



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, 24 September 2012

Ref. No.: MP-300/12

DECISION ON INTERIM MEASURES

in

Case No. KI 78/12

Applicant

Bajrush Xhemajli

**Constitutional Review of the Supreme Court Decision 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", LLC in 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 abovementioned Judgment violates his rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 31 [Right to a Fair and Impartial Trial], Article 6 (Right to a fair trial) of the European Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), , and Article 10 of the Universal Declaration on Human Rights.
4. Moreover, the Applicant requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose interim measures.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Article 22 and 27 of the Law on Constitutional Court of the Republic of Kosovo, of 15 January 2009, (No. 03/L-121) (hereinafter: the Law), Rule 54 and 56 (3) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: Rules of Procedure).

Proceeding 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 on the filed Referral.
9. On 21 September 2012, the Court deliberated on the Preliminary Report of the Judge Rapporteur with regard to the granting of an interim measure pending the final outcome of the Referral.

Summary of facts

10. On 24 November 2009, the District Public Prosecutor's Office filed an indictment (PP. no. 565-1/2009) to the District Court in Prishtina against the Applicant for 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).
11. On 1 March 2010, the confirming judge confirmed the indictment against the Applicant (Ka. no. 438/2009).
12. On 26 November 2010, the District Court in Prishtina (Judgment P. no. 485/09) found the Applicant guilty for having committed a criminal offence under Article 297 paragraph 5 in conjunction with paragraph 1-3 of the PCCK. The District Court in Prishtina decided that the statement of the injured was without a doubt, in compliance with the expertise and the statement of the traffic expert, forensics expertise on injuries caused to the same and the autopsy report on the deceased and therefore the court fully trusted in them. Moreover, the Court fully trusted the autopsy report and the expertise of the traffic expert. Concerning the Applicant's allegations *"[...] that 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 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 from the injuries caused in this accident, as per the autopsy report, has died [...], were injured [...] suffering body injuries, as verified by the opinion of the forensics expert, while the expertise of the traffic expert found that there was 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 to justify the incriminating actions of the accused as well as evasion of the criminal responsibility."* Against this judgment the Applicant has complaint to the Supreme Court.
13. On 8 March 2012, the Supreme Court (Judgment Ap. no. 134/2011) rejected as ungrounded the appeal of the Applicant. The Supreme Court concluded that the place and time when the accident occurred, participants and the consequences were 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 appeal 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 appeal the cause to this accident is 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 is 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 comply, that there is no ambiguity or contradictions with other administered evidence, such as, sketches and photo documents 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 statements of the heard witnesses.

...”

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

14. On 22 June 2012, the Supreme Court (Judgment Pkl. no. 70/2012) rejected as ungrounded Applicant's request for protection of legality. Moreover, the Supreme Court concluded that *"the defense of the accused during the all phases of the proceedings has repeated the same allegations, what is actually doing by this extraordinary legal remedy, respectively alleging that factual situation was not fairly assessed, for the fact that according to them the court did manage to accurately assess who contributed in causing this accident of fatal consequences: human factor, road factor, or technical factor (eventual technical failure, therefore, according to them, in such circumstance, it was necessary to order performance of a super expertise. These entire allegation 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 contraction on experts' opinions, failures or reasonable doubts on accuracy of the given opinion, if the data in experts' conclusions (when we have two) differ 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."*

15. 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.
16. On 18 July 2012, the Municipal Court in Ferizaj (Resolution ED. no. 17/12) again approved the request of the Applicant to postpone the execution of the sentence of imprisonment for a 2 (two) months period. The Applicant is obliged that on 19 September 2012 to show up to serve the sentence.

