SUPREME COURT OF KOSOVO
PKL-KZZ 31/10
Date: 01 November 2010

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Martti Harsia as Presiding Judge, with EULEX Judges Lars Dahlstedt and Harri Katara and Kosovo Judges Salih Toplica and Marije Ademi as members of the panel, in the presence of Adnan Isufi EULEX Legal Advisor, acting in capacity of recording clerk,

In the criminal matter P nr 628/04, of the District Court of Prishtine/Prishtina against the defendant J K with other personal data as in the case file, charged with Murder, contrary to Article 30 par 2, items 1,3,4 and 5 of the Criminal Law of the Socialist Autonomous Province of Kosovo, (*hereafter* "CC SAPK") as read with Article 22 and 24 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (*hereafter* "CCFRY"); Attempted Murder, contrary to Article 30 par 2, items 1,3,4 and 5 of the CC SAPK, read in conjunction with Article 19, 22 and 24 of the CCFRY; Agreement to Commit a Criminal Act, contrary to Article 196 of the CC SAPK read in conjunction with Article 22 and 24 of the CCFRY; according to the Indictment PP nr 523/02 filed on 14 December 2004 and as subsequently amended by the supplemental Indictment PP nr 526/02 dated 31 January 2005,

Deciding upon the Request for Protection of Legality filed by defence counsel, Av Ibrahim Dobruna, on behalf of defendant J K , against the Judgment of the District Court of Prishtine/Prishtina P nr 628/04, dated 08 March 2007 and against Judgment of the Supreme Court of Kosovo AP-Kz nr 84/09, dated 03 December 2009,

Pursuant to Article 454 para 1 of the Provisional Criminal Procedure Code of Kosovo (*hereafter* "PCPCK[1]"), after a session on deliberation and voting held on 01 November 2010, the Supreme Court of Kosovo issues the following:

JUDGMENT

To reject the Request for Protection of Legality dated 04 March 2010 filed by defence counsel, Av Ibrahim Dobruna, on behalf of defendant J K against the Judgment (P nr 628/04, dated 08 March 2007) issued by the District Court of Prishtine/Prishtina and against the Judgment (Ap-Kz nr 84/09, dated 03 December 2009) issued by the Supreme Court of Kosovo as unfounded and to confirm the Judgment of the Supreme Court according to Art 456 of the PCPCK.

REASONING

I. Procedural Background

[1] The Provisional Criminal Procedure Code of Kosovo entered into force on 06 April 2004, as later amended.

The Indictment alleges that on 20 August 2001, at or about 23:17 hrs H H his wife M , his son Xh and his daughters M and A were murdered on a small narrow dirty road between the villages of B and T . They had earlier attended a weeding party of a family member in the village of B On leaving the wedding celebration, the H family travelled together in a car, driven by Xh H with H in the front passenger seat and his wife and daughters in the rear passenger seats heading towards their home in G . As the vehicle began to slowly cross an old wooden bridge the daughter P heard an Albanian voice shout "stop" and then the sound of an automatic gunfire. Bullets began shattering the vehicle and P put her head down in her lap and stayed that way. All the vehicles windows but one were shot out and there were numerous bullet holes on the right side of the car. H H his wife, son and two daughters died as a result of gunshot wounds; P . survived.

The investigation in relation to this incident against J and others was initiated on 09 July 2002 and conducted while the defendant J K was at large. The defendant J K was arrested on 09 November 2004 under the outstanding warrant of 11 July 2002. Defendant J K 's detention has been periodically reviewed and extended since that time.

On 10 November 2004 the investigating judge issued a decision to resume the investigation against J K on suspicion of complicity in the murder of H H and four members of his family, attempted murder of P H and agreement to commit a criminal act.

The investigation against J K was completed on 10 December 2004. The indictment which was filed on 14 December 2004 and supplemented indictment dated 31 January 2005 was confirmed by the District Court on 31 March 2005. The trial of the defendant J K commenced on 29 June 2005.

On 08 March 2007 upon conclusion of the trial, the defendant J K was found guilty by the District Court of Prishtine/Prishtina for committing the criminal offences of; **Murder**, pursuant to Article 30 par 2, items (1) (3) (4) and (5) of the CC SAPK, as read in conjunction with Article 22 and 24 of the CCFRY; **Attempted Murder**, pursuant to Article 30 par 2, items (1) (3) (4) and (5) of the CC SAPK, as read in conjunction with Article19, 22 and 24 of the CCFRY; **Agreement to Commit the Criminal Act of Murder**, pursuant to Article 196 of the CC SAPK as read in conjunction with Article 22 and 24 of the CCFRY, and sentenced with an aggregated punishment of 16 years of imprisonment.

