

SUPREME COURT OF KOSOVO

19th January 2012

Ap – Kz 297/10

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Dr. Horst Proetel as Presiding Judge, Supreme Court Judge Nesrin Lushta and EULEX Judge Gerrit-Marc Sprenger as panel members, assisted by Legal Officer Chiara Rojek as recording clerk,

In the case against the defendant **D. D.**, nickname , son of
and , born in Municipality
of , last known residence
at liberty since 5th July 2010,

Charged as per in the Indictment of the EULEX Public Prosecutor PP no. 72/2008 filed on 15th June 2009, with the criminal offences of Aggravated Murder contrary to Article 147 Item 4 of the Provisional Criminal Code of Kosovo (PCCK); Attempted Murder contrary to Article 146 as read with Article 20 of the PCCK; and Unauthorized Ownership, Control, Possession or Use of Weapons, contrary to Article 328 Paragraph 2 of the PCCK,

Convicted by Judgment P no. 02/2010 of the District Court of Mitrovica/ë dated 5th July 2010 for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of the PCCK and sentenced to 2 (two) years of imprisonment; and declared criminally not liable for the criminal offence of Aggravated Murder contrary to Article 147 Items 4 and 11 of the PCCK due to mental incompetency pursuant to Article 12 Paragraph 1 of the PCCK,

Acting upon the Appeal filed on 6th September 2010 by Lawyer Miodrag Brkljac, Representative of the Injured party Z. M , against the Judgment P no. 02/2010 of the District Court of Mitrovica/ë dated 5th July 2010, and taking into consideration the Response to the Appeal filed on 20th September 2010 by Defence Counsel Rexhep Kacaniku on the behalf of the defendant D. D , and the Opinion on the Appeal filed on 29th December 2010 by the Office of the State Prosecutor of Kosovo (OSPK),

After having deliberated and voted on 19th January 2012 pursuant to Articles 410 and 422 of the Kosovo Code of Criminal Procedure (KCCP), issues the following

RULING

The Appeal filed on 6th September 2010 by Lawyer Miodrag Brkljac in the interest of Injured party Z. M , against the Judgment P no. 02/2010 of the District Court of Mitrovica/ë dated 5th July 2010 is DISMISSED as impermissible.

I. Procedural Background

The Indictment PP no. 72/08 dated 11th June 2009 was filed with the Court Registry by EULEX Prosecutor on 15th June 2009, charging the defendant D. D. as above.

On 18 November 2009, the President of the Assembly of EULEX Judges issued a decision for EULEX judges to take over the case pursuant to Article 3.3 of the Law on Jurisdiction¹ and assigned it to EULEX judges.

On 25th January 2010, the Indictment was confirmed in its entirety by ruling KA no. 40/08 - PP no. 72/08.

The trial sessions were held in public on 15th, 19th, 28th April, 24th June and 5th July 2010.

On 5th July 2010, the District Court of Mitrovica/ë announced the verdict. The defendant was found guilty for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons, contrary to Article 328 Paragraph 2 of the PCCK and sentenced to two (2) years of imprisonment, because he was in possession of a weapon AK-47, Yugoslav made, AB-2, calibre 7,62x39 mm, with serial number C-50588 without a valid authorization card for an unknown period of time until 18 June 2008. The 1st Instance Court ordered the time spent in detention on remand since 19 June 2008 to be credited pursuant to Article 73 Paragraph (1) of the PCCK, and on the same day issued a Ruling terminating detention on remand with immediate effect.

Moreover, the 1st Instance Court ruled that D. D. committed the criminal offence of Aggravated Murder contrary to Article 147 Items 4 and 11 of the PCCK, "[...] because on 18 June 2008 at around 23:00 hours, in Zubin Potok, in Arsenije Carnojevic Street from his house the accused, D. D. in a state of temporary mental disorder defined as paranoid psychotic reaction, fired several shots from a semi-automatic weapon AK-47, Yugoslav made AB-2, calibre 7,62x39 mm, with serial number C-50558, whereby he killed R. M. who bled to death on the way to the hospital due to multiple penetrating gunshot injuries to the body. The accused also shot at F. D. who suffered gunshot injuries but was on the way of recovery when died due to a blockage of the pulmonary trunk by a blood clot on 01 July 2008". The Court nevertheless found that the defendant is criminally not liable, due to mental incompetency pursuant to Article 12 Paragraph (1) of the PCCK. The District Court therefore imposed the measure of mandatory psychiatric treatment at liberty pursuant to Section 5 and Section 12.3 of UNMIK Regulation 2004/34 On Criminal Proceedings Involving Perpetrators with Mental Disorder.²

The property claim of the Injured Party was referred for civil proceedings pursuant to Article 112 Paragraph (3) of the PCCK.