Applicant's allegations

17. The Applicant alleges the following.
 - (i) Violation of the principle of equality of parties in the procedure
 - The Applicant claims that “[...] the court without any firm reasoning, did not examine the evidence proposed by the defense. The evidence that this court did not administer is relevant and influential to determine whether he is guilty or innocent. In the proceedings before the District Court in Prishtina the Applicant's defense had requested from the court to also administer 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/crashed by the Applicant's vehicle, [...], as well as the technical examination of the vehicle that the Applicant was driving in the critical day. This was requested by the defense, based on the statements of the traffic expert [...], according to which there are three factors that contribute to traffic accidents and they are: human factor, road factor and vehicle factor. Having in mind the fact that in this concrete criminal-legal issue, a traffic expert was engaged to examine relevant facts, he tried to give an answer on existence and nonexistence of the two first factors and their contribution in causing the traffic accident. For this reason, always having in mind that vehicle factor could have been the contributor to the concrete accident, the court should have administered this evidence as well, by engaging an expert of machinery, in order to confirm the impact or nonimpact of this factor to cause such accident. By denying this the Court violates Applicant's rights.”
 - (ii) District Court in Prishtina bases its decision on the testimony of a person, who could not provide information on the event-accident
 - Applicant states that “Mr. [...] was not direct observer of the event therefore he should not have been heard in capacity of a witness.”
 - (iii) The assessments of District Court in Prishtina, regarding the expertise of the traffic expert

Applicant states that *“In the reasoning part of the Judgment (page 7), the Court finds that “the Court trusted the expertise, with the reasoning that such expert report provided explanation on 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 expert work by the Court is very superficial and non-critical. Expertise is 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 vehicle before causing an accident. Therefore, we consider that the request of the Applicant’s (now the convicted) defence to repeat 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

- Applicant states 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

- Applicant states 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.”*
18. Furthermore, the Applicant refers to *Kraska* against Switzerland, where *“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 c. SUISSE*, Application no. 13942/88, Judgment of 19 April 1993).
 19. 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).
 20. In addition, the Applicant refers to *Bonisch* against 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” (shih BÖNISCH v. AUSTRIA, Application no. 8658/79, Judgment of 6 May 1985).

21. The applicant also states that “This court also found violation of Article 6.1 of the European Court where hearing of other experts (including a private expert who had come to different the Institute, who concluded to 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).

Request for interim measure

22. Applicant requests from the Court to impose interim measure 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 Applicant³¹, in which case, the Applicant would not enjoy adequate health care within a correctional institution.”

Assessment of the Request for Interim Measures

23. After having heard the Judge Rapporteur, Kadri Kryeziu, and having discussed the views of the Applicant expressed in its written submissions, the Court deliberated on 21 September 2012.
24. The Court concluded, without prejudging the final outcome of the Referral, that the Applicant put forward enough convincing arguments that the implementation of Decision of the Supreme Court, Pkl. no. 70/2012 of 22 June 2012, and the

order of sentence of the Judgment of District Court in Prishtina, P. no. 485/09 of 26 November 2010, and the Judgment of the Supreme Court, Ap. no. 134/2011 of 8 March 2012, and deprivation of his freedom may result in unrecoverable damages for the Applicant.

FOR THESE REASONS

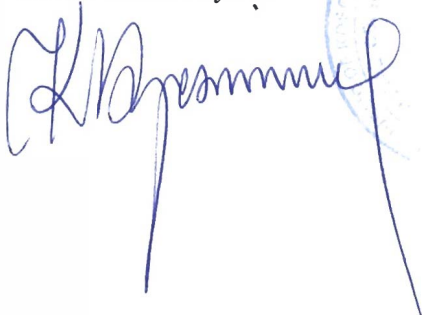
The Court, pursuant to Article 116(2) of the Constitution and Article 27 of the Law, on 21 September 2012,

DECIDES

- I. TO GRANT, by six votes in favour and two votes against, interim measures;
- II. TO GRANT interim measures for a duration until 31 December 2012 from the date of the adoption of this Decision;
- III. TO IMMEDIATELY SUSPEND the implementation of the Decision of the Supreme Court, Pkl. no. 70/2012 of 22 June 2012, and the order of sentence of the Judgment of District Court in Prishtina, P. no. 485/09 of 26 November 2010, and the Judgment of the Supreme Court, Ap. no. 134/2011 of 8 March 2012, for the same duration;
- IV. This Decision shall be notified to the Parties; and
- V. This Decision shall be published in accordance with Article 20(4) of the Law and is effective immediately.

Judge Rapporteur

Mr.sc. Kadri Kryeziu



President of the Constitutional Court

Prof. Dr. Enver Hasani