Defence counsel filed an appeal within legal timeframe against the verdict claiming essential violations of the law on criminal procedure, an erroneous and incomplete establishment of the facts, violations of the criminal code and a disproportionately severe punishment. The Appellant sought an acquittal from the all charges or a cancellation of the verdict together with an order remanding the case for re-trial.

The Office of the State Prosecutor of Kosovo in its opinion dated 02 September 2009 proposed partial approval of the defense's appeal; requesting partial modification of the contested judgment by re-qualifying the criminal acts of Murder and Attempted Murder and release of the defendant of the criminal charge of Agreement to Commit the Criminal Act of Murder.

On 03 December 2009, the Supreme Court of Kosovo partially granted the defense appeal; the defendant J K. was acquitted of the criminal offence of Agreement to Commit the Criminal Act of Murder, *as per* Article 196 of the CC SAPK as read in conjunction with Article 22 and 24 of the CCFRY. The defendant J K. however was found guilty of five intentional aggravated Murders and one attempted intentional aggravated Murder from Article 30 par 1 and 2 items 1 and par 3 of the CC SAPK in conjunction to Article 19 and 22 of the CCFRY, and he was sentenced to an aggregated punishment of 16 years of imprisonment.

The Judgment of the Supreme Court of Kosovo was delivered to defendant and to his defence counsel on 30 December 2009 respectfully on 06 January 2010.

On 04 March 2010 defence counsel Av Ibrahim Dobruna on behalf of the defendant J K. filed a Request for Protection of Legality through the District Court of Prishtine/Prishtina to the Supreme Court of Kosovo.

Defence counsel requested modification of the challenged judgments; to acquit defendant of all criminal allegations, to return the matter for reconsideration to the court of the first instance and finally terminate detention on remand.

The Request for Protection of Legality was forwarded to the Supreme Court of Kosovo on 31 March 2010. The case was sent to the OPPK for an opinion.

By submission KMLP 2/2010 dated 21 June 2010 the Office of State Prosecutor filed a reply and proposed that the request for protection of legality be rejected as ungrounded.

II. Request for Protection of Legality;

The Request for Protection of Legality filed by defence counsel Av Ibrahim Dubruna alleges Violations of Criminal Law, Essential Violations of the Law on Criminal Procedure, other violations of the Provisions of the Criminal Procedure Law (which influenced the legality of the court decision).

III. Supreme Court findings

In assessing the Request for Protection of Legality, the Supreme Court of Kosovo established the following:

a. The Request for Protection of Legality is admissible. The request is filed with the competent court pursuant to Article 454 par 1 and within the deadline pursuant to Article 452 par 3 of PCPCK.

b. The Supreme Court of Kosovo decided in a session as prescribed by Article 454 paragraph 1 of the PCPCK. The parties' notification of this session was not required.

c. The request for Protection of Legality is ungrounded.

Defence counsel alleged a number of violations some of which, although qualified by the appellant as violations of the criminal law and of the criminal procedure law, in fact rather pertain to the question of factual situation (an erroneous or incomplete establishment of the facts). This court however in its assessment is confined by Article 451 and Article 455 of PCPCK in relation to the grounds of request and the arguments raised by the requesting party.

It is worth mentioning that the request for protection of legality mainly deals with issues already raised and dealt with in the course of appellate procedure with minimal modifications adopted against the judgment rendered by the Supreme Court in the second instance.

In the request for protection of legality defence counsel contended the following:

A. SUBSTANTIAL VIOLATIONS OF THE PROVISIONS OF THE CRIMINAL PROCEDURE AND OTHER VIOLATIONS OF THE PROVISIONS OF CRIMINAL PROCEDURE.

1. IMPROPER COMPOSITION OF THE FIRST INSTANCE PANEL

Defence counsel claims about improper composition of the trial panel since it was consisted of three instead of five judges (small panel). In addition defense argues that replacement of trial members in the last session held on 08 March 2007 violated Article 364 par 1 item 1 of Law on Criminal Procedure (hereafter the "LCP[2]"), and Article 403 par 1 item 1 of PCPCK.