¹ Law No. 03/L-53 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo dated 13th March 2008

² UNMIK Regulation 2004/34 On Criminal Proceedings Involving Perpetrators with Mental Disorder dated 24th August 2004

On 6th September 2010, an Appeal was filed with the District Court Registry by Lawyer Miodrag Brkljac, Representative of the Injured party Z M³ Defence Counsel Rexhep Kacaniku for D. D. filed a Response to the Appeal on 20th September. The case file was received by the Supreme Court Registry on 29th September 2010. On 29th December 2010, the OSPK filed an Opinion to the Appeal.

II. Submissions of the parties

II.A. Appeal of the Injured party

The Representative of the Injured party proposes to annul the Judgment and send back the case for re-trial due to a violation of the criminal code; an incorrect and incomplete establishment of the factual situation; on the decision on the criminal sanctions; and the decision on the property claim. Besides Lawyer Miodrag Brkljac claims that the Prosecutor did not provide support to the Injured party as she did not announce or file an appeal against the contested Judgment. Consequently the Injured party is allowed to file an appeal on any grounds, not only on the decision on punitive sanctions.

With respect to the *incorrect or incomplete determination of the factual situation*, Lawyer Miodrag Brkljac raises the following points: existence of a motive to shoot at the Injured parties; mental condition of the defendant at the time of the commission of the criminal acts; and possible shooting of the wrong persons.

As for the motive and mental condition of D. D., the Injured party puts forward that the experts accepted the defendant's account of facts and by doing so reached erroneous conclusions. An additional expertise, as proposed during the trial session, should be conducted. The Lawyer also contends the accurateness of D. D. statement as only corroborated by S. D. In addition, the experts failed to question whether the defendant knew that he was shooting in the direction of the victims and wrongly concluded that the defendant did not know what he was doing.

As for the *decision on criminal sanctions*, the Injured party's Representative alleges that the sentence of two-year imprisonment for Unauthorized Possession of Weapons was aimed at 'covering' the time spent in detention on remand. In his opinion, the imposition of more severe punishments should discourage potential perpetrators from using fire arms. A lenient punishment of imprisonment should have been imposed for two counts of Aggravated Murder, as D. D. was probably in a state of diminished mental capacity at the relevant time (not temporally mentally ill). Similarly there was no room for a treatment at liberty, and at the very least, the defendant should have been placed in the Psychiatric Clinic of Prishtinë/Priština. Lastly the 1st Instance Court neglected that the M family live in the vicinity of the defendant's house and that this visual contact might lead to an act of retribution.

As to the *compensation of property claim*, Lawyer Miodrag Brkljac claims that the issue of criminal liability is directly connected to the decision on the punitive sanctions and on

³ Lawyer Miodrag Brkljac filed on the following day an addendum to the Appeal by which he requested to be informed of the date and time of the appeal session.

the property claim. He opposes the District Court's stance that the defendant cannot be forced to compensate the damage to the injured party as foreseen in Article 112 of the PCPC, as he is not criminally liable for his act.

B. Response to the Appeal of the Injured party

Defence Counsel for D. [redacted] proposes the Supreme Court of Kosovo to reject the Appeal of the Injured party's Representative as inadmissible, apart from the grounds related to the decision on the punishment, and to reject the remainders as ungrounded. He puts forward that the 1st Instance Court correctly established the factual situation and rightly acted when appointed licensed experts in order to determine the mental state of the defendant. In the Defence's opinion, the punishment of two (2)-year imprisonment for such criminal offence is the longest ever imposed in a Kosovo court. The Defence claims that D. [redacted] did not show any kind of violent behaviour since he was detained, and that even today D. [redacted] does not leave his house, except to go to the Health Centre in [redacted]. Given the property claim was not corroborated by credible documents on one hand, and the fact that the defendant was not mentally capable, the 1st Instance Court's decision on the property claim is well grounded.

C. Opinion of the OSPK

In its Reply the State Prosecutor suggests the Supreme Court to dismiss the Appeal as belated and inadmissible as filed by an unauthorized person under Article 420 Paragraph 1 sub-paragraph 1 of the KCCP.

In respect to the *Appeal against the ruling imposing the measure of mandatory psychiatric treatment at liberty*, the OSPK claims the Appeal to be belated and inadmissible as it was filed by an unauthorized person pursuant to Section 33.2 of UNMIK Regulation 2004/34 read with Article 420 of the KCCP. According to Section 12.4 of the said Regulation the Appeal of the Injured party against such ruling is not authorized, and that the appeal must be filed within eight (8) days of the receipt of the decision. As the decision was served to the Injured party on 17th August (to the Representative of the Injured party on 24th August) and the appeal filed on 6th September, the legal deadline is not met. Moreover the State Prosecutor considers the decision of the 1st Instance Court to impose mandatory psychiatric treatment correct.

