

DISTRICT COURT OF MITROVICĚ/MITROVICA

P. No. 70/08

26 August 2010

IN THE NAME OF THE PEOPLE

THE DISTRICT COURT OF MITROVICĚ/MITROVICA, in the trial panel composed of EULEX Judge Agnieszka Klonowiecka-Milart, as presiding judge, and EULEX Judges Charles L. Smith, III, and Nikolay Entchev, as panel members, with the participation of EULEX Legal Officer Zane Ratniece as recording officer, in the criminal case against:

A. B. , charged, according to the Indictment of the Public Prosecutor PP. No. 50/08, dated 15 April 2008, with Murder, under Article 146 Paragraph (1) of the Provisional Criminal Code of Kosovo (the PCCK) and Light Bodily Harm, under Article 153 Paragraph (2) as read with Paragraph (1) of PCCK;

B. B. , charged, according to the Indictment of the Public Prosecutor PP. No. 50/08, dated 15 April 2008, with Participation in a Brawl, under Article 155 Paragraph (1) of PCCK; and

I. B. , charged, according to the Indictment of the Public Prosecutor PP. No. 50/08, dated 15 April 2008, with Participation in a Brawl, under Article 155 Paragraph (1) of PCCK;

After having held the main trial hearings open to the public on 23, 25 and 26 August 2010, in the presence of the Accused **A. B.** , his Defence Counsel Mahmut Halimi, the Accused **B. B.** , his Defence Counsel Agim Lushta, the Accused **I. B.** , EULEX Public Prosecutor Neeta Amin, the Injured Party M. B. (of the deceased Victim A. B.) (except that Injured Party M. B. was not present at the hearing on 25 and 26 August 2010);

After having accepted the plea agreement at the main trial hearing on 25 August 2010 and after the plea agreement has been filed with the Registry of District Court of Mitrovicë/Mitrovica on the same day;

After the trial panel's deliberation and voting held on 26 August 2010;

Pronounced in public and in the presence of all three Accused, both Defence Counsel and the EULEX Public Prosecutor Neeta Amin the following:

JUDGMENT

I.

The Accused **A. B.**, nickname, father's name, mother's name, mother's maiden name, born on, in, residing in, no known previous conviction, in detention on remand since until, in house arrest since;

is

FOUND GUILTY

because on at around hours, in, during the course of a fight that was taking place between **B. B.** and the deceased **A. B.**, and **F. F.**, **A. B.** intervened to help his **B. B.** t Bajraktari, and having heard **F. F.** encourage **A. B.** to cut him, he pulled a from his jacket pocket and stabbed **A. B.**, causing injuries, as a result of which **A. B.** died.

By doing so, the Accused **A. B.** committed and is criminally liable for the criminal offence of **Murder**, under Article 146 Paragraph (1) of the PCCK.

For this criminal offence the Accused **A. B.** is

SENTENCED

to 6 /six/ years of imprisonment.

The time spent in detention on remand since _____ and in house arrest since _____ is to be credited towards the sentence pursuant to Article 73 Paragraph (1) of the PCCK.

II.

The charge of Light Bodily Harm, under Article 153 Paragraph (2) as read with Paragraph (1) of PCCK, against the Accused **A. B.**, **IS REJECTED**, following the withdrawal of the charge by EULEX Public Prosecutor, pursuant to Article 389 Item 1) of the CPCK.

III.

The charge of Participation in a Brawl, under Article 155 Paragraph (1) of PCCK, against **B. B.**, father's name _____, mother's name _____, mother's maiden name _____, born on _____, in _____, residing in _____, in detention on remand since _____ until _____, **IS REJECTED**, following the withdrawal of the charge by EULEX Public Prosecutor, pursuant to Article 389 Item 1) of the CPCK.

IV.

The charge of Participation in a Brawl, under Article 155 Paragraph (1) of PCCK, against **I. B.**, father's name _____, mother's name _____, mother's maiden name _____, born on _____, in _____, residing in _____, in house arrest since _____ until _____, **IS REJECTED**, following the withdrawal of the charge by EULEX Public Prosecutor, pursuant to Article 389 Item 1) of the CPCK.

V.

The Accused **A. B.** shall reimburse the costs of criminal proceedings pursuant to Article 102 Paragraph (1) of the CPCK with the exception of the costs of interpretation and translation. A separate ruling on the

amount of the costs shall be rendered by the court when such data is obtained pursuant to Article 100 Paragraph (2) of the CPCK.

