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Prishtina, date: 19 May 2010
Ref. No.: AGJ 21/10

RESOLUTION ON INADMISSIBILITY

Case No. KI 07/09

Demë KURBOGAJ and Besnik KURBOGAJ

Against

Supreme Court Judgment Pkl.nr. 61/07 of 24 November 2008
Supreme Court Judgment No. Ap.nr. 510/2007 of 26 March 2008

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Snezhana Botusharova, Judge
Robert Carolan, Judge
Ivan Čukalović, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjylieta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge,

The Applicants

1. The Applicants are Demë Kurbogaj from Peja represented by Mr. Zenel Mekaj a practicing lawyer in Peja and Besnik Kurbogaj from Peja represented by Mr. Mentor Neziri a practicing lawyer in Prishtina.

The Challenged decisions

2. In their referral the Applicants challenged the Judgments of the Supreme Court of 24 November 2008¹ and of 26 March 2008².

Subject Matter

3. The applicants claim that the trial was not objective, the facts were not fairly assessed. They also claim, the decision was based on a prejudice created by a coincidence and pressure was exerted on the witnesses. Therefore, they conclude, the trial was not fair and there was a “violation of Article 6 of the European Convention on Human Rights, including the Constitutional Framework (it has been in force at that time) and the Criminal Codes of Kosovo.”

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Articles 20 and 22 paragraphs (7) and (8) of Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law), and Section 54 (b) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Summary of the proceedings before the Court

5. On 2 March 2009, the Referral was lodged with the Constitutional Court. On 7 October 2009, the Applicants were invited to clarify and supplement the referral. On 22 October 2009 and 2 November 2009, the Applicants’ representatives submitted their responses.

6. The appointed Judge Rapporteur Almiro Rodrigues submitted a preliminary report concerning facts, admissibility and grounds of the referral, in accordance with Article 22(3) of the Law.

7. On 2 December 2010, the Review Panel, composed of the Judges Robert Carolan (Presiding), Kadri Kryeziu and Gjylieta Mushkolaj acting under Article 22.6 of the Law, adjudicated the Applicants’ referral.

The facts

8. On 13 April 2007, the District Court in Peja³ found the Applicants Demë Kurbogaj and Besnik Kurbogaj guilty for having committed the criminal offence of robbery and other connected criminal acts and sentenced them with 4 (four) years imprisonment. The

¹ Case No. Pkl. nr 61/07

² Case No. AP.nr.510/2007

³ In the case No. P.Nr. 234/06

Defense Counsels of Demë Kurbogaj and Besnik Kurbogaj appealed that decision to the Supreme Court.

9. On 26 March 2008, the Supreme Court rendered the judgment⁴, upholding the appeal of the Prosecution and refusing as unfounded the appeals of the defense. The Supreme Court decided, among other legal issues, to amend the legal qualification of the offence, to find the Applicants guilty and to sentence them with imprisonment of 7 (seven) years each. On the other side, the Supreme Court annulled the first instance decision on criminal offense of attempted aggravated murder and returned it for a retrial. Meanwhile, the Defense Counsels of the Applicants filed with the Supreme Court a request for protection of legality against the judgments of the District Court and the judgment of the Supreme Court.

10. On 24 November 2008, the Supreme Court⁵ refused the requests for protection of legality in relation to the criminal offence of robbery and rejected as inadmissible the part of request in the part regarding the criminal offence of attempted aggravated murder that was returned for a re-trial.

The Applicant's allegations

11. The applicants alleged that the trial against them was not fair because "it has not been objective; the facts of the case have not been fairly assessed; it has been decided on a prejudice created by coincidence; pressure has been exercised on the witness." According to the applicants there has been "violation of Article 6 of the European Convention on Human Rights, including the Constitutional Framework (it has been in force at that time) and the Criminal Codes of Kosovo."

