

Translation

On March 10, 2004, the Third Criminal Panel of the Court of Cassation, consisting of the acting presiding judge Ralph Riashi, and judges Georges Haydar and Mohammad Makke, convened.

They examined the petition for cassation registered at this court, case number 431/2003;

The court duly deliberated;

Then, in the presence of the representative of Public Prosecution before the court of cassation, Judge Moukhtar Saad, and clerk Mrs. Salwa Zein, the following decision was pronounced:

“In the Name of the Lebanese People”

The Court of Cassation, Third Criminal Panel, upon examination and deliberation,

Finds that Petitioner Muhamad Mugraby, his lawyer being Attorney Antoine Moukarzel, filed on November 15, 2003, at the clerk's office of this court, a petition for cassation against the People and the Bar Association at Beirut (“BAB”), challenging Decision No. 628 of October 22, 2003, issued by the Indictment Chamber, which ordered as follows:

- 1- To admit, in form, the two appeals of the Appellate Public Prosecution of Beirut and BAB.
- 2- To dismiss the appeal of Defendant Dr. Muhamad Abdullah Mugraby in form.
- 3- To affirm the challenged decision for the indictment of the Defendant for the misdemeanors stipulated in Articles 391 and 393 Penal Code.

- 4- To set aside the said decision for declining to indict the Defendant for the crime stipulated in Article 111 of the Code Organizing the Legal Profession (“COLP”) for the non-fulfillment of the elements of the crime. After setting aside the challenged decision in part, the panel decides, in addition to what is stipulated in the third paragraph, to indict the Defendant for the misdemeanor stipulated in Article 111 COLP.
- 5- To direct that the indicted Defendant Dr. Muhamad Abdullah Mugarby be brought to trial before the Penal Judge at Beirut, and to order him to pay the legal costs.

Petitioner requested that the petition be admitted in form, that the challenged decision be reversed, and that judgment be entered as follows:

- (A) To admit his appeal in form.
- (B) To dismiss the appeal filed by BAB in form on the ground of lack of capacity and interest, and to disjoin it from the action.
- (C) To dismiss the appeal of the Public Prosecution in form and in substance.
- (D) To partly ratify the decision of the Investigating Judge with respect to declining to indict him pursuant to Article 111 COLP.
- (E) To reverse the challenged decision and decide to decline to indict him under Articles 391 and 393 Penal Code, to order the respondents to pay all court fees and costs and attorneys’ fees, and to reimburse the amount of the provision.

Petitioner submitted the grounds of cassation on which he relied;

Petitioner filed, on December 12, 2003, what he called “a second addendum to the petition for cassation, with introduction of new documents,” reiterating his demands in the petition for cassation. Then, he filed again, on January 17, 2004, “a third addendum to the petition for cassation, with the addition of a thirteenth appeal reason related to public policy”. He raised, by virtue of this appendix, the conflict of the challenged decision with Articles 828 and 835 COLP.

Defendant BAB, represented by its president, filed a reply memo against the petition for cassation, in which it submitted that it should be dismissed in form because it was not timely filed, and a true copy of the challenged decision certified by the clerk’s office of the indictment chamber was not attached thereto. It also requested its dismissal if it turns out that the original or a certified copy of the power of attorney was not enclosed. It also requested the dismissal of the addendum to the petition for cassation because it was not timely filed as provided under Article 319 CPP. On the merits, it requested the dismissal of the grounds for cassation on the ground of lack of jurisdiction and legal invalidity, and the confiscation of the provision.

The investigating judge of Beirut had issued on September 23, 2003, in action No. 177/2003, Decision No. 151/2003, indicting the Defendant Dr. Muhamad Abdullah Mugraby for the misdemeanor stipulated in Articles 391 and 393 Penal Code, and declining to indict him for the crime provided for under Article 111 COLP on the ground that its elements were not fulfilled, and directing that the Defendant be tried before the Penal Judge in Beirut and ordering him to pay costs.

Based on the above.

I. In Form

A. As to was called Addendum Two and Addendum Three Filed by Petitioner

(Dismissal for not timely filed)

B. As to the Petition for Cassation:

There is no evidence in the file that Petitioner was duly notified the challenged decision....Hence, it was timely filed and fulfills all formal conditions.

But,

There is still a formal condition to admit a petition in cassation, which is the diversity in legal characterization between the investigating judge and the indictment chamber, or involving one or more of the exceptions provided under Article 73 CPP without the necessity of diversity of characterization as Article 311 CPP permits challenging in cassation such formal exceptions before a final decision is made which indicates that such petitions with respect to decisions ruling thereon are absolved of the condition of such diversity of characterization.

