

BASIC COURT IN GJILAN (KOSOVO) REASONING OF THE VERDICT FOR CRIMINAL OFFENSES OF NARCOTICS

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ABSTRACT

The purpose of this research paper is, in the legislative and legal context within which the reasoning of judgments takes place, to make an analysis and evaluation of the decisions of judges, of the Basic Court in Gjilan and its branches, when drafting and publishing the judgment, for the criminal offense of Unauthorized purchase, possession, distribution and sale of narcotics, psychotropic substances and analogues, from Article 267 and for the criminal offense Unauthorized Possession of narcotics, psychotropic substances or analogues, from Article 269 of the Criminal Code of Kosovo.

The object of analysis and evaluation will be 48 judgments of the judges of this court issued for these two criminal offenses. Through a comprehensive assessment approach, a mixed comparative methodology will include the published judgments of this court, for these two criminal offenses, on the official website.

The analysis and evaluation of judgments will be based on criminal, domestic and international legislation, reports of local and international institutions, as well as relevant work related to this issue. Special emphasis will be placed on the quality of legal reasoning that is reflected in court decisions, as well as the assessment of how this action is done by the judges of this court.

KEYWORDS: Gjilan Basic Court, reasoning, judgment, narcotics offenses

INTRODUCTION

The right of the accused to a reasoned decision is one of the basic conditions for a fair trial, because it enables him the right to appeal and clear reasoning and analysis of court decisions, is also the main requirement of criminal legislation, an important aspect for a fair trial provided for in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Furthermore, proper reasoning provides the necessary assurance that the law has been implemented and convinces the Court of Appeals that the legal provisions have been adequately implemented and will reduce the number of appeals and the possibility of overturning poor decisions which are not uncommon.

In the justice system, according to the criminal legislation, “Basic Courts are competent to adjudicate in the first instance all cases, unless otherwise provided by law”.¹

This organization, functioning and jurisdiction of the courts in the Republic of Kosovo is defined by the provisions of criminal legislation, mandatory for their work, which guarantee a fair trial “independent, impartial, uninfluenced in any way by any person physical or legal”.²

But, the analysis and evaluation of the judgments of this court, has shown that these guarantees are not being fulfilled. Judges have often failed to fully and thoroughly argue their decisions. The reasoning of these decisions is

¹ LAW no. 06 / L - 054 ON COURTS, article 12

² Ibid

generally not detailed and incomplete, as provided by domestic and international legislation. During the trial, "every person has the right to have his or her case heard fairly"³ and to be provided with guarantees of a fair trial and the right to a fair trial, which must be respected by the Basic Court, including other, includes the right to a well-reasoned decision and publicly announced within a reasonable time.⁴

The Criminal Procedure Code of Kosovo - KCCP, has determined the content and form of a written judgment. According to this code, when drafting and reasoning a criminal judgment, the Court must "present the reasons for each point of the judgment"⁵, it must "present clearly and fully what facts and for what reasons it considers established or unproven", "... as well as the reasons on which it is based in the case of resolving legal issues, especially in the case of proving the existence of a criminal offense and criminal responsibility of the accused, as well as in the case of application of certain provisions of law criminal charges against the accused and his offense".⁶

When drafting and pronouncing a judgment, it is very important that judges provide a clear and complete reasoning for the decisions they make. Good reasoning of the decision convinces the party that his case has been evaluated and judged fairly, enables the public opinion to be convinced of the applicability of the law and reduces the possibility of challenging the judgment by legal means.

When reasoning their decisions, for these criminal offenses, the judges must justify each point of the enacting clause, to show on what facts they have based their decision, if those facts have been partially or fully substantiated, to judge and evaluate the evidence correctly and show for what reason they consider it valid or unverified. Thus, the reasoning of the judgment is a legal obligation which is provided by domestic and international legislation.

The sentencing decision must take into account the gravity of the criminal offense, the relevant mitigating and aggravating circumstances, and individualize it and achieve the objectives of the sentence, and the court must justify its decision and clarify its authority whenever imposes a sentence below the minimum provided in the criminal code⁷ because "Insufficient reasoning of the court may be grounds for appeal".⁸

From the analysis made of the decisions of this court, for this group of criminal offenses, it is noticed that the basic shortcoming which affects these judgments to be hit by legal means, is the incomplete reasoning and according to the law. By failing to meet these criteria, when imposing a criminal sanction, judges violate the right to a fair trial, violating the principle of independence and impartiality of the court.

In the case of our analysis, the lack of reasoning is noticed in the decisions for measuring the sentence and its purpose, and when we are dealing with the individualization of the criminal offense or the circumstances of the commission, the reasoning is insufficient. In almost all cases the wording of the sentence is standard, without any individualized wording and reasoning, implicitly referring to legal provisions. The total lack of reasoning is found in the general rules for mitigation or aggravation of punishment, where judges only cite the Criminal Code.