REASONING

1. JURISDICTION OF THE COURT

1.1. *Subject matter and territorial jurisdiction*

According to Article 23 Paragraph (1) of the CPCK, a district court shall have jurisdiction to adjudicate at first instance a criminal offence punishable by imprisonment of at least five years or by long-term imprisonment.

The Indictment of the Public Prosecutor PP. No. 50/08, dated 15 April 2008, *inter alia*, charged the Accused **A. B.** with Murder, under Article 146 Paragraph (1) of the PCCK. The prescribed punishment for this criminal offence is at least five years.

Therefore, the District Court of Mitrovicë/Mitrovica has subject matter jurisdiction over the case.

The charged criminal offences against all three Accused were allegedly committed in ¹

Therefore, pursuant to Article 27 Paragraph (1) of the CPCK, the District Court of Mitrovicë/Mitrovica has also territorial jurisdiction over the case.

1.2. *Jurisdiction of EULEX judges*

Article 3.3 of the Law No.03/L-053 'On the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo' states that in cases of subsidiary competence, EULEX judges can take over a case upon appointment by the President of the Assembly of EULEX judges. On 18 November 2009, the President of the Assembly of EULEX judges, upon the petition of the EULEX Prosecutor, decided to assign to the case EULEX judges of Mitrovicë/Mitrovica District Court.

¹ Indictment of the Public Prosecutor PP. No. 50/08, dated 15 April 2008

2. APPLICABLE LAW

The applicable substantive law is the one in force at the time when the criminal offence was committed. On _____, when the offence was committed, in force was the PCCK, adopted with the UNMIK Regulation 2003/25, effective since 06 April 2004. After commission of the criminal offence (i.e., after _____) the PCCK was amended by the Law No. 03/L-002. The Law No. 03/L-002 amended the PCCK by stipulating *inter alia* that the court shall impose a sentence mitigating punishment when the perpetrator has entered a plea of guilty, and the written plea agreement includes a clause mandating mitigation of punishment. In particular case this provision as introduced into the PCCK with the Law No. 03/L-002 is more favorable to the perpetrator, because adds a statutory mitigating factor. Therefore, by virtue of being more favorable to the perpetrator, the amendments according to the Law No. 03/L-002 in the present case apply retroactively.

As to procedural law, the court followed the procedure pursuant to CPCK, in force at the time of conduct of court proceedings, as amended by the Law No. 03/L-003 introducing into the CPCK, previously titled Provisional Criminal Procedure Code of Kosovo (PCPCK), the guilty plea agreement.

3. GUILTY PLEA AGREEMENT

3.1. Acceptance of the guilty plea agreement by the court

The Prosecution, the Accused **A. B.** _____ and his Defence Counsel entered the plea agreement, dated 23 August 2010, signed by the EULEX Chief Public Prosecutor on 23 August 2010, and the Accused **A. B.** _____, his Defence Counsel Agim Lushta and the EULEX Public Prosecutor Neeta Amin on 24 August 2010.

The plea agreement, as amended during the main trial session on 25 August 2010,² was accepted by the court in view of the following:

First, as per Article 308 A, Paragraph (12) Items (i), (ii) of CPCK:

The court verified that Accused **A. B.** _____ had understood the nature and the consequences of the guilty plea. The Presiding Judge at the main trial

² Record of the main trial session 25 August 2010, pp. 3-5 (in English language)

hearing on 25 August 2010 personally questioned **A. B.**, whether he had read the plea agreement and that it was clear for him. The Accused gave affirmative answer. Further, **A. B.** confirmed that consequences of the plea agreement are that after the court accepts the plea agreement, he cannot withdraw from it; and that, by entering into plea agreement, he admits committing the criminal offence of Murder.³

It was verified by the court that in signing the agreement Accused **A. B.** had been represented by Defence Counsel. As explained by EULEX Public Prosecutor Neeta Amin at the main trial hearing on 25 August 2010, the Defence Counsel of **A. B.** had approached the Public Prosecutor with the request to enter into plea agreement. Between 18 August and 23 August 2010 the EULEX Public Prosecutor Neeta Amin and the Accused's Defence Counsel Agim Lushta had had meetings in which the plea agreement was discussed.⁴ The Accused **A. B.** was also given sufficient time to consult his Defence Counsel during the main trial, regarding amendments to the plea agreement.⁵

Second, as per Article 308 A, Paragraph (12) Item (iii) of CPCK:

The court determined that the guilty plea was supported by the evidence in the file:

a. The plea agreement regarding factual basis stated that before the incident on , earlier that day there was a disagreement between **B. B.**, his friend and the deceased Victim **A. B.**. The trial panel found that this statement of facts in the plea agreement was supported by the following evidence in the file:

The witness on , testified before Kosovo Police Service that on the day of he was together with **B. B.**. He and **B. B.** met a group of three persons, which included a person named F. . Another person in the group started assaulting and beating **B. B.**. Seeing this, immediately left.