Whereas what the petition in cassation contained with respect to the findings of the indictment chamber regarding Articles 391 and 393 Penal Code must be dismissed in form because the appellate indictment affirmed the decision of the investigating judge in this respect. Hence there is no diversity in the legal characterization between the two authorities from this side.

Whereas what the petition in cassation contained as to the grounds related to Article 111 COLP is, for this part, admissible in form, not because what was raised regarding this article is an exception in form but because decision of the investigating judge and the decision of the indictment chamber did not agree as to the legal characterization related to this article. The first authority denied the existence of the elements of the crime in contrast to what the second authority found. The cassation rules of CPP did not deny the right of the defendant to petition for cassation in the event of diversity of characterization. We may not draw on the provisions of Article 135 CPP Paragraph (2) that prohibits a defendant from appealing the decision of the investigating judge indicting him for a misdemeanor. Such prohibition is an exception to the general rule that permits challenging all judicial decisions unless there is a provision to the contrary. Exceptions may not be generalized.

Whereas the petition for cassation is admissible with respect to the grounds related to Article 79 COLP because what is raised in this article of the obligation to have the permission of the council of the bar association to prosecute a lawyer in penal proceedings relates to the exception in form

provided in Article 73 CPP which is the non-admission of a public action for a cause that prevents hearing it or proceeding with it.

Based on the above we are bound to dismiss in form that part of the petition involving Articles 391 and 393 Penal Code and to admit in form that part thereof involving Articles 111 and 79 COLP and the grounds related thereto.

II. On the Merits

1. As to Ground One

Petitioner faults decision for violating Article 121 CCP. The decision was issued although the chief judge should have recused himself due to his existing animosity with Petitioner as provided in Paragraph 7 of Article 120 CCP.

The issue raised under this ground has an impact on the application of Articles 79 and 111 COLP. Hence it is orderly to examine the substance of this ground on the merits.

Whereas the causes for recusal and abstention, unless unknown during the trial, must be pleaded before the court that issued the challenged decision. If not first pleaded then, they may not be raised for the first time before the Court of cassation.

Whereas the cause for abstention submitted by Petitioner was known to him during the proceedings of the action before the Indictment Chamber, particularly that he bases it on the existence of animosity between him and the presiding judge. As he did not plead that cause during the appellate trial he has no right to make this submission for the first time before the Court of cassation.

Therefore the submitted ground must be dismissed.

2. As to Ground Two

Petitioner faults the challenged decision for not declaring the lack of the jurisdiction of the investigating judge to examine the case at hand, an issue related to public order, although the two disciplinary decisions issued against him by the disciplinary council of the bar association did not become

irrevocable pursuant to a judicial decision. This violates Article 65 CPP which requires the investigating judge to declare his incompetence if the action does not fall within his venue or subject matter jurisdiction due to the standing of the defendant.

Whereas when an investigating judge declares his incompetence to examine an action due to the standing of the defendant in accordance with Article 65 such a decision only relates to the event where the defendant, due to his standing, is subject to the competence of another judicial authority in accordance with the rules of personal jurisdiction.

Whereas the immunity pleaded by Petitioner, who submits that he still has the capacity of an attorney, unless an irrevocable judicial decision is issued confirming the two disciplinary decisions, has no effect on the competence of the investigating judge to examine the penal action brought against him. For there is nothing in the law that strips the investigating judge of his personal competence to examine the penal action brought against Petitioner, even on the assumption that he still enjoys the immunity provided for lawyers. The rules of competence provided under article 65 should be understood narrowly, i. e. venue, subject matter jurisdiction and personal jurisdiction. Nothing raised by Petitioner falls within this concept.

Whereas this ground must be dismissed.

3. As to Ground Seven

Petitioner faults the challenged decision for violating Article 7 and 68 CPP by recognizing the capacity and interest of the bar association to bring action and admitting its appeal in form, Although the association did not take the position of personal plaintiff as required by the said articles.

The issue raised by Petitioner has no impact on the decision whether as to dismiss his appeal in form or to set aside the decision of the examining judge as to Article 111 COLP, and his indictment under said article and upholding the said decision under Articles 391 and 393 Penal Code. For the action at hand against him does not require the filing of a personal action by the bar association, which did not appeal the decision of the investigating judge under Articles 391 and 393 Penal Code. The appeal by the public prosecutor as to Article 111 is sufficient to place it before the Indictment Chamber regardless of whether or not the bar association filed an appeal.

Therefore the ground submitted has no impact on the on the findings by the Indictment Chamber with respect to Petitioner, and must be dismissed for lack of efficacy.