The decision of the court, only if it is taken on the basis of the evidence that is examined and verified in the main trial, is independent and based on law. But to be of high quality, a court decision must be perceived as such by both the parties and society at large. They are satisfied that the adequate application of legal norms and due process has been done only through adequate reasoning for all the facts, evidence and general aggravating or mitigating circumstances, or mitigation of the sentence, that have influenced the final decision.

**UNAUTHORIZED PURCHASE,
POSSESSION, DISTRIBUTION AND SALE**

³ European Convention on Human Rights, Article 6

⁴ CODE No. 04 / L-123 OF CRIMINAL PROCEDURE, article 379 par.6

⁵ CODE No. 04 / L-123 OF CRIMINAL PROCEDURE, article 379 par.6

⁶ Ibid

⁷ CODE NO. 06 / L-074 CRIMINAL CODE OF THE REPUBLIC OF KOSOVO Article 66 (2).

⁸CODE No. 04 / L-123 OF CRIMINAL PROCEDURE Articles 396 (8), 402 and 403.

OF NARCOTICS, PSYCHOTROPIC SUBSTANCES AND ANALOGUES

Narcotics are natural and synthetic substances which, mainly affect the central nervous system of man causing an unusual state of mind and then create a lasting addiction with the demand of constant consumption.

Consumption of narcotics and psychotropic substances, in addition to the consequences on the mental and physical health of users are presented as a very important criminogenic factor. Therefore, the issue of combating the production and unauthorized release of these substances is part of domestic and international legislation.

Domestic and international criminal law aims to "ensure that patients have access to pharmaceutically controlled substances for lawful medical purposes, while also seeking to protect public health from the risks of diverted or manufactured controlled substances on the market illegal".⁹

The Law on Narcotic Drugs, Psychotropic Substances and Precursors regulates the production, circulation, possession, import, export, transport, purchase, supply, sale, consumption, use and promotion of plants from which narcotics, narcotic drugs, psychotropic substances can be obtained and precursors. The law makes the classification of plants, narcotic drugs, psychotropic substances and precursors based on their dangerousness, during use in medicine and veterinary medicine. Defines general measures for preventing and combating misuse of herbs, narcotic drugs, psychotropic substances and precursors.¹⁰

The legal provisions provide penalties for the production, distribution and possession of narcotics, psychotropic substances or other similar substances.

According to Article 267 of the Criminal Code of Kosovo, this criminal offense is committed "Anyone who without authorization buys or

possesses for the purpose of sale or distribution, or offers for sale substances or preparations which are declared by law as narcotics, psychotropic substances or analogous substances ", And" is punishable by a fine and imprisonment of two to eight years".¹¹

Which substances will be considered dangerous is determined by other legal provisions, while the perpetrator of this criminal offense can be any person who without authorization buys or possesses for the purpose of sale or distribution, or offers for sale substances or preparations of which are declared by law as narcotics, psychotropic substances or analogous substances.¹²

The commission of this offense is determined alternatively; purchase or possession for the purpose of sale or distribution and offering for sale of such substances or preparations. To be considered a criminal offense, these actions must be committed in an unauthorized manner, illegally. This follows from the fact that "if the purchase or possession for the purpose of sale or distribution of narcotics, psychotropic substances and analogues, is done in accordance with the law, for medical or scientific purposes, then such an act is not considered a criminal offense."¹³

The object of protection of this act is human health, it is committed only intentionally and its consequence is the abstract danger to human health.¹⁴

The means by which this criminal offense is committed are narcotics and psychotropic substances or precursors declared as dangerous. As narcotics or psychotropic substances, are considered natural ones or artificial substances and preparations processed from these substances which are registered in the register of dangerous narcotics and psychotropic substances and precursors presented in the attached tables

⁹ Congressional Research Service, (2021).The Controlled Substances Act (CSA): A Legal Overview for the 117th Congress
<https://crsreports.congress.gov/R45948>

¹⁰ LAW NO. 02 / L-128 ON NARCOTIC DRUGS, PSYCHOTROPIC SUBSTANCES AND PRECURSORS

¹¹ CODE NO. 06 / L-074 CRIMINAL OF THE REPUBLIC OF KOSOVO, article 267

¹² LAW NO. 02 / L-128 ON NARCOTIC DRUGS, PSYCHOTROPIC SUBSTANCES AND PRECURSORS

¹³ Ismet Salihu, 2009. E Drejta Penale, Pjesa e Posaçme, Kolegji Fama, Prishtinë

¹⁴ Ibid

of the Law on Narcotic Drugs, Narcotic Substances and Precipitating Substances.¹⁵

The qualification of this criminal offense is made in par.2 where it is stated that "Anyone who without authorization distributes, sells, transports, delivers, mediates, sends or sends in transit substances or preparations which are declared by law as narcotics, psychotropic substances or substances analogous, for the purpose of distribution, sale or offering for sale, is punishable by a fine and by imprisonment of two to twelve years.

