Kosovo Judicial Institute
Instituti Gjyqësor i Kosovës
Kosovski Institut za Pravosudje

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KJI NEWSLETTER
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This newsletter is published to fully inform the magistrates in Kosovo on the activities of the Kosovo Judicial Institute (KJI). This publication is distributed to judges and prosecutors throughout Kosovo. The Monthly KJI Newsletter features articles relating to issues of interest to judges and prosecutors working in Kosovo.

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ADMISSIBLE AND INADMISSIBLE EVIDENCE

Introduction

The provisions of the Provisional Criminal Procedure Code of Kosovo (hereinafter PCPCK) provide legal safeguards for the defendant from the violations of law, procedural omissions, misuses of defendant's rights and violations or curtailing of the legal rights from official persons during the application of criminal procedure.

These provisions provide safeguards for the defendant and prohibit the use of evidence that were gathered in violation of formal or material provisions in the criminal procedure. The provisions on inadmissible evidence should be understood in a restrictive manner without allowing any analogy. Such evidence may be present in the case file until the indictment is filed and they may only serve for orientation of the investigations. In the previously applicable law there was a possibility to read such evidence in the main trial upon the request of the accused, or the court could do this *ex officio* in cases of grievous criminal offences which were punishable with more than 20 years of imprisonment, whereas now the new Criminal Procedure Code treats them explicitly as inadmissible and prohibits the practice of reading or referring to them during the procedure.

The parties may raise the issue of admissibility of evidence after such evidence is submitted to the court and especially during the Confirmation of Indictment, later on this can be done only if the parties argue that they had no previous information on this evidence, whereas the court may raise the issue *ex officio* whenever such evidence is presented before the court or when there is a doubt on the legality of the evidence (Articles 154 par 2, 306 par 3 for confirmation judge, 319 par 3 for presiding judge and 368 par 2 for trial panel).

The evidence in general is an instrument that verifies the decisive facts which are relevant such as: inculpatory or exculpatory actions criminal liability, circumstances (guiltiness, purpose, negligence etc) of certain persons regarding criminal offence that has been committed. The inadmissible evidence are similar instruments which pretend to show the

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material truth but, during the time when they were gathered certain elementary human rights and freedoms from the European Convention on Human Rights which are incorporated in PCPCK were not respected, meaning that the legal procedure foreseen by the law, the quality of person who is being examined, the relationship with the defendant, the dignity of the person were not taken into consideration. This also indicates that the person was physically or mentally influenced, was ill-treated, was threatened or hypnotized, was promised benefits which he or she is not entitled according to the law, the action was taken by an incompetent body etc. and by doing so the legal safeguards of the person against whom the actions were taken were not taken into consideration or respected.

The Evidence collected in violation of the provisions of the criminal procedure shall be considered as inadmissible. The code expressively announces these evidence as inadmissible and the consequence is that the decision of the court can not be grounded in such evidence (Article 153 of PCPCK), when marked as such they shall be separated from the case file, the judgment can not be based on them otherwise it would constitute a violation of provisions of the criminal procedure, Article 403 par 1 point 8 of PCPCK, and would be one of the grounds of appeal which is reviewed *ex officio* by the second instance court regardless to the fact that the parties did or did not submit an appeal, Article 415 par. 1 point 1 of PCPCK.

Case from the court practice - comment

During the criminal investigation at the District Court there was an appeal submitted by the defense attorney for announcing the records of the examination of the witness by the public prosecutor as *inadmissible evidence* with the reasoning that the defense attorney of the defendant was not present at the examination session and that the investigative action was taken before the decision for initiation of investigations.

The pretrial judge found that the decision for initiation of investigations contained the date of 16.10.2004 whereas the minutes from the examination of the witness contained the date of 13.10.2004 and the defense attorney was not notified on the examination of witness.