Addressing the appellate averments about composition of the trial panel, the Supreme Court agrees with defence counsel that the PCPCK provides for a large panel consisted of five members (two professional and three lay judges) when considering criminal offences punishable of at least fifteen years of imprisonment. On this topic specifically Article 24 of the PCPCK reads as follows:

(1) A district court shall adjudicate in the first instance in a trial panel of one judge and two lay judges or, when considering graver criminal offences punishable by imprisonment of at least fifteen years, in a trial panel of two judges and three lay judges

[2] Law on Criminal Proceedings, year 1986 (Official Gazette No 26/86)

In this context as a legal principle it is undisputable that a large panel is required in cases punishable by at least fifteen years.

It is worth noting however that while Article 24 of the PCPCK sets forth the rules on composition of the panel, the appointment and assignment of International Judges is subject to other legal provisions. The Supreme Court acknowledges that assignment of international judges/prosecutors in criminal matters was made pursuant to UNMIK Reg 2000/06 dated 15 December 2000[3]. As in any other criminal cases handled by international judges the composition of the trial panel in the case at hand was made pursuant to and in full compliance with said regulation. Moreover it is not contested that this regulation was in force and applicable during the course of this trial proceedings.

In this context specifically Section 2.1 UNMIK Reg 2000/06 On the Appointment and Removal from Office of International Judges and International Prosecutor reads:

" *Upon approval of the Special Representative of the Secretary-General in accordance with section 1 above, the Department of Judicial Affairs shall expeditiously designate* "

(a) An international prosecutor;
(b) An international investigating judge; and/or
(c) A panel composed only of three (3) judges, including at least two international judges, of which one shall be the presiding judge.

The Supreme Court opines that the question of the apparent overlapping scope between provisions of PCPCK and UNMIK regulations cited above must be resolved according to the principle of specialty, i.e., Section 2.1 point (c) specifically addressing the assignment of International Judges in criminal cases, as a special enactment supersedes the provisions of PCPCK which broadly address composition of the trial panels.

Accordingly the Supreme Court considers defense request unfounded on this point.

As regards the change on composition of the trial panel, Article 345 paragraph 1 of the PCPCK stipulates the following:

"When the composition of the trial panel has changed, the adjourned main trial shall start from the beginning. However, after hearing the parties, the main panel may in this case decide not to examine the witnesses and expert witnesses again and not to conduct a new site inspection, but rather to read the testimony of the witnesses and the expert witnesses given at the previous main trial or the record of the site inspection".

Addressing defense claim over change on panel composition, the Supreme Court refers to trial minutes of 20 February 2007 which clearly indicate that the presiding judge had announced the changes on composition of the trial panel. Evidently the parties to the proceedings including defence counsel although expressly asked had not submitted any

[3] See United Nations Interim Administration Mission Regulation 2000/ 6 dated 12 February 2000, as amended by Regulation No 2000/64 dated 15 December 2000.

objection regarding newly composition of the panel and all parties agreed to reading out the testimonies of the witnesses given at the previous main trial. As matter of fact, the Supreme Court finds it important to stress that it was the defence counsel who stated that he had no objection on the newly established trial panel; stated that he agrees in reading out the previously statements in order to expedite and prevent procedural delays. In light of this, the Supreme Court of Kosovo finds that the very fact that a change on composition of the panel occurred does not *eo ipso* mean that newly established panel was contrary to the law. Moreover no circumstances that would render the impartiality of the new members of the District Court panel doubtful are found in this case.

Accordingly the Supreme Court considers defense request unfounded on this point.

2. INCOMPREHENSIBILITY OF THE ENACTING CLAUSE OF THE JUDGMENTS OF THE FIRST AND SECOND INSTANCE.

The appellant maintains that the enacting clause of the challenged verdicts rendered in the first and second instance are incomprehensible, internally inconsistent or inconsistent with the grounds of the verdicts and did not cite the reasons concerning the decisive facts; in particular, the enacting clause and the reasoning of the verdicts is contradictory with statements of the accused, witnesses, accused witnesses, other documentation in the case file and beyond the capacity of the administered evidences and those verdicts did not specify what form of culpability was attributed to the accused.

The Supreme Court respectfully disagrees with defence counsel and considers the claim of the defence counsel as ungrounded.

According to Article 396 para 1 of the PCPCK, the judgment shall have an introduction, the enacting clause and a statement of grounds. The obligatory content of the enacting clause is specified further in the paragraphs (3), (4) and (5) of that Article of PCPCK.