The witness to the crime scene F. F. , on , *inter alia* testified to Kosovo Police Service that on the day of he was together with

³ *ibid.*, pp.5, 6 (in English language)

⁴ *ibid.*, p.2 (in English language)

⁵ See Record of the main trial session 25 August 2010, p.4 (in English language)

the deceased Victim A.B. . Earlier on the day of , while F.F. and A.B. were in , A.B. had an argument with a person, who F.F. did not know. But during the photo identification of suspects, on , F.F. identified this person to be B.B. , the of the Accused A.B. . F.F. also testified that this person, whom he identified as B.B. , before the misunderstanding started between B.B. and A.B. , had been together with another person.

b. The plea agreement regarding factual basis further stated that Accused A.B. came across the fight between his B.B. and A.B. and F.F. . A.B. intervened to help his . When A.B. heard F.F. encouraging A.B. to cut him, A.B. pulled out a and stabbed A.B. once on the upper right back part of his body, as a result of which A.B. died. The trial panel found that this statement of facts in the plea agreement was supported by the following evidence in the file:

The circumstances of the incident as provided by the witness F.F. , on , before Kosovo Police Service, differed from their description in the plea agreement, as he claimed that it had been him and A.B. who were being assaulted and not *vice versa*. However, F.F. also stated that at the place, where A.B. was hit with the knife, there was present also the person, with whom A.B. had had previously a disagreement, and whom F.F. identified as B.B. . F.F. stated that this person (i.e., B.B.) had not hit A.B. with the , it had been this other person.

A.B. and B.B. both testified, on , before Kosovo Police Service that, after A.B. had intervened, F.F. encouraged A.B. to cut him. B.B. stated that in that moment his A.B. Bajraktari and A.B. got into fight. And A.B. stated that he noticed in the hand of A.B. a , raising it up with the blade in his direction. In the moment A.B. pulled out a and stabbed A.B. in upper part of his body.

The autopsy report, dated , regarding the deceased A.B. provided that in the backside of the right shoulder, next to the arm, was a hole, centimetres wide, suspected to be caused with a blunt object (). His internal organs () were damaged, and according to a pathologist the depth

of penetration was over centimetres. The autopsy report stated that it is suspected that the cause of his death was a stab with a 'cold weapon' ().

In view of aforementioned the court considered that the guilty plea of **A.B.** to Murder was supported by the evidence in the file.

c. The plea agreement included a statement that the murder of **A.B.** presents a credible but excessive necessary defence case.

In this regard the trial panel assessed that according to the autopsy report, dated , the deceased **A.B.** had a stab wound in the backside of his shoulder. The wound on the backside of the shoulder can be seen in photograph number . The autopsy report stated that no signs of violence were found in front part of his body, which indicates that **A.B.** could have been approached from the back. **A.B.** had testified before Kosovo Police Service on , that as soon as he saw **A.B.** lifting up the in his direction, he pulled out a and stabbed him. From this statement of **A.B.** it can be inferred that no physical struggle occurred between **A.B.** and **A.B.**, which could affect direction of stab. Further, according to the report from the crime scene, dated , **A.B.** was found lying face down on the ground and in his left hand there was a . **A.B.**, therefore, was not found with a but a may have been mistaken for one and is, in any event, a dangerous tool.

Therefore, the Panel accepted that the averment of acting in defence was plausible, although the circumstances did not allow exonerating the accused – he voluntarily joined the fight between **B.B.** and **A.B.**, without ascertaining whether there was an unprovoked attack.

Third, as per Article 308 A, Paragraph (12) Item (iv) of CPCK:

The court found that none of the circumstances under Article 316 Paragraphs (1) to (3) of CPCK exists.

Based on the foregoing the plea agreement, as amended during the main trial session on 25 August 2010, was accepted by the court.