While, another form, as severe, is defined in par.3 where it is stated that "Anyone who without authorization exports or imports substances or preparations which are declared by law as narcotics, psychotropic substances or analogous substances, shall be punished by a fine and by imprisonment from three to ten years".¹⁶

UNAUTHORIZED POSSESSION OF NARCOTICS, PSYCHOTROPIC SUBSTANCES OR ANALOGUES

The figure of the criminal offense and the definition of the elements that must be met for the commission of this offense are provided in Article 269 of the Criminal Code of Kosovo.

The perpetrator of this criminal offense may be, "Anyone who possesses narcotics, psychotropic substances or analogues without authorization"¹⁷, and is punished with a fine and imprisonment of one to three years.¹⁸ This criminal offense is committed by any person who intentionally and illegally possesses narcotics, psychotropic substances or analogues. Meanwhile, paragraph 2 of Article 269 defines this offense, where as a mitigating circumstance is considered if the offense is committed for the first time and if the perpetrator possesses less than three grams of narcotic substances or psychotropic substances or analogues with which the sentence can be imposed with a fine

or imprisonment of up to one year, while narcotic substances, psychotropic substances or analogous substances are confiscated.¹⁹

The purpose of this crime is to protect human health, and to avoid the consequences that may come as a result of this crime, while this crime can be committed by anyone who illegally possesses narcotics and psychotropic substances declared dangerous.

REASONING OF JUDGMENT

Following the decision, the reasoning for the final sentence is of paramount importance. Every judge should have the aim that when deciding on a criminal case, in addition to having to decide fairly and legally, the court decision should also be convincing. The indisputable component to establish credibility in the objectivity of the court and the legality of court decisions is the reasoning of the judgment. Through the reasoning of the judgment, a picture of the whole judicial process, including the conclusions of the court, must be presented in a credible manner.

Clear reasoning and analysis are essential requirements of court decisions and an important aspect of the right to a fair trial provided for in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The quality of court decisions depends mainly on the quality of their reasoning. Adequate reasoning is a necessity which should not be neglected in the interest of speed.²⁰

The judge must ensure that his judgments are comprehensible; they must state the reasons why such a decision was taken, so that all parties involved understand the logic on which he has based his decision.²¹ Emphasizing reasons not only makes the decision easier for the parties to understand and accept, but above all it is a guarantee against arbitrariness.²²

¹⁹ Ibid

²⁰ The Consultative Council of European Judges (CCJE), Opinion no. 11 of the CCJE on the attention of the Council of Ministers of the Council of Europe on the quality of judicial decisions, Strasbourg (2008) no. 3

²¹ Rrjeti Evropian i Këshillave për Gjyqësorin (RREKGJ), Raporti i etikës gjyqësore 2009-2010, Dëgjim dhe komunikimi, fq. 14.

²² Gjykata Supreme e Kosovës (2018). Udhëzues për politikën Ndëshkimore, Prishtinë.

¹⁵ LAW NO. 02 / L-128 ON NARCOTIC DRUGS, PSYCHOTROPIC SUBSTANCES AND PRECURSORS

¹⁶ Ismet Salihu, 2009. E Drejta Penale, Pjesa e Posaçme, Kolegji Fama, Prishtinë

¹⁷ CODE NO. 06 / L-074 CRIMINAL OF THE REPUBLIC OF KOSOVO, article 269

¹⁸ Ibid

The full and clear reasoning of the judgment, regarding the reasons for the decision, showing the facts on which the decision was based, why those facts were considered proven and on the basis of which the evidence was made, convinces victims and prosecutors that concerns over the issues raised and their arguments have been addressed and taken into account, the public must be convinced that the legal provisions have been applied correctly, that the trial has been impartial and that the decision has been lawful. Moreover, proper reasoning provides the necessary assurance that it will not be challenged on appeal, and this will reduce the number of successfully adjudicated judgments and the reversal of judgments by the Court of Appeals, based on a lack of reasoning.

The reasoning of the decision does not mean that the judge will be responsible for any arguments or allegations raised, but it should indicate that the judge has considered all the main issues that have arisen. Decisions should not be confusing, unsubstantiated, and without any legal or factual logic, and "When a reasoned decision is written, the trial judge should adopt an approach that minimizes the possibility of appeal".²³

The Supreme Court of the Republic of Kosovo has adopted a Penal Policy Guide, which provides instructions for sentencing and providing adequate reasoning for the final sentence, but the analysis of these judgments has shown that the essential requirement of court decisions as an important aspect for a fair trial provided for in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which depends mainly on the quality of the reasoning, has not been properly fulfilled and does not provide the necessary guarantees for the courts higher than all provisions of the law have been adequately reviewed.