As for the *Appeal against the Judgment of Mitrovica's District court*, in the State Prosecutor's view, the Appeal is belated and inadmissible as it was filed by an unauthorized person pursuant to Article 420 of the KCCP and does not comply with the legal deadline under Article 398 of the KCCP. The OSPK furthermore alleges that Z. [redacted] is not injured party in regards to the weapons violation in the sense of Article 399 Paragraph 3 of the KCCP. Should the Supreme Court declare the appeal admissible, the State Prosecutor deems the sanction to be fair and not disproportionate to the criminal offence and that the District Court rightly considered the relevant mitigating and aggravating circumstances.

Finally the OSPK agrees with the 1st Instance Court's decision to refer the claim to civil litigation pursuant to Article 112 of the KCCP.

III. Findings of the Supreme Court of Kosovo

A. Competence and proceeding before the Supreme Court of Kosovo

The Supreme Court of Kosovo is competent to decide on the Appeals pursuant to Articles 26 Paragraph 1 and 398 and fol. of the KCCP. The Supreme Court panel has been constituted in accordance with Article 3 Paragraph 7 of the Law No. 03/L-53 on Jurisdiction. The Supreme Court panel held a session on 19th January 2012.

B. Admissibility of the Appeals filed by the Injured party

The verdict in the case P no. 02/2010 was announced by the District Court of Mitrovica/ë on 5th July 2010.

By letter dated 7th July 2010, the Representative of the Injured party Z M announced an appeal against the contested Judgment. He received the Judgment on 24th August 2010. It is impossible to ascertain when the judgment was served to Z M as the case file does not contain any receipt. The other injured parties S. and P. D received the challenged Judgment, respectively on 16th and 17th August 2010. The Appeal of the Injured party Z M was filed with the District Court Registry on 6th September 2010.

The appeal is not permissible. There are already doubts in regard to its punctuality of the remedy against the sanctions for the indicted murders. The applicable UNMIK Regulation No. 2004/34 grants the appeal to be filed within eight (8) days of the receipt of the decision. But even if the appeal would be admitted due to the wrong instruction of the 1st Instance Court, referring to a deadline of fifteen (15) days from the service of the Judgment pursuant to Article 389 paragraph 1 of the PCPCK, the appeal is impermissible nevertheless. Section 12.4 of the mentioned Regulation expressively excludes the right of the injured party to file an appeal against judgments imposing a measure of mandatory psychiatric treatment.

Based on several psychiatric experts' reports the District Court acquitted the defendant from the charge of Aggravated Murder due to his lacking criminal liability, when murdering R M and seriously hurting P D. The defendant was deemed temporarily mentally disordered; his illness was defined as paranoid psychotic reaction.

The exclusion of the injured party's right to appeal aims at avoiding repetitions of taking of evidence burdening mainly psychic ill persons. This cannot be evaded by reviewing the decision considering the alleged serious violations of criminal proceedings which - by the way - did not take place. On the contrary, the District Court has very thoroughly explored the facts and its results are not evidently defective.

This exclusion of the right to appeal does not contravene Article 6 of the European Convention of Human Rights. The Injured party is not charged with a crime and does not

need a further protection in criminal proceedings. He can pursue his rights in civil disputes.

As well the appeal of the Injured party concerning the punitive sanctions for the criminal act of Article 328 Paragraph 2 of the CCK is inadmissible. The injured party is not entitled to appeal because he is not directly protected by criminal provisions aiming to avoid misuse of weapons. The state only, represented by the Prosecutor, has to safeguard law and order and to watch if a perpetrator is sanctioned adequately for a criminal act contravening the protective objective law.

The decision of the District Court to refer the property claim of the injured party to civil proceedings is not separately contestable. Moreover it deems reasonable to have the civil claims dealt extra because of possibly complicated further explorations by expert witnesses which would have burdened the criminal proceeding. The careful establishment of facts in separate proceeding will be as well in the interest of the injured party. The civil judge has to make his mind independently from the point of view of the criminal judge. Both proceedings follow different procedural principles with the consequence that the liability for compensation of damage might be differently assessed than the criminal responsibility.

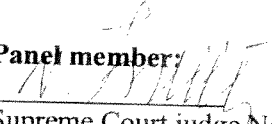
Due to the inadmissibility of the appeal, the Supreme Court is prevented from further substantial examination.

The appeal had to be rejected by ruling according to Article 422 of the KCCP.

Presiding Judge:


EULEX Judge Dr. Horst Proetel

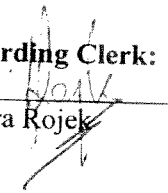
Panel member:


Supreme Court judge Nesrin Lushta

Panel member:


EULEX judge Gerrit-Marc Sprenger

Recording Clerk:


Chiara Rojek

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