

KJI NEWSLETTER ***January 2005***

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

THE CONFIRMATION OF THE INDICTEMENT PHASE PROVISIONAL CRIMINAL PROCEDURE CODE OF KOSOVO

Mr. Pasquale Profiti ***(Italian Prosecutor – Council of Europe expert)***

1. The aims of the confirmation of the indictment phase

In order to correctly address the issues arising when applying the Kosovo Criminal Procedure Code (CPC) provisions regarding the confirmation of the indictment one preliminary question is fundamental:

What is the rationale behind this procedural phase? In other words what are the purposes, the objects, the substance of this compulsory step of the criminal proceeding? Why the drafter of the CPC deemed opportune to set a stage where the indictment is scrutinised by a judge prior to the main trial?

Reading through the articles from 304 to 318 it emerges that apparently there is more than one function associated to this phase:

⇒ discovering the evidence collected during the pre trial phase;

- ⇒ setting out the evidence which both parties (Prosecutor and defendant) intend to present before the trial phase;
- ⇒ giving the opportunity to the defendant to plead his/her case before a judge;
- ⇒ objecting to the admissibility of the evidence gathered by the Prosecutor;
- ⇒ evaluating the sustainability of the indictment.

In reality what described above are activities of the actors of the criminal proceeding which, apart from one, could also be carried out throughout the main trial in the same way.

Which of the listed activities is structurally different to the one performed during the main trial? The answer to this question reveals the specificity of the confirmation phase in comparison with the main trial and its essential purpose and object.

2. The rationale behind the confirmation of the indictment

The fundamental goal of the main trial is the verdict by the Court on the guilt or innocence of the accused (art. 390 and 391 CPC). In particular an acquittal judgement is rendered whenever "*it has not been proven that the accused has committed the act with which he or she has been charged*". The pieces of evidence produced during the trial do not show, beyond any reasonable doubt that the accused is guilty. This is a decision on the merits, on the substance of the accusation: the accused has not been proven to have committed the offence.

As to the confirmation of the indictment stage the parameter of adjudication of the substance of the accusation is different: the dismissal of the indictment shall be issued when *there is not sufficient evidence to support a well grounded suspicion that the defendant has committed the criminal offence*. In this case it is not necessary to prove that the accused has committed the offence; it sufficient a **well grounded suspicion** that that the defendant has committed the offence on the basis of admissible sufficient evidence (art. 316 p. 1 no. 4).

What does this provision really mean?

3. The correct standpoint for a suitable application of the **well grounded suspicion** clause

It should be clear that the judge called on to confirm the indictment has not the same task of the main trial Court. It is not a first complete judgement on the

merits of the accusation; in fact the *suspicion* of having committed the offence, even if well grounded, does not imply that there are the indispensable elements for convicting the defendant.

The confirmation of the indictment judge (thereinafter confirmation judge) is not given the power to bar the trial claiming that it is impossible for the Prosecutor to prove, beyond any reasonable doubt, that the accused has committed the offence. In case there is a well grounded suspicion, the judge is obliged to confirm the indictment, even if he or she is uncertain that in the main trial the accused would be declared guilty.

When is the suspicion ungrounded so that the legitimate outcome is the rejection of the indictment?

In my opinion it is not purely a question of degree of evidence; in other way the difference between the evidence necessary to convict an accused and the evidence essential for confirming the indictment is not that the first conclusion must be adopted with more solid elements. It is, on the contrary, a question of different perspective.

4. Some practical cases with brief comments

Some examples may clarify the idea.

a) A case of rape. According to the victim's statements she was forced to have sexual intercourses with the accused; the accused admits that he had sex with the victim but he claims she had consciously accepted the intercourse. Medical reports are not collected; victim's family members or victim's friends who observed the victim just after the alleged crime and heard

from her the account of the event, are not examined. The indictment is filed. There are of course deficiencies in the investigation, but evidence can be increased during the main trial. In this case the confirmation judge should not consider the two versions and decide which of the two are more reliable. It has to be considered that further elements can be achieved in the main trial, corroborating the indictment. The judge in this phase cannot bar the prosecution on the basis of the uncertainty of the findings regarding the accusation.

b) Again an indictment of rape; the victim has recognized the offender, previously unknown to her, among a series of pictures (art. 255 CPC); the defendant has stated that there is certainly a mistake, since during the time when the offence was perpetrated he was alone in his house watching the television. In this case it is important to evaluate the credibility of the victim regarding the recognition; it is well known that the degree of mistakes is considerable in this kind of evidence. The Court has to verify all the details of the case (if the offence took place in the darkness, if the perpetrator was partially disguised, if the sight of the victim is good, if the victim is totally certain or there is a margin of doubt). This kind of details can and must be obtained during the main trial, with the direct supervision of the Court during the main trial; the confirmation judge may not replace the role of the main trial Court, anticipating the same kind of judgement that has to be rendered at the end of the main trial. In some way the decision of the judge for the confirmation of the indictment is

not on the substance of the indictment but on the proceeding; better, in my opinion a correct approach should take this perspective: it has to be verified whether or not a main trial is useful for the success of the prosecution, namely if the evidence collected during the pre-trial phase are of such a nature that it cannot be excluded that the outcome of the main trial will be a conviction. This interpretation of the provision requiring a well grounded suspicion for confirming the indictment implies that when the judge deems that further evidence at the main trial, indicated by the Prosecutor, might lead to decisive evidence against the accused, the indictment has not to be dismissed.