The pretrial judge approved the request of the defense attorney and assessed that the minutes of the examination of the defendant could not be admissible evidence in the criminal procedure because of the following reasons:

Taking into consideration the provisions of Article 221 of PCPCK the investigations are initiated through a decision rendered by the public prosecutor who is obliged to determine the person against whom the investigations are conducted, the description of the criminal offence including the elements of the offence, legal denomination, circumstances and facts that justify the reasonable suspicion for the criminal offence and evidence together with the information gathered until that very moment. Article 222 par 1 says that the investigations are

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conducted only for the criminal offence at stake and against the defendant determined in the decision, if the investigations discover new criminal offence than new investigations shall be initiated or the existing investigation should be expanded.

The provisions of Article 209 which describes the authorizations of the public prosecutor in its par 1 states in part that if the criminal report is not sufficient for the public prosecutor to determine the grounds for initiation of investigations, than he or she may himself or herself require additional information from the judicial police.

Article 209 in its paragraph 2 states in part: the public prosecutor may collect evidence himself or herself or through other public bodies, including HEAVING CONVERSATION WITH WITNESSES, INJURED PARTIES AND THEIR LEGAL REPRESENTATIVES. This Court therefore considers that until the decision on initiation of investigations is rendered by the public prosecutor in certain criminal issue all the actions of other bodies including the public prosecutor shall only be considered as collection of information and data and are not considered as valid – admissible evidence in the investigative procedure because, the legal provisions for examination of the witness were not respected. Such actions of the public prosecutor will only be considered as information taking, this is also verified in par 5 of Article 209 which states that the public prosecutor may reject the criminal report even if the actions from paragraph 2 of Article 209 have already been taken. Besides this there was also an objection on the part of defense attorney that he or his client was not notified on the date and time of the examination of the respective witness.

Witness statement

When examining the defendant it is prohibited to influence in his or her liberty for the purpose of formulating his or her opinion through ill-treatment, exhaustion and physical intervention, use of drugs, torture, coercion, or hypnotization. It is also prohibited to threat him or her with prohibited legal measures, to promise a benefit, to weaken his or her memory or ability to remember (Article 155 of PCPCK).

In order to make the police and public prosecutor records of the of the examination of the defendant admissible evidence they need to be compiled in accordance with Articles 229 through 236 of PCPCK, which means that the defendant should be duly summoned (Article 269 par 2 through 5), whereas pursuant to Article 231 the defendant shall be informed of the criminal offence with which he or she has been charged, the right to remain silent and not answer any questions except to give information about his or her identity, in case he or she doesn't speak the language in which the procedure is conducted he or she shall be provided assistance of an interpreter, the right to receive the assistance of the defense council and to consult with him or her prior to as well as during the examination, the fact that his or her statement might be used as evidence before the court of law, he or she may

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request evidence to be taken in his or her defense, whereas when the defendant is in detention on remand he or she has the right on heaving a defense attorney who will be compensated by the public budget when the defendant is not capable of covering the expenses himself or herself.

Article 233 provides that when being examined the defendant should be given the right to object the reasons of doubt to him or her and also has the right to dismiss facts that are in his or her favor.

During the procedure the court should pay respect for the dignity of the defendant and the questions should be clear, understandable and exact, irrespectively to the consent of the defendant (Article 234).

The violations from Article 235 refer to Article 155 par 1, 231, par 2,3, and 234 par 2 when the statement of the defendant was taken in violation of these rules are inadmissible evidence in the criminal procedure.

Article 156 provides that the statement of the defendant which is taken in accordance with all the provisions of Articles 229 through 236 is admissible for the court and can be used in the judicial procedure.

With respect the statements of witnesses before the police authorities and before the prosecutor, admissible evidence could be considered only the statement that was given in the presence of the defendant or his defense council who were given a possibility at some stage of the procedure to challenge such evidence.

Orders for gathering the evidence, house search, confiscation of items

There is also the issue of Article 237 p.2 of PCPCK related to the Autopsy, physical examination, psychiatric examination, molecular and DNA analysis when such examinations and analyses are ordered by the prosecutor without heaving the consent of the injured party or witness. I think that in the concrete case although the evidence have been collected in a normal way, it is disputable to know who is the authorized person that ordered them, and this is why the admissibility of the evidence can be challenged.