4. As to Ground Twelve

Petitioner faults the challenged decision for violating fundamental rules and lack of legal reasoning in indicting him under Articles 391 and 393 Penal Code.

Whereas this ground is no longer admissible as this Court has dismissed in form of that part of the cassation petition related to Articles 391 and 393.

5. As to Ground Three

Petitioner faults the challenged decision for misrepresenting the facts by asserting that he did not submit exceptions in form before his interrogation while, in fact, he did precisely that at the beginning of his interrogation by the investigating judge.

It is clear from the reasoning of the challenged decision that a finding was reached to the effect that Petitioner's appeal should be dismissed in form because he did not submit exceptions in form before his interrogation by the investigating judge. Hence the decision by the investigating judge, that did not address the exceptions, constitutes final decision on the merits of the action. Thus Defendant may not appeal it because it does not fall within the list of Article 135 CPP which determines what decisions may be appealed by defendant.

Whereas although Petitioner/defendant did not actually submit to the investigating judge his exceptions in the form of a memo, it is clear from the minutes of his interrogation by the investigating judge that he raised at the outset that the public action may not be prosecuted against him for lack of permission for his prosecution by the council of the bar association.

whereas what Petitioner submitted before the investigating judge with respect to this issue, and regardless of whether it is unlawful or unlawful, constitutes an exception in form pursuant to paragraph 3 of Article 73 CPP requiring the investigating judge to make a ruling thereon, by admitting or

dismissing it. Defendant has the right to appeal such decision in accordance with Paragraph (B) (2) of Article 135 CPP especially that the law does not require a written or specific format for submitting an exception in form.

Whereas the right to appeal is not destroyed as a result of the indictment decision against Defendant the by the investigating judge adopting the characterization of a misdemeanor, without ruling on the exception in form raised. Defendant still has the right to bring before the Indictment Chamber the exception in form ignored by the investigating judge even though Article 135 CPP does not give him the right to appeal the decision of the investigating judge that in indicted him for a misdemeanor. If the Indictment Chamber accepts his appeal on this basis, it must set aside the decision of the investigating judge both as to the exception in form and on the merits. If the Indictment Chamber dismisses the appeal, it may not examine that part of the decision indicting Defendant.

As the challenged decision, by dismissing defendant's appeal in form on the basis that he did not raise before investigating judge any exception in form, although the minutes of his interrogation before the investigating judge indicate otherwise, at least as to what Defendant raised regarding the permission to prosecute, distorted the facts, it must be reversed in this respect.

Whereas in the light of what we decided in this respect it is no longer necessary to look into the grounds four and six submitted in the petition because they aim to reach the same result.

6. As to Ground Eleven

Petitioner faults the challenged decision for its violation of Article 111 COLP by indicting him under this article although it makes it, as a condition for the fulfillment of the elements of the crime, that the disciplinary decision becomes irrevocable, which is not the case.

Whereas the facts presented indicate that the disciplinary council of the bar association issued on 4/4/2002 the decision precluding Petitioner from practicing the legal profession for three years. Then it issued the second decision on 17/1/2003 striking Petitioner off the roll of the profession. Petitioner appealed both decisions before the civil court of appeal. This court has not yet ruled on the appeals nor taken a position on whether to

suspend the execution of the two disciplinary decisions. The bar association has accused Petitioner, and so did the public prosecution, that he committed the crime stipulated by Article 111 COLP for continuing to practice the legal profession despite the issuance of the two disciplinary decisions.

Whereas Article 111 COLP penalizes every lawyer who practices the profession after he was precluded therefrom or during his temporary suspension or the striking off of his name from the roll of lawyers pursuant to an irrevocable disciplinary decision.

Whereas Article 111 COLP permits the lawyer to challenge before the court of appeal all decisions against him by the disciplinary council.

Whereas it is to be clearly understood from the said Article 111 that the fulfillment of the elements of the crime provided thereunder depends on the disciplinary decision becoming irrevocable, i. e. that it no longer may be challenged by any means of ordinary or extra-ordinary recourse as defined in Article 553 CCP.

Whereas the above reasoning may not be undermined by the submission, for the sake of argument, that the decisions issued by the disciplinary council of the bar association are immediately enforceable because having such a quality does not result in making them irrevocable for the purpose of applying Article 111. For the two standings (or characterizations) are different both as to contents and effects.