In relation to the content of enacting clause of judgment, Article 396 paragraph 3 of the PCPCK reads;

(3) *"the enacting clause of the judgment shall include the personal data of the accused (Article 233 paragraph 1 of the present Code) and the decision by which the accused is pronounced guilty of the act of which he or she is accused of by which he or she is acquitted of the charge for that act of by which the charge is rejected"*

(4) *"if thee accused has been convicted, the enacting clause of the judgment shall contain the necessary data specified in Article 391 of the present Code, and if he or she was acquitted of the charge was rejected, the enacting clause shall contain a description of the act with which he or she was charged and the decision concerning the costs of criminal proceedings and the property claim if such claim was filed".*

The Supreme Court finds that the enacting clause of the challenged judgment rendered in the second instance is entirely in compliance with the provisions of the applicable

procedural law. The enacting clause of the challenged judgment contains the citation of the facts and circumstances which constitute the statutory features of the criminal act and those on which depends the application of the particular provision of the criminal law, whereas facts and circumstances from which the court draws conclusions as to the culpability or not of the accused as to the criminal act are not to be included in the enacting clause, but must be addressed in the reasoning of the verdict. The verdict clearly states in the enacting clause that the accused is found guilty of the criminal offence of five intentional aggravated murders and on attempted intentional aggravated murder committed in an insidious manner, as well as in the reasoning the court exhaustingly compiled the reasons showing why it decided that the accused had acted deliberately and intentionally in order to kill victims. Accordingly, the Supreme Court opines that the defense contention about a violation of procedural law is without merit.

In addition, it is noted that the enacting clause of the verdict makes reference to provisions of the criminal law, so clarifying what form of culpability was determined by court. Therefore, while the appellant may argue whether such attribution is well based in the evidence, the court decisions remain unambiguous and thus free from error as per Article 396 of the PCPCK.

3. THE JUDGMENT WAS BASED ON INADMISSABLE EVIDENCE-EXEMPTION FOR THE K FAMILY MEMBERS FROM THE DUTY TO TESTIFY IN FRONT OF THE COURT

Defence counsel points out that the accused F . K was interrogated as a witness like J K and B K . Defence counsel argues that they are all family members who according to Article 227 of the LCP they should have been exempted from the duty to testify. Defence counsel alleges that these individuals had not been duly instructed before giving their testimonies in accordance to Article 227 para (1) (2) and (4), Article 229 and Article 231 par (2) of the LCP and/or Article 160 para 3 and Article 161 para 1 item 2 of the PCPCK.

Before answering this question, the Supreme Court finds it crucial to emphasize that the applicable procedural law at the time when those statements were obtained was the Law on Criminal Procedure (LCP). There is no contestation on the applicability of the LCP during the investigation stage in this criminal matter.

In this context Article 227 (1) of the LCP enumerates persons that are exempted from the duty to testify.

In the respective part, the LCP reads as follows:

(1) the following persons are exempted from the duty to testify:

1) The spouse of the accused;

2) *Direct blood relatives of the accused, relatives in the lateral line to and including the third degree, and relatives by marriage up to and including the second degree.*
3) *The adopted child or adoptive parent of the accused*
4) *A religious confessor concerning matters that the accused has confessed to him.*

As explained also by the defence counsel the accused Fl K and A K are brothers. Same applies for B R and A R . The accused B K is uncle's son of F K , A K and J K . A K is uncle of J K . Xh K and A K are brothers. B K and J K are uncle's sons of Xh K . F K and Bl K are the uncle's sons of J K

Based on this factual situation it comes out that F K and B K are relatives in the lateral line of the 4th degree to the defendant J K. As a result, the Supreme Court of Kosovo considers that the courts in previous instances had correctly established the compliance of the authorities conducting the interviews with the then applicable law provisions of the procedure.

It is evident from the case file that when F K was heard as a witness on 27 August 2001 he was properly warned of the right to remain silent. Later, on 06 July 2002 when F K was heard as a suspect he was informed of the suspects' rights. This is confirmed by a document which he signed at the end. As for interrogation of 07 July 2002 his defence counsel had been present when his statement was obtained.

Therefore the acceptance of these evidences does not raise doubts as to their formal admissibility and reliability. Accordingly the Supreme Court considers defense request unfounded on this point.