12. In his written submission submitted on 20 October 2009, Zenal Mekaj, the lawyer of the Applicant, Demë Kurbogaj, clarified the referral alleging, , that the Applicants did not commit the offense. He alleged that it was coincidence that the applicants were found near the location where a police operation was taken. He further alleged that the Applicants were maltreated by the police and that the police and the Prosecution has threatened a witness to testify in favor of the charges. Consequently, it was stated that Article 31 of the Constitution (the right to fair and impartial trial) has been violated.

13. On 2 November 2009, Mentor Neziri, the lawyer of the Applicant Besnik Kurbogaj submitted his written submission and, pointed out, , that the Supreme Court made several violations of both Law on Criminal Procedure Code and the Criminal Code. He emphasized, *inter alia*, that the judgment was based on unacceptable proof; the testimony of Albion Lajci, who repeated many times that he was under duress and maltreated by the police.. Consequently, according to him there was a violation of Article 403 1.8 of the Criminal Procedure Code. It was further stated that the Supreme Court also violated the Criminal Code, while wrongfully applying Article 256.1, in connection with its Article

⁴ No. Ap.nr.510/2007

⁵ By its judgment Pkl.nr.61/07

23, as the legal elements of the criminal offense definition were neither ⁶fulfilled, nor the Supreme Court justified the decision on requalification of the criminal offense. Thus, it was concluded, the Supreme Court didn't take into account Article 3.2 of the Criminal Procedure Code. He also claimed that, during the proceedings, different procedural violations mainly by the Prosecutor in courtroom, were committed and the Accused's personal integrity was violated as well as their human rights were not respected. He finally concluded that Articles 21, 23, 27, 30 and 31 of the Constitution were violated.

Assessment of the Admissibility of the Referral

14. In order to be able to adjudicate the Applicants' Referral, the Court need first to examine whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution that are further specified in the Law on the Constitutional Court and the Rules of Procedure.

15. Moreover, the applicants must⁷ submit a succinct statement of facts and accurate clarification of the rights that have been violated, indicating the concrete act of public authority that is subject of challenge and the relief sought. Finally the Applicants have to attach necessary supporting information and documents.

16. As it was already stated, the Applicants stated that "Article 6 of the European Convention on Human Rights, the Constitutional Framework (it has been in force at that time) and the Criminal Codes of Kosovo were violated", because "the trial was not objective, the facts were not fairly assessed, the decision was based on a prejudice created by a coincidence and pressure was exerted on the witnesses".

17. More precisely, the Applicants stated mainly that they did not commit the offense (a), the trial was not fair (b), the decision was based on a prejudice (c), they were maltreated by the police (d), pressure was exerted on the witness Albion Lajci and the Supreme Court ignored his testimony (e), and judge Riza Loci did not participate in the session (f). They conclude that Articles 21, 23, 27, 30 and 31 of the Constitution were violated, as different procedural violations were committed and the personal integrity of the Accused was violated, as well as their human rights were not respected.

(a) They did not commit the offense

18. With regard to the Applicants allegations that they did not commit offence, it should be recalled that Constitutional Court does not have jurisdiction to adjudicate such a complaint.

19. Indeed, the Constitutional Court of Kosovo does not have an appellate jurisdiction and can not intervene on theory that such courts have made a wrong decision or erroneously assessed the facts. The role of the Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and can, therefore,

⁶ As stipulated by Article 22.2 of the Law.

⁷ In accordance with Article 48 of the Law

not act as a “fourth instance” court (see, *mutatis mutandis*, i.a., *Akdivar v. Turkey*, 16 September 1996, R.J.D, 1996-IV, para. 65).

(b) The trial was not fair

20. The Applicants further argue that trial against them was not fair. The Constitutional Court considers that the allegation is only a conclusion which has not been proven. The Constitutional Court cannot guess which right in Article 6 of the European Convention on Human Rights was violated, and how and why it was violated. The Applicants suggestions to the Constitutional Court to “see the case files, where the abovementioned violations can be found”⁸ does not fulfil such a gap. In fact, it is not up to the Court to replace the Applicants in noting the facts and building the argument with regard to alleged violation Article 6 of the European Convention on Human Rights.