In support of Article 246 of PCPCK all the evidence collected during the search of a house or a flat will be considered as inadmissible if:

- 1. The search was conducted without an order of the pretrial judge,
- 2. The order is in contradiction with the provisions of the Criminal Procedure Code,
- 3. The content of the order issued by the pretrial judge is in contrast with the conditions envisaged in this Code.
- 4. The search was conducted in contradiction with the order of the judge,
- 5. The persons whose presence is mandatory were not present during the search (Article 243 par 1 and 2)
- 6. The search was implemented in contradiction to Article 245 par 1, 3, 4 and 5

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Article 248 in a case when items were confiscated as foreseen in par 1 point 1, 2, 3 they can not be treated as admissible evidence. Such cases are: written communications between the defendant and persons from Article 159 and 160 of PCPCK – privileged witnesses when they do not accept to testify or have waived their right of testifying.

Article 254 also provides that the records of site inspection and reconstruction of the site compiled by the police or public prosecutor are inadmissible if the defendant or his attorney were not notified of this fact.

Case No. II

This is an issue of site inspection without notifying the defense attorney or the defendant.

This issue is one of the most disputable ones in the Court – Prosecution relationship every since the Criminal Procedure Code was only a draft and it continues to by such even today.

Article 254 of PCPCK should be understood according to the concept of the code in general that investigations are conducted by the public prosecutor whereas the site inspection is an investigative action and is in the inters of the prosecutor to have more information about the site of the accident which will probably contain some leads and evidence of the offence.

As a condition for these records to be considered admissible by the court is that public prosecutor should notify the defendants or their defense attorneys that such an action is being undertaken. Nevertheless the difficulties have emerged in cases when the perpetrator of the criminal offence is yet unknown?

The same provision provides for a possibility for repetition of the site inspection by the public prosecutor with the condition of notifying the defendant or his or her defense attorney for such an action. The difficulties again arise because, as time goes by the evidence are lost?

On the other hand pursuant to Article 366 par 3 parties and the injured party are always notified on the time and place of implementation of the reconstruction of the site scene informing them that they too may be present. Out of this one could conclude that the records of the site inspection may be disputable measure when it comes to its admissibility if it was conducted without notifying the accused and his or her defense attorney.

It is a fact that the site inspections are also done for the criminal offences that were committed by people who were arrested immediately after committing the criminal offence but, the notification of the defendant and his or her defense attorney is lacking most of the times. Such cases in the judicial practice are very frequent and the consequence of such actions is usually that the evidence is found inadmissible, sometimes this is avoided through the reconstruction of the site through witnesses or other evidence that are available to the court.

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Covert investigative measures

In Article 258 p 2 all of the measures of the covert investigations from point 1 to 10 if they are ordered by the prosecutor but were not confirmed by the pretrial judge within 24 hours from the issuance of the order they constitute inadmissible evidence in the criminal procedure. Article 264 par 1 provides that the evidence collected through covert investigative measures are inadmissible if the order for their implementation is illegal. Whereas the same Article in its 3 par provides that before the indictment becomes final and before the confirmation of the indictment (309-318) the court shall *ex officio* review the admissibility of the evidence collected, and shall render a written decision regarding the legality of the order. It is my opinion that the evidence collected pursuant to the chapter for covert technical measures of surveillance and investigation will not be admissible without this special decision even if the indictment will not be complete to become final. It is worthwhile to also mention Article 260 of PCPCK which provides that implementation of the order for covert investigative measures, simulated purchase, simulation of a corruption and covert measures in which the person who is carrying out the order incites another person into committing a criminal offence will also not be admissible evidence in the criminal procedure.

Article 205 p 5 forcefully gathering of urinary stains or breathalyzer when determining the presence of alcohol without an order from the court also constitutes inadmissible evidence. Pursuant to Article 205 p 5 the police may require from the suspect to undergo Alco-test through urine sample or breathalyzer. The refusal of the defendant constitutes admissible evidence for the court.