4. ADMISSIBILITY OF B K 's STATEMENTS ON 04 AND 07 JULY 2002

Defence counsel claims that both statements given by B K on 04 July 2002 and 07 July 2002 are inadmissible. Defence counsel states that the statement given before police on 04 July 2002 which was also video-taped has been given in absence of a defense lawyer and without court's authorization. Further defence counsel argues the *ex-officio* appointed defence counsel who presented on 07 July 2002 did not defend his client in an efficient manner; no question was put by the *ex officio* defence counsel nor had he consulted his client prior to his interview. Therefore according to the defence counsel such statements are inadmissible.

Regarding the statement given on 04 July 2002, the Supreme Court agrees with the claim of the appellant. As indicated by the court of the second instance, no records from the case file could be found that demonstrate B K being properly notified of the rights prior to giving his statement. The Supreme Court acknowledges the obligatory

nature of Article 67 paragraph 1 and 2 of LCP which foresees that ... " *the accused must be instructed that he has the right to engage a defence counsel and that his defence counsel may attend his examination*".

The instructions about the rights provided in an unsatisfactory manner and/or the inability of the authorities conducting an interview to document that the interviewee has been properly notified of his or her rights render that statement inadmissible. Therefore Supreme Court finds that the second instance court deciding on the appeal had evaluated properly the statement of B . K before the police on 04 July 2002 as inadmissible.

In addition, the Supreme Court concedes with the claim of the defence counsel that the video-recording of the statement dated 04 July 2002 was in violation of the procedural law.

Article 87 par 1 of the LCP reads;

> *(1) The investigating judge may order that the conduct of the proceedings in the examination be tape-recorded. The investigating judge shall so inform the person being examined or interrogated in advance.*

Based on this provision, the Supreme Court notes that the only legitimate authority to allow recording of an interview relies with the investigating judge. Non-compliance with this provision constitutes a procedural violation.

In the case at hand, no written records can be found in the case file demonstrating that video recording was authorized by the investigating judge. Apparently the police officers conducting the examination had informed an international prosecutor as soon as they became aware of the quality of the statement that was affecting in the legal capacity of the interviewee. Nevertheless no conclusion can be drawn that video recording was authorized by a legitimate authority. This panel respectfully disagrees with the view of the Supreme Court deciding on the appeal which held that the interview was recorded upon request of the prosecutor according to his power to guide preliminary criminal proceedings because at that moment the investigating judge had not yet been involved in this part of the investigation. This panel considers that the fact that no investigating judge was involved at that moment in the investigation does not derogate powers of the investigating judge to the prosecution[4]. There can be no such shifting of the power that goes to the detriment of the defendant. In this context the Supreme Court considers that the prosecutor had exceeded his powers while undertaking such actions. Therefore the Supreme Court considers that video recording was not conducted in compliance with the procedure and as such it has to be separated from the case file.

With regard to statement dated 07 July 2002 which defense argues that the *ex officio* defence counsel did not defend his client in an efficient manner; *ex officio* counsel did not

---

[4] Judgment of the Supreme Court, Ap.-Kz no 84/2009, date 03 December 2009, page 19, point 38.

put any questions to the defendant, that he had not consulted his client prior to his interview, the Supreme Court considers this argument ungrounded.

The court acknowledges the fundamentally important role the defense lawyers play in the criminal proceedings. It is also acknowledged that the appointment of an *ex officio* defence counsel is not only a formal requirement limited to the presence of a defense lawyer. In contrary an advocate is obliged not to only be present but to carry out duties with responsibility, maintain honesty, respect and defend his/her client's interest to highest professional standards and in compliance with domestic law and international human rights standards.

According to Article 67 paragraph 1 of the LCP;

"The defendant may have a defence counsel throughout the entire course of criminal proceedings".

This Article should be interpreted in the manner that includes also the investigation phase. According to the commentaries on this point it reads *"If the criminal procedure is going through a phase of investigation it is then initiated from the moment when the decision on carrying out of the investigation is made".* [5]

Furthermore on this point Article 72 (4) of the LCP reads;

"The president of the court may dismiss an appointed defence counsel who is not performing his or her duties properly at the request of the defendant or with his of her consent. The president of the court shall appoint another defence counsel of experience and competence commensurate with the nature of the offence in place of the dismissed defence counsel. The bar association of Kosovo shall be informed of the dismissal of any defence counsel who is a member of the Bar".