(c) The decision was based on a prejudice

21. The Applicants also claim that “the trial was not objective, the facts were not fairly assessed, and the decision was based on a prejudice created by a coincidence”.

22. The Constitutional Court notes that according to the Supreme Court’s judgment⁹ the Applicants based their appeal “on the essential violations of provisions of the criminal procedure that are closely related to the ones for wrongful and incomplete assessment of factual situation and violation of the criminal law”. No allegation on a specific constitutional law violation was made. The Supreme Court found that “the appeal allegations that the factual situation in this criminal matter is incomplete or wrongfully verified are not substantiated, because all the circumstances of the case have been verified properly and there is no doubt left in it”.

23. Also in its decision on the request of protection of legality¹⁰, the Supreme Court concluded that “the appealed judgments are not based on prejudice but on evidence, which have been assessed one by one and in conjunction with each other, whereas the content of the judgments provides for sufficient, clear and convincing reasoning, which are approved by this court without any doubt”.

24. As it was stated earlier, the Constitutional Court of Kosovo does not have an appellate jurisdiction and can not intervene on basis that courts allegedly have made a wrong decision or erroneously assessed the facts (see, para. 19 above).

(d) They were maltreated by the police

25. The Applicants attached to the referral a letter, addressed namely by the Defence Counsel Zenel Mekaj to the Regional Police of Peja, informing that “on 13 March 2006, officers of the Kosovo Police Service when arresting the defendants Demë and Besnik

⁸ As stated in page 3 of the Referral

⁹ Ap.nr 510/2007

¹⁰ (PKL.nr 61/07 of 24 November 2008)

Kurbogaj, have beaten them so much, as to cause serious injuries, consequences of which are present even nowadays”¹¹. They also notified that they “have raised criminal charges before the Public Prosecution of Kosovo, against NN Officers of the Kosovo Police Service, due to criminal offence of Mistreatment in Exercising Duties”. That letter in itself does not prove the allegation. Furthermore, the Applicants didn’t submit any information whatsoever on the final result on the “criminal charges before the Public Prosecution of Kosovo, against NN Officers of the Kosovo Police Service”.

26. That means that either there is no evidence to support the alleged violation or the remedy is not exhausted yet.

(d) Pressure was exerted on the witness Albion Lajci and the Supreme Court ignored his testimony

27. The Applicants allege that the police and the Prosecution have threatened witnesses to testify in favor of the charges, which even happened in a hearing when the police ordered to handcuff a witness in the hearing and sent them to the police station. They further point out that “the Supreme Court ignored the testimony of Albion Lajci, repeating many times that he was under duress and maltreatment of the police”, and thus the Supreme Court violated the Criminal Code and the Criminal Procedure Code.

28. The allegation that the police and the Prosecution have threatened witnesses to testify in favor of the charges, which even happened when the police ordered to handcuff the witness in the hearing and sent them to the police station, is not substantiated with any attached evidence to the referral. In addition, neither in the attached decision of the District Court of Peja nor in the decisions of the Supreme Court any reference to the event can be found. On the other side, there is nowhere mentioning of any objection made in the hearing to the alleged violation eventually occurred and, if any, what was the remedy.

29. Therefore, the referral does not attach the necessary supporting information and documents to prove the allegation. Apparently the applicant didn’t actually object to the violation and therefore waived the right of invoking now such a violation if any.

30. The Applicants further claimed that the content of the testimony of Albion Lajci was ignored by the Supreme Court. The defense had already alleged in the appeal before the Supreme Court that the testimony of Albion Lajci, which “was inserted during the procedure and at the judicial trial, (...) can not be used as evidence in which the punitive judgment would be substantiated”¹².

31. The Supreme Court, in its decision on the request for protection of legality concluded that “the case file and the appealed judgments show that both the first instance and second instance court gave legal reasons on all of their decisive facts, which are substantiated in just assessment of many evidence administered at the judicial trial”. No

¹¹ Letter dated “Peja 17 March 2006

¹² See Ap.nr.510/2007 of the Supreme Court

arbitrariness or unreasonableness is found on the conclusion and no specific constitutional law violation was invoked by the applicants.