The case set out above sub a) may clarify the assumption. It is important in that case to take the testimony of those who soon after the alleged rape had the occasion to see and hear from the victim; for instance the fact that the injured party was terrified, shocked, in tears, trembling is of paramount importance for the decision of the case, namely whether or not the victim agreed to have sex with the defendant. For instance the statements of a doctor who examined the victim a few hours or minutes after the alleged rape, is decisive. The Prosecutor and the police clearly made a mistake not to call those persons to testify during the pre-trial phase, but this failure cannot be lethal for the upshot of the criminal proceeding. In fact the Prosecutor can indicate his / her will for having those witnesses, not yet examined, to be interrogated at the main trial (article 307, p. 1, no. 2, article 322). In case of a failure from the Prosecutor side in this

direction the gathering of new evidence can be ordered by the Presiding judge (article 322, p. 3) or by the panel trial (article 360, p. 4).

As a consequence whenever the evidential material submitted to the judge for the confirmation of the indictment can be completed at the main trial and it is possible that this integration of evidence might reasonably result in the conviction of the accused, the judge cannot dismiss the indictment. On the contrary where the evidential material is clearly not sufficient to ground a conviction **and it cannot be increased in the direction of the indictment**, because all possible elements were collected or because the missing evidence are most likely to be in favour of the defendant, it is the appropriate case for the dismissal of the indictment.

5. A case of absence of well grounded suspicion

A concrete example taken from the practical experience: a corruption case. An entrepreneur was negotiating a contract with a local administration; a certain amount of money in that period was withdrawn by cash from the personal bank account of the entrepreneur on a certain day; the analysis of the bank records of the head of the local administration shows that the following day a certain amount of cash, less than that withdrawn by the entrepreneur, was deposited in the bank account of the civil servant.

The Prosecutor questioned the entrepreneur on the destination of the money he had withdrawn; the

entrepreneur availed himself of the right to remain silent.

The Prosecutor interrogated the public officer too; the latter contented that the money deposited on his bank account was a gift from his parents; the public officer's father confirmed the allegation; the father was questioned on why he disposed of such a relevant amount of cash; he replied stating that the sum was a result of years of savings and that he was in the habit to keep money in his house. In this case all the bank investigations were carried out. The partners, the family's members, the employees of the entrepreneur were interviewed; they all knew nothing. The same as to the civil servant's colleagues and his family's members (apart from his father). The father was a retired civil servant who had received a grant from the State when he resigned; the amount of this grant was compatible with the amount of the alleged gift to his son if added to some other savings.

In a case like the one just illustrated the judge for the confirmation of the indictment could well deem that the evidence are insufficient and, above all, there are no perspectives to be reinforced, since the investigation was complete.

6. Final considerations

To sum up the proposed standpoint it can be said that the judge for the confirmation of the indictment has to evaluate whether there are minimum chances that at the main trial the defendant will be convicted, also considering the possible increase of the

evidential material; where those chances are clearly insufficient he has to dismiss the indictment; on the contrary were those chances are present he cannot bar the possibility of the Prosecutor to prove in the main trial that the accused has committed the offence, even if the evidence gathered at the pre – trial stage were not sufficient for the conviction. What is important is that the main trial can enrich the evidential material at a level adequate for a conviction.

The fact that the decision on the confirmation of the indictment has a different perspective from that of the main trial can be taken from different elements:

- 1) sufficient evidence of well grounded suspicion are enough for confirming the indictment, while for a conviction the Prosecutor must prove the facts contained in the accusation;
- 2) there are essentially no possibilities to integrate the evidence during the confirmation of the indictment phase, while new evidence, as already exposed, may well be introduced in the main trial (article 307, p. 1, no. 2, article 322, article 360, p. 4);
- 3) the judge for the confirmation of the indictment has no power to force the parties and especially the Prosecutor, pending the confirmation of the indictment, to make additional investigation which he / she deems necessary or opportune;
- 4) the judge for the confirmation of the indictment has no power to

send the case back to the Prosecutor ordering specific investigations. The confirmation judge has the power to send the case back when the indictment does not comply with the requirements pinpointed in article 305; one the requirements consists of the explanation of the grounds for filing the indictment (article 305, p. 1, no. 5). When this explanation is contained in the indictment the requirement is met even though the grounds does not satisfy the confirmation judge in the sense that some additional investigations would be needed;

- 5) the decision of the confirmation judge, whichever it is, cannot *prejudice the adjudication of the matters which will be considered at the main trial* (art. 317, p. 1). This necessarily implies that the perspective taken by the confirmation judge should necessarily be different from that which pervades the main trial.