Based on above, the defendant is entitled to a defence counsel during the whole criminal procedure. Failure to comply with such requirements infringes defendant's right of an effective defense. The law foresees that the president of the court may dismiss an appointed defence counsel who does not perform his or her duties properly at the request of the defendant or with his or her consent.

In the case at hand however no infringements of the defense rights could be detected. Based on the case file no request from the defendant or from somebody else upon defendant's consent indicating dissatisfaction with performance of the *ex officio* defence counsel could be found. The fact that the previously appointed defence counsel who had participated in previous stages of the procedure was subsequently replaced at the trial by the present defence counsel, in the Supreme Court's opinion does not activate the protection afforded by Article 72 of LCP. Nor has the defence counsel shown how his client's rights to effective defense had been adversely affected. The Supreme Court found no circumstances that would render the previous *ex officio* appointed defence counsel's

[5] Commentaries Momcillo Grubac & Tihomir Vasiljevic. English version

attitude doubtful in this case. Therefore the Supreme Court finds no infringement of the defense rights guaranteed to the defendant under the applicable law.

It is evident that the applicant and his defence counsel were afforded the opportunity to state the case and to contest the application of the law to the evidence before the court. The mere fact that an *ex officio* appointed defence counsel had not put questions as alleged by the appellant, in the Supreme Court's assessment does not lead to a reasonable conclusion that defence counsel had acted to the detriment of his client. It is not up to the court of first instance to determine the defense strategy. Defence counsel is a party to the proceedings; free and independent in discharging effectively the defence counsel's functions.

The Supreme Court found no indication of any misconduct of *ex-officio* defense lawyer, including failure to provide competent and ethical legal assistance. Therefore the Supreme Court considers this point as ungrounded.

5. ADMISSIBILITY OF THE MINUTES OF THE HEARING OF INTERNATIONAL POLICE OFFICER R H AND OF THE LIST OF MOBILE PHONE CALLS.

Defence counsel claims inadmissibility of the statement of the international police officer R H dated 06th and 7 August 2002. It is alleged that a motion for disqualification of the investigative judge was made during the course of the session and since it was not decided upon, according to the defence counsel the continuation of the session is contrary to law in light of Article 43 of LCP.

In addition defence counsel alleges that the list of mobile phone calls was unlawfully obtained from PTK[6]. According to the defence counsel no request has been made by the investigative judge for such information from PTK.

With regard to the statement given by R / H , the Supreme Court deems important to stress the fact that the motion of the defence counsel seeking disqualification of the investigating judge was made not at the commencement of the hearing but during the course of the hearing on 06th August 2002 pursuant to Article 39 paragraph 6 of LCP.

The Supreme Court shares the view of the defence counsel that a motion for disqualification can be submitted before the hearing commences but if the parties have learned of the reason for disqualification after the session has begun, they can file the motion later but immediately after learning it.

Article 40 (1) of LCP reads:

(1) *As soon as a judge or a lay judge learns that any of the grounds for disqualification exist as referred to in Article 39, Items 1 through 5 of this Law, he must interrupt all work*

[6] PTK- the Post and Telecommunications of Kosovo.

on that case and accordingly inform the president of the court, who shall appoint his replacement from among the judges of that court, and if this is not possible, he shall ask the president of the immediately higher court to appoint a replacement.

(2) *If a judge or lay judge feels that there are other circumstances that justify his disqualification (Article 39, Item 6) he shall inform the president of the court accordingly.*

Article 43 of LCP reads:

When a judge or a lay judge learns that a petition has been filed for his disqualification, he must immediately suspend all the work on the cases; but if it concerns the disqualification as referred to in Article 39, Item 6 of this Law, he may, until the decision is made on the petition , take only those actions whose performance is required to avert postponement.

Article 39 of LCP reads:

A judge or lay judge may not perform his judicial duties in the following cases:
.....
.....
.....
.....
(6) if there are circumstances which cause doubt as to his impartiality.

