

Supreme Court of Kosovo
Ap.-Kž. No. 402/2006
8 September 2009
Prishtinë/Priština

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel constituted in compliance with Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure ("KCCP"), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo ("Law on Jurisdiction"), composed of:

- Guy Van Craen, EULEX Judge, as presiding and reporting judge,
- Maria Giuliana Civinini, EULEX Judge, as member of the panel
- Emilio Gatti, EULEX Judge, as member of the panel
- Avdi Dinaj, Supreme Court Judge, as member of the panel, and
- Agim Krasniqi, Supreme Court Judge, as member of the panel;

Assisted by Judit Eva Tatrai, EULEX Legal Officer, as recording officer, Vlora Johnston and Sonila Macneil, EULEX court recorders, Arlinda Gjebrea, Nexhmi Rexhepi and Anamarija Richter, EULEX Interpreters;

In the presence of the Public Prosecutors, Anette Milk EULEX Prosecutor and Bademe Sllamniku State Public Prosecutor, Defence Counsel Enver Nimani, and Defendant G F ;

In the sessions held on 8 September 2009, following the deliberation of the panel concluded on the same day;

In the criminal case against:

G F

Charged with two counts of Aggravated Murder, defined and penalized under Article 30 paragraph (2) items 2) and 3) of the Criminal Law of Kosovo (CLK), in relation with Article 22 of the Criminal Law of the Socialist Federal Republic of Yugoslavia (CL SFRY), as read with Article 147 items 4) and 6) and Article 23 of the Criminal Code of Kosovo (CCK), and four counts of Attempted Aggravated Murder, defined and penalized under Article 30 paragraph (2) item 6) of the CLK, in relation with Articles 22 and 19 of the CC SFRY, as read with Article 147 paragraph 10 and Articles 20 and 23 of the CCK;

Deciding on the appeal of the Public Prosecutor filed on the detriment of the defendant against the verdict of the District Court of Prishtinë/Priština, P. No. 716/2005, dated 11 May 2006;

Having reviewed the court records, heard the arguments of the Public Prosecutor, the Defence Counsels and the Defendant, and having analysed the relevant laws;

Pursuant to Article 423 of the KCCP, the Supreme Court of Kosovo renders the following

JUDGMENT

The appeal of the public prosecutor filed on the detriment of the defendant is **REJECTED as unfounded**, and the verdict of the District Court of Prishtinë/Priština, P. No. 716/2005, dated 11 May 2006 is **AFFIRMED**.

REASONING

Procedure:

The timely appeal of the Public Prosecutor, filed on 24 July 2006, against the verdict pronounced 11 May 2006 which acquitted the accused G F , is admissible.

The public session of the Supreme Court, to which all parties were duly summoned including the injured parties, was held 8 September 2009; the injured parties were absent.

The public prosecutor appealed the verdict to the detriment of the defendants, on the grounds of *substantial violations of the provisions of the criminal procedure*, mainly in the form of *erroneous or incomplete determination of the factual situation*.

In support of her appeal, the public prosecutor argues that the first instance court acquitted the defendant because of the absence of eyewitnesses that could identify the defendant as one of the perpetrators. She finds that the physical evidence, that is the weapon that was seized from the defendant which matched six 7.62 cal cartridge cases found at the crime scene, overweighs the absence of the eyewitnesses and should convince the panel beyond reasonable doubt that the defendant was in fact one of the perpetrators.

Secondly, the public prosecutor opines that the verdict suggests that if the six casings were discovered on the crime scene five days after the incident, then it is doubtful if those were actually fired at the crime scene on the night of 17 March 2004. The public prosecutor is on the opinion that since the defendant was at all times in the possession of the said weapon from its purchase until it's temporary confiscation, one can only conclude that the six 7.62 cal cartridge cases connect the weapon to the crime scene.

Further on, the public prosecutor disagrees with the findings of the verdict that the crime scene inspection was not correct and reliable. As the public prosecutor argues, the fact that the police officers attending the crime scene were not trained for crime scene inspection and

were not endowed with the proper equipments do not make the results of the crime scene investigation unreliable. It only explains why they were not able to find all shell cases at the first time.

The public prosecutor concludes that since G F admitted that he had possessed the weapon at all times, this weapon connects him to the crime scene where it was fired at D and B S causing their death, and endangering the life of V S , and attempting to kill four Serbian KP Officers.

Based on these arguments, the public prosecutor moved the panel of the Supreme Court to modify the first instance judgment by pronouncing G F guilty of the charges, or alternatively to return the case to the first instance court for retrial.

The Office of the State Public Prosecutor partially stood by the appeal of the public prosecutor and moved the Supreme Court to annul the first instance judgment and return the case for retrial for the following reasons.

OPPK argues that the trial court's finding that there was insufficient evidence in support of the criminal liability of the defendant is due to its own failure to correctly and completely establish the facts. She refers to precedents of the Supreme Court of Kosovo (Ap.-Kž. No. 91/2002 and Ap.-Kž. No. 514/03) and concludes that "*in dubio pro reo*" means a state of uncertainty reasonably remaining after an exhausting available means of evidence. OPPK opines that the prosecution successfully established a *prima facie* case against the defendant. His own admission of having been in the continuous possession of the weapon should have led the court to the conclusion that he's criminally liable for the criminal offences against the S family and the Serbian KP Officers.

OPPK finds that the trial panel failed to acquire further investigative actions to complete the factual situation as well as it has failed to properly assess all administered evidence. The panel also erred when refusing all the motions of the parties for further evidence especially that of the defence counsel regarding the alibi of the defendant, as it would have had a direct effect on the assessment of his credibility. Statements of alibi witnesses (family members or dwellers of the same house) could have also helped establish whether the weapon could have been in someone else's possession on the critical night.