Whereas if we were to accept that a disciplinary decision issued by the disciplinary council of the bar association has the quality of immediate enforceability this does not at all conflict with the irrevocability condition of Article 111. The two concepts may be reconciled on the basis that the quality of immediate enforceability provided for a disciplinary decision precludes the person so precluded from using his professional standing or practicing his profession as a lawyer regardless of whether the disciplinary decision is being challenged before the court of appeal. But his continuing to use his professional standing and practicing his professional work despite the disciplinary decision precluding him from that does not constitute the crime provided by Article 111 until an irrevocable decision is issued confirming the disciplinary decision. Thus the violations of such decision committed before it became irrevocable constitute from the date it becomes irrevocable the crime penalized under Article 111 COLP.

Whereas the foregoing does not conflict either with the prior decisions of the court of cassation with respect to the decisions by the president of the bar association and its council pursuant to Articles 79 and 94 COLP relative to the permission to the prosecution of a lawyer or bringing personal action against him. These decisions were considered to be in force from the date they were issued regardless of the filing of appeals challenging them. For COLP did not require, with respect thereto, that the decision becomes irrevocable as it did for the decision by the disciplinary council for applying the provisions of Article 111.

Whereas the challenged decision, by finding in favor of indicting Petitioner for the misdemeanor under Article 111 COLP, without ascertaining that the disciplinary decision became irrevocable, violated the provisions of said article; thus its reversal is mandatory with respect to the foregoing.

Whereas in the light of what is decided hereinabove there is no more need to examine the contents of Grounds Five, Eight, Nine and Ten of the cassation petition which all lead to the same result.

After cassation,

This court sits in place of the indictment chamber at Beirut after cassation and has to examine what was reversed in accordance with the procedure before the said body.

I. As to the Appeal Filed by Appellant Muhamad Mugraby

A. As to Form

Whereas there is no evidence that Appellant Muhamad Mugraby was duly notified of the decision by the investigating judge against him of 23/9/2003, the appeal has been filed within the legal delay.

Whereas, even though Petitioner Muhamad Mugraby, as Defendant, may not, in the light of Article 135 (2) CPP, appeal the decision of the investigating judge finding in favor of indicting him pursuant to Articles 391 and 393 Penal Code, nevertheless he is entitled to appeal said decision if he had raised before the investigating judge one of the exceptions provided under Article 73 CPP but the latter abstained from ruling thereon in an

interlocutory decision or in his final decision as aforesaid under Ground Three for cassation.

Whereas Defendant Muhamad Mugraby had raised, when interrogated by the investigating judge, and before the beginning of the interrogation, the following two exceptions:

- The exception that the prosecution was not valid because the conditions of Article 79 COLP were not fulfilled as to the requirement that, before prosecution, an advance permission to prosecute be issued by the council of the bar association.
- That the application of Article 111 requires, for incrimination, the existence of a duly exiting decision by the bar association disciplinary council and that such decision be irrevocable, while the two decisions against him are non-existent and he is duly registered with the bar association and his name has not been stricken off therefrom by a decision of the court of appeal.

Whereas the first exception submitted based on Article 79 COLP as to the advance permission to prosecute constitutes an exception in form within the meaning of Paragraph 3 of Article 73 CPP because it results in the non-admissibility of the public action, and precludes its prosecution, but the second exception relative to said Article 111 and what is related thereto does not fall within the meaning of the exceptions in form provided by Article 73. Rather, it is a defense on the merits because it examines the availability of material elements of the crime stipulated by Article 111, an issue related to the merits. Tackling it requires examining the subject of the action and investigating it. Thus Defendant may not raise this issue pursuant to Article 135 CPP which does not permit him to raise in his appeal grounds of defense related to merits.

Whereas the appeal filed by Petitioner Muhamad Mugraby is admissible in form only within the framework of the exception based on Article 79 COLP and is otherwise inadmissible in form.

B. As to the Merits Regarding the Exception Based on Said Article 79

Whereas Appellant Muhamad Mugraby seeks in his appeal to set aside the decision of the investigating judge for not ruling on the exception he made

based on Article 79 COLP and that this exception be accepted after the action is reheard, resulting in the dismissal of the action and reversing the indictment. He submits that the lack of a ruling on this exception results in the violation of the presumption of innocence related to public policy and the upholding of invalid investigating procedures that violate the said article.

Whereas Article 79 COLP stipulates that a lawyer may not be prosecuted for an act arising out of the practice of the profession or occasioned thereby unless the council of the bar association decides to give permission to prosecute, provided that the issuance of such permission or its denial takes place within one month from the receipt by the president of the bar association of a written letter advising him of the act. If the one month delay lapses without a decision made, permission is to be presumed.

Whereas the purpose of the permission to prosecute provided in the said Article 79 is to provide a safeguard to lawyers via their association against abuse of prosecution against them for the purpose of prohibiting them or influencing them in a way that compromises their practice of their functions with liberty and objectivity.