In most of the decisions for the offenses in question, the court has imposed the sentence below the minimum provided for these offenses and the judges have not justified the decisions in their reasoning. The reasoning of the decisions simply referred to the existence of mitigating

circumstances, without assessing the relevant circumstances that were perceived as mitigating or aggravating. In all the reasoning of the judgments, the judges have started the reasoning, that "When measuring the sentence against the defendant, the court has taken into account some circumstances that affect the type and height of the sentence, provided in Articles 73 and 74 of the KPRK", continuing that "The imposition of sentences is in line with the gravity of the criminal offense and the degree of criminal responsibility of the defendant and the purpose of the sentences imposed"²⁴ also concluded that with these sentences the purpose of the sentence can be achieved, in accordance with Article 38 of the CCRK, which consists in preventing the defendant from committing criminal offenses in the future and to rehabilitate him; to prevent other persons from committing criminal offenses and to express the social judgment for the criminal offense, raising morale and strengthening the obligation to respect the law"²⁵, which is a paraphrase of this article of the CCRK. For the sentences imposed with a fine, the standard reasoning was "it has taken into account the property status of the defendant".²⁶ Meanwhile, in determining the costs of the proceedings, in the reasoning of the judgments, the reasoning was common, that "Given the nature of this criminal case and the financial situation of the accused, the court based on Article 451 paragraph 1 of the CPC, or 452 has decided to oblige the accused to pay the amount of..., within 15 (fifteen) days, from the day when this judgment becomes final."²⁷

In these cases, as can be seen from our analysis, the court had failed to assess, and even more so, not to identify the specific mitigating circumstances and to justify to them how the

²³B. Hyseni, A. Zogaj dhe F. Hasani, (2017). *Doracak i Gjyqtarëve për Shkrimin dhe Arsjetimn Ligjor*, Prishtinë.

²⁴Judgments of the Basic Court Gjilan, for the criminal offenses Unauthorized purchase, possession, distribution and sale of narcotics, psychotropic and analogous substances, from article 267 and for the criminal offense Unauthorized possession of narcotics, psychotropic or analogous substances, Article 26 of the Criminal Code of Kosovo. <https://gjilan.gjyqesori-rks.org/publikimet/aktgjykimet/?r=M>

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

purpose of the sentence could be achieved through an easier punishment.²⁸

In most cases, in the reasoning of the written judgment, the judges simply count the mitigating and aggravating factors without further evaluation and then make a standard reference "as mitigating circumstances, the presiding judge has also taken into account the fact that the defendant has cooperated with the state prosecutor; that he has pleaded guilty during all stages of the criminal proceedings; that the defendant has repented of committing this criminal offense and that he has promised that in the future he will not commit other criminal offenses"²⁹ or "as a mitigating circumstance the court took into account his relatively young age and the fact that he is a student" and "that the accused had good behavior in Court that he is a family man, that from the beginning of the proceedings he did not deny the fact that he possessed narcotic substances and the promise that in the future he will not commit criminal offenses of this nature nor other offenses"³⁰,... "the court found that the accused is married and the father of ... children", that the accused has repented for committing the criminal offense, as well as the fact that he has not been previously convicted of any other criminal offense".³¹

Meanwhile, for the assessment of aggravating circumstances is continued with the standard template that, "As aggravating circumstance is taken the large amount of narcotics of... grams and the dangerousness of the criminal offense"³²,... the degree of social danger of offenses of this nature and the increasing

phenomenon their"³³... .."as an aggravating circumstance, the trial panel took into account the fact that it is a large amount of narcotic substance of the type"³⁴... "While as an aggravating circumstance it took into account the social danger of this criminal offense where most the endangered are the new generations".³⁵ From the above examples it is clear that the judges of this court lack the understanding of how to assess the mitigating and aggravating circumstances provided in the CC of RK when sentencing and the reasoning of the judgment provided in Article 370 paragraphs 6 and 7, on the content and form of the written judgment of the KCCP.

Such a way of assessing mitigating or aggravating circumstances in the reasoning of the decision not only violates the applicable law, but also will not serve the purpose of prevention and may affect the general public perception of how the system the judiciary responds to specific criminal offenses.

CONCLUSION

After careful evaluation and analysis of judgments, we note that the wording of the reasoning is standard and non-individualized, not done in accordance with applicable law and violations are made during the assessment of mitigating and aggravating circumstances and reasoning for the purpose of the sentence. The reasoning is not made in the judgment and thus creates the general perception of the public that the decisions are not fair and based on law, do not meet the main requirement of criminal legislation for a fair trial, provided in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Human Freedoms. Furthermore, they become targets for legal action and the Court of Appeals is not convinced that the legal provisions have been adequately implemented and leads to the reversal of these judgments.

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