3.2. Involvement of injured parties

a. The plea agreement stated that Injured Party F.F. could not be contacted and that all the efforts of Prosecution to contact him had failed. The court ascertained that F.F. had been duly invited for the confirmation of indictment hearing and served with standard information on the injured party's rights. The court again summoned F.F. for the main trial hearings, as initially scheduled on 23, 24, 25 and 26 August 2010. When the court at the main trial hearing on 23 August 2010 established that F.F. had not appeared, the court sent out another summon, which on 24 August 2010, at 11:30 hrs, was personally delivered at his place of residence. F.F. was not present at his place of residence, and as explained by his B.F., who also there resided, he F.F. was staying in .

b. The Injured Party M.B. (of the deceased Victim A.B.) had been summoned by the court for the main trial hearings, as initially scheduled on 23, 24, 25 and 26 August 2010. M.B. was present at the first main trial hearing on 23 August 2010, and was informed about the intended plea negotiations and explained its aim and consequences of the plea agreement. He was notified about the next main trial hearing on 25 August 2010,⁶ and encouraged to discuss the issue with the Prosecution. He however did not attend subsequent hearings. The plea agreement stated that Injured Party M.B. had been informed of the results of the plea negotiations and the plea agreement. As explained by the EULEX Public Prosecutor Neeta Amin she had met with the Injured Party M.B. to discuss at length the negotiated plea agreement, and explained fully his rights and the reasons for the negotiated plea agreement. The statement of M.B., following the meeting, was included in the plea agreement. However, later M.B. had refused to sign the injured party statement included in the agreement.

Therefore, the court concluded that sufficient efforts had been made to involve Injured Parties F.F. and M.B. in the proceedings, and, therefore, their absence or refusal to participate could not be an obstacle in proceeding based on the plea agreement.

⁶ *ibid*, p.7 (in English language)

3.3. Sentencing

In determining the punishment for **A.B.** the Court took into consideration that Prosecution recommended the punishment of six (6) years imprisonment.

Further the court took into account the following mitigating circumstances:

- a. Pursuant to Article 66 Paragraph (3) of the PCCK (as amended by the Law No. 03/L-002), the court considered as a mitigating circumstance the fact that parties had entered the plea agreement. Also, on the next day after the incident, on _____, when the Accused **A.B.** was examined by the Kosovo Police Service, he confessed that he had stabbed the Victim **A.B.** with the _____.
- b. Since _____ the Accused **A.B.** has been under house arrest, and during all this time the court was not informed of violation of house arrest, and **A.B.** did not take any action in order to avoid criminal proceedings.
- c. The evidence in the file indicated that Accused **A.B.** mortally stabbed the Victim **A.B.** because of assault of his **B.B.** _____, and to preempt the attack of the deceased Victim **A.B.** on the Accused **A.B.** himself.
- d. The plea agreement, as supported by the evidence, provided that **A.B.** came across the fight by coincidence, and, therefore, was not an instigator of the incident, within which the crime was committed.

In view of these circumstances the court accepted the punishment of six (6) years imprisonment as recommended by the Prosecution, and sentenced the Accused **A.B.** to six (6) years imprisonment.

The time spent in detention on remand since _____ and in house arrest since _____ is to be credited towards the sentence pursuant to Article 73 Paragraph (1) of the PCCK.

4. OTHER CHARGES

At the main trial hearing on 25 August 2010 the EULEX Public Prosecutor Neeta Amin withdrew the charge of Participation in a Brawl, under Article 155 Paragraph (1) of PCCK, against **B.B.** _____, and **I.B.** _____. Therefore, pursuant to Article 389 Item 1) of the CPOK the court rejected the charge of Participation in a Brawl against **B.B.** _____, and **I.B.** _____.

The Indictment PP. No. 50/08, dated 15 April 2008, charged the Accused **A. B.** also with Light Bodily Harm, under Article 153 Paragraph (2) as read with Paragraph (1) of PCCK. The EULEX Public Prosecutor Neeta Amin withdrew this charge at the main trial hearing on 26 August 2010. Therefore, pursuant to Article 389 Item 1) of the CPCK the court rejected the charge of Light Bodily Harm against **A. B.**

5. Costs

The Accused **A. B.** shall reimburse the costs of criminal proceedings pursuant to Article 102 Paragraph (1) of the CPCK with the exception of the costs of interpretation and translation. A separate ruling on the amount of the costs shall be rendered by the court when such data is obtained pursuant to Article 100 Paragraph (2) of the CPCK.

**District Court of Mitrovicë/Mitrovica
P. No. 70/08**

Prepared in English, an authorized language.

Presiding judge:

Recording officer:

~~Agnieszka Klonowicka-Milart~~
EULEX Judge

Zane Ratnice
EULEX Legal Officer

Panel members:

Charles L. Smith, III
EULEX Judge

Nikolay Entchev
EULEX Judge

Legal Remedy: Authorized persons may file an appeal in written form against this judgment to the Supreme Court of Kosovo through the District Court of Mitrovicë/Mitrovica within fifteen (15) days from the date the copy of the judgment has been received, pursuant to Article 398 Paragraph (1) of the CPCK.