The Supreme Court is of the view that a motion for disqualification made on ground set forth in Article 39 paragraph 6 of LCP does not require termination of an ongoing legal activity which commenced before such motion was made. Article 40 Paragraph 2 of LCP specifically lays down an obligation to a judge or lay judge whose disqualification is sought only to inform the president of the court if he/she feels that there are circumstances that justify his disqualification from Article 39, item 6. This is further specified in the Article 43 of LCP which foresees that if the motion concerns the disqualification from Article 39 paragraph 6, which is the case here, a judge or lay judge whose disqualification is sought can take only those actions whose performance is required to avert postponement. In the case at hand, referring to the minutes dated 06th August 2002 before commencement of the hearing, the investigating judge had duly established the hearing while none of the parties had made any objections, in particular with regard to disqualification of the investigating judge. A mere fact of existence of a rejected motion for disqualification does not render the statement obtained by a judge whose disqualification was sought, inadmissible. It is evident that the investigating judge had duly informed the president about the motion which was then rejected by the president on 11 August 2002, as ungrounded. Therefore the Supreme Court finds that the court complied with stipulated legal requirements.

Regarding to mobile call lists, it is evident from the case file that a letter from investigating judge dated 23 November 2001 was sent to the Directorate of Infrastructure

Affairs and Communications requiring outgoing and incoming call details related to the time period 19 through 21 August 2010 for enumerated therein VALA numbers. Otherwise the information obtained would not likely been provided by own initiative of PTK officials. Such standing would be irrational; consequently the Supreme Court considers that this argument from defence counsel can not be accepted. As indicated on the reply from PTK which is part of the case file, the request of the investigating judge was complied with and results were made available to the court. Such investigative activities in the view of the Supreme Court were in full compliance with the provisions of the LCP which was in force at the time. No infringements of the human rights could be detected as result of such activity. Therefore the request is ungrounded in this point.

6. LACK OF THE CAUSAL LINK BETWEEN ACTIONS AND CONSEQUENCE AND *ALIBI* CLAIM SUBMITTED BY DEFENDANT J K

Defence counsel argues that the challenged judgments does not contain reasons regarding decisive facts in light of Article 364 par 1 item 11 of LCP respectively Article 403 par 1, item 1 and 12 of PCPCK , falling short in providing a proper reasoning with regard to *Causal Link* between actions and consequences, *Intent and Motives* of the defendant. In addition defence counsel claims that judgments do not clarify circumstances related to an *Alibi* since J K was at a wedding party at S K family and this fact is strongly supported according to defence counsel by a series of convincing statements of the witnesses, including here also the statements of the prosecutor's witnesses.

The Supreme Court of Kosovo points out that the allegations of the defence counsel that the court findings are in contradiction with the evidence and that do not provide a proper reasoning on *causal link* between action *vs* consequence as well the presented theory on an *alibi* of the defendant, are at this stage not admissible pursuant to Article 451 of the PCPCK. Such allegations are directly related to determination of factual situation, a ground for which a request of protection of legality may not be filed under the provisions of the PCPCK.

The respective Article 451 (2) reads:

(2) *A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation...*

Furthermore, Article 456 of PCPCK states:

The Supreme Court of Kosovo shall, by a judgment, reject a request for protection of legality as unfounded if it determines that the violation of law alleged by the requesting party does not exist or that a request for protection of legality is filed on grounds of an erroneous or incomplete determination of factual situation (Article 405 and Article 451 paragraph 2 of the present Code).

Based on above reasons, the Supreme Court of Kosovo considers that on this part the request for protection of legality falls outside the scope of review at this stage of the procedure. Therefore on this part it is rejected as inadmissible.

In addressing the possible motive/s of defendant J K which the defense alleges to have not been established, this panel shares the view of the Supreme Court of the second instance that the motive/s of a crime is/are not part of the crime itself as it is defined in the law. The motive/s may be relevant for purpose of determination the restrictive measures and length of punishment. Nevertheless there is no legal obligation whatsoever for the court to establish the motives that drove defendant in committing a criminal offence. For that reason this point shall be further discussed when dealing with defense allegation in relation to decision on punishment.

B. VIOLATIONS OF THE CRIMINAL LAW ARTICLE 451 (1) OF THE PCCK[7].

7. FAILURE TO COMPLY IN ACCORDANCE WITH PRINCIPLE *IN DUBIO PRO REO*

Defence counsel alleges that court did not comply in accordance to Article 2 (2) of the PCPCK- Legal Principle *In dubio pro reo*. The defense maintains that if there is a doubt regarding the existence of facts relevant to the case or doubts regarding the implementation of a certain criminal law provision the court should interpret it in manner to the favor of the defendant.