Whereas such an objective is not presented, and hence the permission to prosecute is unnecessary, when the penal complaint against them originates in the bar association in the person of its president regardless of whether such complaint is supported by personal action, because such a complaint constitutes in itself a permission to prosecute the lawyer without the need for any other process.

Whereas the above may not be rebutted by stating that the filing of a penal complaint by the association in the person of its president may not replace the permission to prosecute because the permission is issued according to Article 79 by the association's council and not the president. Such a rebuttal is not legally valid as it is to be understood from Article 79 COLP that the request for the permission to prosecute is to be sent to the president who refers it to the council to rule on it within one month or else permission is to be presumed. Hence the filing by the president of the penal complaint in the name of the association against the lawyer constitutes an abstention by the president of referring the request of the permission to prosecute to the council to rule on it within the legal period. Thus the permission to prosecute becomes a fact as long as the association's council is unable to rule on it because it was not referred thereto.

Whereas the occurrence of the permission to prosecute is an administrative act which is in force from the date it takes place even though it may be challenged before the court of appeal.

Whereas, and based on the above, deeming the penal complaint filed by the president of the association against Defendant Muhamad Mugarby as a virtual permission to prosecute makes the exception raised by the latter based on said Article 79 worthy of dismissal. Hence the grounds of appeal based he submitted in relation to the said exception must also be dismissed.

II. As to Article 111 COLP Raised in the Light of the Appeal of the Public Prosecution and the Appeal of the Bar Association

Whereas the investigating judge reached a finding in his appealed decision rejecting the indictment of Defendant Muhamad Mugarby for the misdemeanor stipulated under Article 111 COLP for the non-fulfillment of its elements.

Whereas the appellate public prosecution of Beirut and the bar association appealed this part of the decision and requested its reversal in this regard and the indictment of Defendant Muhamad Mugarby under said Article 111.

Whereas the appeal filed in this regard must be dismissed on the merits because the fulfillment of the elements of the crime provided under Article 111 COLP is conditioned upon the decision of the association's disciplinary council's decision becoming irrevocable in accordance with the causes and reasons above stated in the cassation decision in the course of responding to Ground Eleven raised in this respect.

Whereas the papers of the action do not evidence that the two disciplinary decisions issued against Defendant Muhamad Mugarby have become irrevocable, which necessitates declining his indictment for the crime stipulated under Article 111 COLP for the non-fulfillment of its elements.

Whereas the decision of the investigating judge, by reaching this same conclusion in Paragraph (2) of his adjudication clause, has not violated the law in this respect, which requires its confirmation and the dismissal of the two appeals.

Therefore,

It is hereby decided unanimously:

A. As to the cassation petition

I. As to form

1. To reject in form the second and third addendums to the cassation petition submitted by Petitioner.
2. To dismiss in form that part of the cassation petition that contains the grounds related to Articles 391 and 393 Penal Code and to confirm the challenged decision in this respect.
3. To admit the cassation petition in form as to its part containing the grounds relative to Articles 111 and 79 COLP.

II. As to substance

1. To dismiss the cassation petition on Grounds (1), (2), (7) and (12).
2. To admit the cassation petition on the merits on Grounds (3) and (11), and to strike down the challenged decision and to duly rehear the case within the framework of cassation.
3. To reimburse the cassation provision.

And after cassation

B. As to the Appeal

I. As to form

1. To admit in form the appeal filed by Appellant Muhamad Mugraby within the framework of his exception based on Article 79 COLP.
2. To dismiss his appeal in form in all other respects.

II. On the merits

1. To dismiss the appeal by Muhamad Mugraby on the merits.
2. Further to the substance of the cassation decision, to dismiss the two appeals filed by the public prosecution and the and the bar association at

Beirut on the merits with respect to their content related to Article 111 COLP , and to affirm the decision of the investigating judge as to its content declining the indictment of Defendant Muhamad Abdallah Mugarby for the crime stipulated by Article 111 COLP for the non-fulfillment of the elements of this crime.

3. To hold that the other parts of the decision of the investigating judge unaffected by this adjudicating clause, and hence irrevocable, and to dismiss all the additional grounds or requests or in conflict with the present decision.

4. To refer the file to the public prosecution before the court of cassation to refer the same to the penal judge at Beirut in accordance with the decision of the investigating judge.

5. To reserve the legal costs for the present appeal.

Decision issued on 10/3/2004

Acting Chief Judge (Riashi) Judge (Makke) Judge (Haidar) Clerk (Salwa)