Witness statements

The following persons may not be examined as witnesses:
A person who by giving a testimony would violate the obligation to keep an official or military secret, until the competent body releases him or her from the obligation, a defense council on matters confided to him by the defendant, unless the defendant himself or herself so requests, a codefendant while joint proceedings are being conducted. Any violation of these provisions would constitute inadmissible evidence (Article 159). These issues are defined in Article 161 which states for the reasons in which a statement of a person who has been examined as a witness shall be inadmissible: a person may not be examined as a witness (Article 159), a person is exempted from the duty to testify (Article 160) but he or she has not been instructed about the right or has not explicitly waived that right, or the instruction and the waiver were not entered in the record, if a person is a child who could not understand the meaning of his or her right to refuse to testify or a testimony was extorted by force, threat or similar prohibited means (Article 155 of the present code).

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Article 162 also provides that the witness is not obliged to answer individual questions by which he or she is likely to expose him or herself or a close relative to serious disgrace, considerable material damage or criminal prosecution. When we refer to Article 164 p 2 such a notification shall be inserted in the records. In case the notification was not inserted than such references would be found inadmissible in the criminal procedure.

Referring to Article 178 and all the provisions of Article 159 and 160 and in cases when there is a conflict of interest between such persons or when such persons conduct an expertise in the capacity of expert witness such evidence will be found as inadmissible in the criminal procedure.

All of these concrete cases that were expressively foreseen by the provisions of the Criminal Procedure Code may be presented by the court by the parties from the moment when such evidence are handed over to the court. Nevertheless the court may *ex officio* render a decision for announcing such evidence as inadmissible in the criminal procedure and especially at the stage of confirmation of indictment, which allows for a special appeal against such decision before the criminal trial panel of the court.

If the prosecution refers to the witnesses or facts which could not be a subject to direct examination by the defendant of his or her defense attorney, during the main trial such evidence or witness may be referred provided that the witness is present and the defendant and his or her defense attorney have the chance to challenge such evidence or witness.

Case No. III

In some occasions the defendants who have pleaded guilty on the offences that were subject to investigation during the investigative procedure before the prosecutor, but they deny to have done so referring to different circumstances together with their defense attorneys in the final referral.

In the further test I will quote a part of a reasoning of the judgment related to challenging of the validity of the statement of the defendant during the investigation stage which was later on challenged by the defendant himself and his defense attorney.

When rendering the punitive judgment this court based its judgment on the evidence in its disposal during this trial. During the main trial the defendant has denied to have committed any criminal offence besides one of the offences which was namely accepted by all four of the defendants. However the court gave complete confidence to the statement of the defendant during the investigation stage which was also supported by the allegations of the witnesses, this for the following reasons:

The defendant was examined in the prosecutor's office in the presence of his defense council and this indicates that legal

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safeguards have been met for ensuring the rights of the defendant pursuant to the provisions of the Criminal Procedure code (Articles 229 – 236) the defendant had 5 days in his disposal to prepare his defense before being examined by the public prosecutor. Some of the offences which objectively could not have been committed, they were not accepted by the defendant during the investigations, such as criminal offences from Article 10 and 13 of the accusation for grievous theft committed in detriment of the injured parties Refki Gashi and Isa Shala. The offences which were accepted were described in details for each of the co-accused. The defendant during the main trial could not argue and convince the court for the change in his statement. In the beginning of the main trial he presented himself as a mentally ill person and was therefore directed to the Psychiatric Clinic which assessed that during the time of commission of the criminal offences his ability to understand and control his action was not essentially diminished. The insisting on his part that he is suffering from a mental disease for which there was no previous documentation establishes the evident circumstance that the accused is in fact changing his defense harmonizing it with the allegations of other co-accused with the purpose of avoiding criminal responsibility.

The examination before the public prosecutor can not be attributed as forced one or as cheating on the part of the prosecutor when it is well known that the examination was conducted in the presence of the defense attorney of the accused, therefore his argument that he was all the time under the police pressure can not be accepted and is not true. Among other things the prosecutor has given 5 day notice to the defendant for preparation of his defense.

These were the issues that could be reviewed in relation to the procedure of assessment and treatment of evidence in the criminal procedure, some of them had omissions from the prosecution bodies and some of the omissions happened as a reason of qualities and personal relationship with the defendant, expert or the defendant in the criminal procedure. This indicates that the right to defense of the defendant was not realized exactly as it is foreseen in the Criminal Procedure Code.

