulled for the sole purpose of determination of the constitutional right under Article 31 paragraph 4 of the Constitution of the Republic of Kosovo, respectively the right to confront with the person (...) because of whom he was accused and convicted, was violated to him."

Request for interim measure

18. The Applicant requests:

"that the Constitutional Court of the Republic of Kosovo render DECISION on imposition on interim measure towards Basic Court in Gjakova, Branch in Malisheva on halt-suspension of the execution of sentence imprisonment in duration of 3 years and 6 months of the convict Tahir Bytyqi, the punishment imposed by the final judgment of the District Court in Prizren P.no.283/2011 dated 02.02.2012, now in jurisdiction of the Basic Court in Gjakova with execution number PED.no.4/13."

19. The Court also takes into account Article 27 of the Law, which provides:

"The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest."

20. The Review Panel proposed to the full Court to reject Applicant's request for interim measure with the reasoning that the Applicant has not attached any convincing evidence that would justify the imposition of the interim measure as being necessary to avoid any irreparable damage, or any proof that such measure is in the public interest.

Assessment of the admissibility of the Referral

21. In the present case, the Court refers to Article 113 [Jurisdiction and authorized parties] which provides:

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

“7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhausting all legal remedies provided by law.”

22. The Court also refers to Article 48 of the Law, which provides:

“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.”

23. Furthermore, Rule 36 (2) b) of the Rules of Procedures, provides:

The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that: (b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights.

24. The Applicant mainly alleges that the judgment of the first instance and the judgments of the second instance court have violated his right guaranteed by Article 31 paragraph 4 of the Constitution [Right to Fair and Impartial Trial].

25. The Applicant filed the appeal with the Supreme Court against the judgment of the District Court in Peja *“due to substantial violations of the criminal procedure, incorrect and incomplete determination of factual situation, violation of the criminal law and decision on punishment, with a proposal that the same is modified in terms of legal qualification, so that much more lenient sentence is imposed against the accused.”*

26. The Supreme Court, after comprehensive analysis of the grounds of appeal, found that *“the above mentioned appealed allegations are ungrounded.”*

27. The Applicant submitted a request for protection of legality against the judgment of the Supreme Court, *“due to substantial violations of the provisions of CPCK and erroneous application of the provisions of CCK with the proposal to approve the request for protection of legality as grounded and to quash challenged judgments and to return for retrial.”* The Supreme Court (Pml. no. 13/13 of 30 April 2013) after considering the request for protection of legality found that the request is ungrounded.

28. The Constitutional Court further notes that the District Court in Prizren (P. no. 283/2011 of 02 February 2012) was reasoned and this Court has not noticed that during the trial in this case there were procedural violations that would result in a violation of the Applicant’s fundamental rights guaranteed by the

Constitution. The Applicant was provided ample opportunities to defend himself throughout the trial in the case.

29. As far as the Applicant's Referral for the examination of witnesses is concerned, on page 9 of the judgment of the first instance court, we can see the statement of the forensic expert who, in a court hearing, stated that: "*even if the injured was heard, his testimony depending on his health condition, because from his injuries there is a doubt that his mental ability was affected, the testimony of that witness would be put into question and this fact is confirmed by the public prosecutor who was in the University Clinical Centre of Kosovo in Prishtina to question the injured R.T. and he saw by himself that his hearing was impossible (...). Therefore, the trial panel taking into account that the factual situation was completely determined and taking into account the impossibility of hearing the injured R.T. due to the reasons mentioned above, did not question the latter in the court hearing, because even without his questioning, the factual situation according to the opinion and the conclusion of this Court was determined in a complete manner.*"
30. The Court considers that the Applicant did not substantiate and did not support with evidence the alleged violation of his rights by the District Court and Supreme Court.
31. Furthermore, the Court notes that, for a *prima facie* case to meet the requirements for the admissibility of the Referral, the Applicant must show that the proceedings before the District Court and the Supreme Court, viewed in their entirety, were conducted in a manner that did not afford the Applicant a fair trial or that other violations of the constitutional rights may have been committed by the regular courts during the trial.
32. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
33. Thus, the Court is not to act as a court of third instance, in the present case, when considering the decisions taken by regular courts. It is the role of regular courts to interpret and apply the applicable rules of procedural and substantive law (see, *mutatis mutandis*, Garcia Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court of Human Rights [ECHR] 1999-I).
34. Furthermore, the Applicant has failed to explain why and how his rights were violated, he has failed to substantiate *prima facie* the allegation on constitutional grounds and he failed to provide evidence showing that his rights and freedoms, such as his right guaranteed by Article 31 of Constitution and Article 6 in conjunction with Article 13 of the ECHR, were violated by regular courts.
35. Thus, the Constitutional Court cannot consider that the relevant proceedings before the District Court and the Supreme Court were in any way unfair or arbitrary (see *mutatis mutandis*, Shub v. Lithuania, ECHR Decision as to the Admissibility of Application No. 17064/06 of 30 June 2009).

36. Therefore, the Court concludes that the Applicant has neither established nor shown a *prima facie* case on either the admissibility or the merits of the Referral.

37. The Court concludes that the Referral is inadmissible as manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Articles 27 and 48 of the Law and Rule 36 (2) b) of the Rules of Procedure, in the session held on 16 October 2013, unanimously

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. TO REJECT the request for imposing interim measures;
- III. This Decision shall be notified to the Parties and it shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court; and
- IV. This Decision is effective immediately.

Judge Rapporteur


Kadri Kryeziu

President of the Constitutional Court




Prof. Dr. Enver Hasani