What stated above has nothing to do with the professional duty of the Prosecutor to conduct complete investigation; of course he has, but the lack of some important investigative actions from the Prosecutor side not necessarily implies that the confirmation judge, after having recognised this fault, dismisses the indictment. The confirmation judge should appreciate whether or not it is possible to retrieve

the missing and fundamental evidence, for the purpose of the prosecution, at the main trial; if the answer is positive the judge may not dismiss the indictment.

(The lecture of Mr. Profiti was presented at the Workshop on the Confirmation of Indictment held by KJI in Collaboration with the Council of Europe in December 2004)

Project activities January 2005

Workshop on Inheritance Law:

The first training event for 2005 was related to Inheritance Law and was held on 19 January;

Workshop on the Provisional Criminal Procedure Code of Kosovo - Simulation of a Main Hearing:

On 26 and 27 January 2005, KJI in collaboration with Kosovo Judges Association, Kosovo Prosecutors Association and Kosovo Bar Association organized the abovementioned Workshop for the judges and prosecutors from Mitrovicë/Kosovska Mitrovica region.

Workshop on property, cadastral and mortgage law:

On 31 January and 1 February 2005 KJI organized a Workshop on Property, Cadastral and Mortgage Law for the judges handling such cases from Prizren region.

Forthcoming events

Seminar on Non Discrimination

On 7 and 8 February 2005, Kosovo Judicial Institute in collaboration with OSCE organizes a Seminar on principles of Non-Discrimination for judges and prosecutors from all the regions in Kosovo. The Seminar will be held at the premises of Victory Hotel in Prishtinë/Priština. The law on Non Discrimination has been recently promulgated in Kosovo and has entered into force in 2004. As such legislation is still a novelty in Kosovo the Seminar

aims to inform and present to the judges and prosecutors the issues related to discrimination in both private and public sector. European and regional experiences and possible practical problems will be presented by local experts, experts from OSCE and experts coming from the neighbouring countries.

Seminar: Science and technology in courts

On 10 February Kosovo Judicial Institute organizes a Seminar on the abovementioned topic that aims to clarify and contribute to the harmonization of the court practice concerning the conduct and impact of the expertise in the Criminal proceedings. Target groups of the Seminar are judges trying criminal cases and prosecutors. The Seminar would provide the participants with information regarding the technical opportunities applicable in the conduct of expertise, possible difficulties that judges and prosecutors may face while working with experts and expertise etc. Experts from judiciary, prosecutorial service as well as from the KPS and Scientific Organizations are invited to present relevant topics at the Seminar. After the completion of the seminar, the participants would obtain deeper understanding on the possible techniques for investigation and proof

and on the role of experts in the case proceedings.

Workshop on Legal Defence

The Workshop is a continuation of series of discussions on the problems concerning unclarity and contradictions in applying the new Codes. The previous Workshops treated subjects like: Confirmation of indictment (October 2004), Detention on remand (November and December 2004) and Main hearing (January 2005).The particular edition scheduled for 11 February 2005 at the premises of the Kosovo Judicial Institute aims to draw the attention of the participants to the Legal Defence in Criminal Proceedings. The Workshop is organized by KJI in Collaboration with the Association of Judges, Association of Prosecutors and Kosovo Chamber of Advocates. The target group is prosecutors and judges, trying criminal cases.

Seminar: Harmonization of the Case Law in Civil Cases

The seminar aims to provide information on the recent developments and pending promulgation regulations in the field of civil law in Kosovo. In addition participants will be given an opportunity to attend group exercises on practical cases in order to try to harmonize their practice on most common types of civil cases. Topics such as settlements and mediation in compensation of damages will be presented. The seminar will be held at the premises of KJI.

Workshop on Minor Offences

The Workshop is a continuation of a series of Workshops with the same title offered by KJI to the Minor Offences Judges. Participants will look at possibilities to reduce the workload at the Minor Offences Courts by developing proposals supported by their practical experience for handling specific cases. The training session will be held at the KJI premises.

Seminar on the protection against Domestic Violence

The Kosovo Judicial Institute (KJI) offers a seminar on implementation of UNMIK Regulation 2003/12, *Protection against Domestic Violence*. As the members of judiciary have shown great interest for this matter KJI included the topic in its program for 2005. The first Seminar on this topic was held in May 2004. Since the Regulation has established new procedures on both the civil and criminal side judges working in civil and criminal matters as well as public prosecutors who had not attended the previous seminar are invited for this session. The program addresses the responsibilities of the courts that have jurisdiction over these cases. The Seminar aims to initiate a discussion on the implementation of the Regulation and to encourage the participants to present the cases they have been working on and the practical difficulties they have been facing.