This view could not cover all the procedural actions which are encountered during the everyday practice of the courts, nevertheless we could say most of them have been covered and this represents a solid grounds for further discussions which will be supplemented after the objections and suggestions.

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KJI Training Activities
April 2006

Workshop – evidence procedure- Admissible and Inadmissible evidence in the Criminal Procedure

On 04 April 2006 KJI organised a workshop with the abovementioned topic. Beneficiaries of this seminar were judges, prosecutors and judicial police. This workshop which was held at the premises of KJI focused on the evidence procedure and the rules for the administration of evidences provided for in the second part of the Criminal Procedure Code.

Seminar for lay judges in the Mitrovica region

Based on its mandate KJI is involved in training of lay judges in all regions of Kosovo. On 10 April 2006 a practical training for lay judges from Mitrovica region was held. The training focused on the criminal and civil procedures as well as on some aspects of the Code of Ethics.

Workshop on Code of Ethics

In 2006 KJI continued with the organisation of workshops on the Code of Ethics in all regions of Kosovo. Within this program on 18 April 2006 KJI organised a workshop on the abovementioned topic. The beneficiaries of the training were judges and prosecutors from Prizren region. The training aimed to give a more detailed overview on the experience and practice in which the independence of judges may be worrying. The workshop focused on the position of the judge as a single decision-maker and as a decision-maker in a panel.

Seminar: Practical Problems related to property issues pursuant to the applicable law in Kosovo

On 20 April KJI organised a seminar focusing on the newly promulgated Regulation 2006/10 on the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property. The establishment and functions of the Kosovo Property Agency were also a matter of discussion. In addition during the seminar were treated the practical aspects of gaining of ownership pursuant to the applicable law in Kosovo, such as registration of real estates and other relevant problems that are encountered in the practice when dealing with co-ownership.

Seminar – Measures for ensuring the presence of the defendant

On 26 April KJI organized training for criminal law judges and prosecutors, who impose measures ensuring the presence of the defendant in accordance with the Criminal Procedure Code. This seminar focused on the measures that are foreseen by the Criminal Procedure Code. The precise implementation of the respective provisions providing a guarantee for prevention of criminal offences and for successful flow of the procedure was also discussed.

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Forthcoming events

Practical Skills Training: Simulation of a trial – Juvenile Justice field

The practical training will be organized for judges and prosecutors dealing with Juvenile cases from Pristina Region.

Although the juvenile delinquency is an integral part of criminality in general they are characterised with special characteristics. This simulation of a trial aims to clarify a lot of dilemmas from this field and also aims to serve as guidance for the protection of the rights of juveniles during the judicial proceedings.

Planned date: 3 May 2006

Venue: District Court in Pristina

Practical Skills Training: Simulation of a trial

Target group: civil judges

KJI is planning a practical simulation of a trial for the judges of the civil field from Mitrovica region. A problematic case from the court practice will be selected for the purpose of this seminar. The participants will discuss the problems related to the civil procedure in similar cases.

Planned date: 11 May 2006

Training for Minor offence Judges

Throughout 2006 KJI will continue to organise special training sessions for Minor Offences judges. The second training session for this year will focus on the Minor Offence Procedure with special emphasis on the Minor Offence Liability, co-liability of natural and legal persons and collection of evidence during the procedure.

Planned date: 16 May 2006

Seminar – Criminal offences against life and body

Target group of this seminar will be judges and prosecutors.

This training aims to give a detailed overview on the criminal offences against life and body, their elements and the manner of their manifestation in practice pursuant to the Criminal Code. Cases from the court practice will also be presented.

Planned date: 18 May 2006

Simulation of a trial – Indictment, Confirmation of Indictment

Target group of this simulation will be judges and prosecutors from Peja region.

Within the scope of different simulations of trials, KJI will organise a simulation of the Hearing for the Confirmation of Indictment.

A concrete case from the practice which is related to the issue of Indictment and the Confirmation Hearing will be selected for this purpose.

Planned date: 24 May 2006

Venue: District Court in Peja.