32. In relation to the testimony of Albion Lajçi, the Supreme Court further established that “the appealed judgments are not based exclusively on the statements of the witness Albion Lajçi, as alleged in the request for protection of legality of the convicted Besnik Kurbogaj and as alleged without any grounds that violence was used against this witness in order to make him change his statement in relation to the sale of his vehicle to convicted Demë Kurbogaj”¹³.

33. As a matter of fact, the Supreme Court took note of the submissions made by the applicants to the proceedings, took them into consideration and gave reasons for its decisions. Therefore, the Constitutional Court does not intervene where infringements of procedural law, if any, have been remedied at the instance of appeal and no good cause is made on a specific constitutional law violation by the applicants.

(e) Participation of Judge Riza Loci in the session

34. The Defense Counsel of Demë Kurbogaj maintained, in the request for protection of legality before the Supreme Court, that “the judgment of the first instance court contains essential violation of provisions of the criminal procedure”, namely because “although I did not participate at the session of the court panel of the Supreme Court, I do not believe that the panel member Riza Loci whose name appears in the judgment participated in the session, as he was ill at the time”.

35. The argument was used before the Supreme Court which concluded¹⁴ that “the allegations that judge Riza Loci did not participate at the session of the panel are unfounded and without arguments”. The Supreme Court considered that “the allegations from the request for protection of legality, that Riza Loci “was not present” are not substantiated”. Furthermore, the Supreme Court also took into account that “the defense counsel of convicted Besnik Kurbogaj only presented assumptions in relation to the issue of non presence of Riza Loci, by alleging that “...based on the evidence in my possession judge Riza Loci was not present at the session”.

36. On the other side, the Supreme Court session “was followed by the defense council (sic) of the convict Besnik Kurbogaj, attorney at law Mentor Neziri, and the records from the session of the second instance court¹⁵, indicate that the presiding judge has communicated the composition of the court panel, which included Mr. Riza Loci as a member of the trial panel who is present. The attorney at law Mentor Neziri had no objections in this matter”¹⁶.

¹³ See again Supreme Court, PKL.nr.61/07, of 24 November 2008)

¹⁴ In the Decision PKL. Nr 61/07 of 24 November 2008)

¹⁵ Ap. Nr. 510/2007 dated 26.03.2008

¹⁶ As it is written in the Supreme Court decision Pkl.nr.61/07, dated of 24 November 2008

37. Again, the Supreme Court not only was aware of its being active in an area that is of relevance with regard to fundamental rights, but also took note of the submissions made by the applicants to the regular proceedings, took them into consideration and gave reasons for its decisions.

Conclusion on admissibility

38. It appears consequently that the Applicants did not describe the relevant facts, did not ground the allegations that the right to a fair trial was violated and the referral does not accurately clarify precisely what rights and freedoms they claim to have been violated.

39. The Court finds, therefore the Applicant failed to demonstrate that their right to a fair and impartial trial have been violated and that their complaints were procedurally and substantively justified.

40. Moreover, the Court considers that there is nothing in the Referral which indicates that the Courts hearing the case lacked impartiality or that the proceedings were otherwise unfair. The mere fact that the Applicants are dissatisfied with the outcome of the case cannot of itself raise an arguable claim of a breach of Article 31 of the Constitution (see *mutatis mutandis* judgment ECHR Appl. No. 5503/02, *Mezotur-Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005).

41. This finding is based solely upon the Referral and the evidence submitted in support of the Referral. If additional evidence that could not have been reasonably discovered at the time this Referral was filed with the Court but which could substantially affect the Court's conclusion is subsequently presented to this Court, the Court would and could consider a request to re-consider this case.

42. In these circumstances, the Applicants cannot be considered to have fulfilled the requirements for admissibility of the Referral.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 49 of the Law, and Section 54(b) of the Rules of Procedure, unanimously,

DECIDES

- I. TO REJECT the Referral as inadmissible.
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur

Almiro Rodrigues



President of the Constitutional Court

Prof. Dr. Enver Hasani