OPPK adds that the crime scene inspection was secured and carried out as soon as it was possible. Although it was KP Officer D D 's first crime scene investigation he was able to secure the area, looked for traces and took pictures of each findings. Therefore, OPPK concludes that based on the testimonies of the KP Officers, investigators and forensic experts, it is unequivocally established that all the recovered cartridge cases were found at the crime scene, and the first instance court's suggestion that some of the cases could have been placed there maliciously is unreasonable and in contradiction with the administered evidence. OPPK submits that the weapon was found eight months later in the possession of the defendant and ballistic examinations was carried out, hence it is not reasonable to believe that eight months prior to the discovery of the murder weapon someone had been able to

maliciously place the cartridge cases in the area that would connect the weapon and the defendant to the crime scene.

Regarding the date when the incriminated cartridge cases were found, OPPK explains that cartridges exposed to natural phenomenon: rain, sun, cold, etc. for five additional days, would be more oxidised than ones collected on the following day. Further forensic analysis would reveal when the six relevant cartridge cases were found. OPPK also finds that the impossibility to reposition the cases on the scene and the contamination of the crime scene have no relevant effect on the final conclusion of the court, as the prosecution did not base its case on the footprints found in the area. The fact that the cartridge cases found at the crime scene matched the weapon seized from the defendant who was at all times continuously in the possession of the weapon, corroborated with further questioning of witnesses, KP Officers and family members of the victim, neighbours would reveal the factual situation of the case.

Based on these reasons, OPPK submits that retrial proceedings would eliminate the above shortcomings and the court would be able to establish the facts fully and correctly.

Facts and findings:

After reviewing and examining the case files and the appealed verdict and after analyzing the reasoned appeal of the Public Prosecutor, the response of the Defence and the opinion emitted by the Public Prosecutor, the Supreme Court concludes:

- that the first instance court established correctly the material facts which happened on the evening of the 17 March 2004 and which resulted in the death of D and B S
- that the first instance court, after properly examining and analyzing all the presented gathered evidence, regularly decided that no reliable evidence is available in order to conclude without reasonable doubt, the presence at the crime scene and/or the participation in whatever form or capacity of the accused to the crime. By doing so the first instance court stressed correctly the doubtful (not professional) collection of the evidence at the crime scene and the absence of other reliable evidence which can link the defendant directly to the killings he is accused of.

The Supreme Court does not share the opinion of the public prosecutor that the first instance court based G F 's acquittal solely on the absence of eyewitnesses. It is indisputable that there were no eyewitnesses to the events of the 17 March 2004 in front of the home of the victims, However, this is not the mere reason that led to the defendant's release from all charges. The first instance verdict also refers to the improper crime scene inspection by the Police which further aggravated the improper administration of exhibits, cartridge cases in the present case.

Further on, the Supreme Court also disagrees with the public prosecutor's opinion according to which the six casings discovered on the crime scene five days after the incident and the admission of the defendant of having possessed the weapon at all times prove beyond reasonable doubt that those were actually fired at the crime scene or, moreover, fired by the defendant on the night of 17 March 2004. The Supreme Court does not adhere the thesis of the Public Prosecutor that the ballistic report coupled with the defendants statement (saying

that the AK47 never left his home and never was given to somebody else) proofs not only that the accused lied but also that the accused took the firearm, went to the crime scene, fired at the victims and later on at the police officers. This thesis based on the doubtful starting point (doubtful findings/evidence) can not be subscribed by the Court.

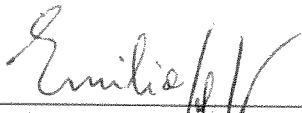
Likewise the Supreme Court does not adhere to the opinion of the State Public Prosecutor that alibi witnesses would contribute to the completeness of the factual situation established by the first instance court. It is indeed arguable that some of the cartridge cases could have been maliciously placed at the crime scene to compromise the defendant eight months prior to when his weapon became known to the Police. However, more than five years after their discovery it is not plausible that further forensic examinations on the possible corroding of the cartridge cases would reveal the exact time or day when and where they had been fired. This kind of examination could have been done during the investigation phase.

Based on the above reasons the Supreme Court finds that the first instance court correctly and in compliance with Article 3 paragraph (2) KCCP acquitted the accused.

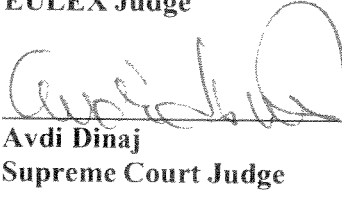
The Supreme Court did not find grounds to assert the Public Prosecutor's argument on the "erroneous or incomplete determination of the factual situation" nor on any other forms of "substantial violation of the provisions of the criminal procedure". Therefore the Supreme Court rejects the appeal and confirms the appealed first instance verdict of acquittal.

Supreme Court of Kosovo
Ap.-Kž. No. 402/2006
8 September 2009
Prishtinë/Priština

Members of the panel:



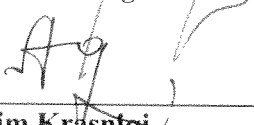
Emilio Gatti
EULEX Judge



Avdi Dinaj
Supreme Court Judge

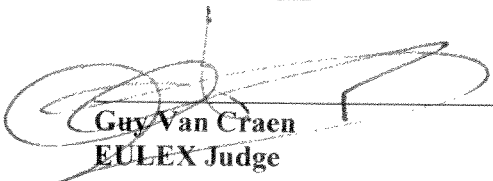


Maria Giuliana Civinini
EULEX Judge



Agim Krasniqi
Supreme Court Judge

Presiding Judge:



Guy Van Craen
EULEX Judge

Recording officer:



Judit Eva Tatrai
EULEX Legal Officer