As regards to alleged doubts concerning the existence of facts relevant to the case referred by the defence counsel, the Supreme Court of Kosovo finds it crucial to reiterate again that the contestation of the judgments on ground of factual situation is inadmissible pursuant to Article 451 (2) of PCPCK. Therefore on this part of question, the Supreme Court adheres by reference to reasons provided above.

Concerning the application of "*most favorable law*", the Supreme Court of Kosovo concedes with defence counsel that in the event of a change in the law applicable to a given case prior to a final decision, the law more favorable to the perpetrator shall apply.

In that sense the primary consideration must be given on the restrictive measures and length of the sentence foreseen by the concurring criminal provisions -the law in effect at the time a criminal offence was committed and the law entering into force prior to a final decision. Upon such comparison, conclusion can be drawn with regards to the more favorable law for the defendant.

In the case at hand, undoubtedly the law in effect at the time of occurrence is far more favorable to the defendant than the law entering into force prior to a final decision. Therefore, the Supreme Court of Kosovo finds the request on point unfounded to such a degree that qualifies it as frivolous.

---

[7] Provisional Criminal Code of Kosovo, entered into force on 06 April 2004, as later amended.

8. FAILURE TO COMPLY WITH RULES ON AGGREGATION OF PUNISHMENT

Defence counsel claims the failure of the courts to comply with the rules for imposing an aggregated punishment as foreseen by Article 48 par 1 of the CC of the SFRY which corresponds in entirety with Article 71 par 1 of the PCCK. Defence counsel alleges that the courts in previous instance did not convict the defendant for each criminal act and then apply an aggregated sentence. Further more defence counsel claims that as the defendant was acquitted of one criminal offence, yet the Supreme Court did not reduce the sentence as imposed by the first instance.

With regard to allegation in relation to aggregation of punishment, it is evident that the second instance court, after sentencing the accused separately for the five criminal offences of murder and one attempted murder sentenced the accused to an aggregated punishment of sixteen (16) years of imprisonment.

The defendant was sentenced for the criminal act of Murder to a term of imprisonment of fifteen (15) years [Article 38 paragraph 1 and 2 of the CCK as read with Article 30 paragraph 2 of the CC SAPK and UNMIK Reg 1999/24 as amended by UNMIK Reg 2000/59] and to a term of six (6) year of imprisonment for criminal act of Attempted Murder [Article 38 paragraph 1 and 2 of the CCK as read with Article 30 paragraph 2 of the CC SAPL and UNMIK reg 1999/24 as amended by UNMIK Reg 2000/59 and Article 65 paragraph 2 of CCK]. Applying Article 71 paragraph 1 and 2 item 2 of the CCK, the defendant J K was sentenced to an aggregated term of imprisonment of sixteen (16) years of imprisonment. Therefore the Supreme Court considers that the appellate court fully complied with provisions of the law regarding aggregation of punishment.

With regard to reducing of sentence since the defendant was acquitted of one criminal offence by the appellate court, the Supreme Court maintains that there is no obligation for the court to reduce the sentence due to the partial acquittal. The court is only bound by the maximum penalty.

9. WRONGFUL QUALIFICATION OF THE CRIMINAL OFFENCE

Finally defence counsel claims that the criminal offences have been wrongfully qualified by the trial panel and the Supreme Court of Kosovo. Defence counsel claims that J K did not take any action that constitutes the criminal offences of Murder or Attempted Murder nor did he intend the commission of those acts. Further defense argues that there is no connection between the act and the consequence.

This court finds that the actions of the accused amount to the criminal offences for which he is found guilty based on the evidences which were properly obtained, administered and evaluated by the trial court. The error on application of law was properly rectified by the court during the course of appellate procedure. The Supreme Court of Kosovo is satisfied with re-qualification of the second instance and finds therefore, that the second instance did not make an error of law.

In light of the above, the Supreme Court of Kosovo has decided as in the enacting clause of this judgment.

SUPREME COURT OF KOSOVO
PKL-KZZ 31/10, 01 November 2010

Presiding judge:

Martti Harsia
EULEX Judge

Recording clerk:

Adnan Isufi
Legal Advisor

Members of the panel:

Harri Katara,
EULEX Judge

Lars Dahlstedt
EULEX Judge

Salih Toplica
Supreme Court Judge

Marije Ademi,
Supreme Court Judge

Legal Remedy

No request for protection of legality may be filed against a decision of the Supreme Court of Kosovo in which a request for protection of legality was decided upon (Article 451 paragraph (2) of the KCCP).