PAKR No. 902 / 2012

IN THE NAME OF THE PEOPLE

The Appellate Court of Kosovo, namely its Department for Serious Crimes, in a panel composed of the following judges: Presiding Judge Tore Tomassen and panel members Fillim Skoro as Reporting Judge and Vahid Halili, assisted by Legal Officer Anna Malmstrom, in the criminal matter against the accused **MK** from village, municipality, due to the following criminal offences: Aggravated Murder, pursuant to Article 147, par. 1, subpar. 4; Grievous Bodily Harm, pursuant to Article 154, par. 1, subpar. 3 and Unauthorized Ownership, Control, Possession or Use of Weapons, pursuant to Article 328, par. 2 of the CCK, while deciding upon Appeals filed by EULEX Prosecutor's Office in Peja and Defense Counsel of the accused **MK**, namely lawyer Muharrem Hoti as well response to appeal filed by Defense Counsels of the accused, namely lawyers Haxhi Millaku and Muharrem Hoti and written clarification of the Chief Prosecutor's Office filed against Judgment of the District Court in Peja, P. No. 336 / 2010, dated 22 August 2011, in a panel session held in presence of the following parties: the Accused and his Defense Counsel, the injured party **LP**, represented by legal representative Zeqir Berdynaj, in absence of the State Prosecutor and the Defense Counsel of the accused, lawyer Muharrem Hoti, on 18 June 2013, rendered the following:

J U D G M E N T

Appeals of the EULEX Prosecutor's Office in Peja and Defense Counsel of the Accused **MK**, lawyer Muharrem Hoti are hereby rejected while Judgment P. No. 336 / 2010 of the District Court in Peja, dated 22 August 2011 is affirmed.

R E A S O N I N G

The accused **MK** was found guilty with the impugned Ruling of the District Court in Peja, No. 336 / 2010, dated 22 August 2011 for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons, pursuant to Article 328, par. 2 of the CCK and was sentenced to one (1) year of imprisonment, crediting the time spent in detention from 3 March 2010 until 22 August 2011. In addition to this, a handgun type TT No. along with one (1) magazine and eight (8) rounds of ammunition of caliber 7.62 mm was confiscated from the accused as means used for commission of the criminal offence, their destruction was ordered and the accused was obliged to pay compensation in amount of 100 euros for the criminal offence he was found guilty of. He was also obliged to pay 80 euros on behalf of the scheduled amount within a period of 15 days upon entering into force of this judgment under threat of its forcible execution.

The court of first instance, pursuant to provisions of Article 390, par. 3 of the KCCP, has acquitted the accused **MK** from the criminal offence of Aggravated Murder, as to Article 147, par. 1 and subpar. 4, Grievous Bodily Harm, as to Article 154, par. 1, subpar. 3 of the CCK, due to failure to prove commission of these criminal offences, contained in indictment.

Appeals against this judgment were filed in timely manner by the following parties:

District Prosecutor's Office – EULEX Prosecutors of Peja Region, due to erroneous and incomplete determination of factual situation, proposing to the court of second instance to modify the challenged judgment and to find the accused guilty for Aggravated Murder, as to Article 147, par. 1, subpar. 4 and for Grievous Bodily Harm, as to Article 154, par. 1, subpar. 3 of the CCK or to annul the judgment and send back the case for retrial.

Defense Counsel of the Accused **MK**, i.e. lawyer Muharrem Hoti, on decision on punishment, proposing to the second instance court to modify the challenged judgment and to impose an alternative punishment i.e. suspended sentence against his client;

Response to appeal was filed by the D.C. of the accused, lawyer Haxhi Millaku who proposed that the Prosecutor's Appeal should be rejected as unfounded, affirming thus Judgment of the court of first instance;

Response to appeal was filed by the D.C. of the accused, lawyer Muharrem Hoti who proposed that Judgment of the court of first instance should be affirmed only on the part challenged by the Public Prosecutor of Peja District Court;

The State Prosecutor, in her Opinion AP. No. 2 / 12, dated 25 January 2012, while explaining the EULEX Prosecutor Appeal and the appeal filed by the defense of the accused, proposed to the second instance court to reject the prosecutor's appeal in its entirety and grant the appeal filed by defense, proposing imposition of such punishment against the accused which would take into account the purpose of the punishment as well as both aggravating and mitigating circumstances, based on the degree of the criminal liability of the accused.

The Court of Appeals has scheduled a panel session pursuant to provisions of Article 410, par. 1 of the KCCP and Decision of the President of the Assembly of EULEX Judges on composition of the panel with local majority, i.e. two local judges.

In this panel session attended by the accused **MK** and his Defense Counsel Haxhi Millaku, the latter explained some of allegations presented in his response to appeal, which were supported in their entirety by the accused who also agreed with allegations presented in the appeal by his other defense counsel – lawyer Muharrem Hoti and those with respect to decision on punishment.

This panel session was also attended by the injured party **LP** and his legal representative – lawyer Zeqir Berdynaj who supported entirely the appeal filed by the EULEX Prosecutor and clarified some of the appeal allegations and some allegations made during the main trial sessions. The injured party also agreed with him.

The panel session was held in absence of the State Prosecutor and Defense Counsel of the accused – lawyer Muharrem Hoti although they were both duly notified, hence the session was held without their presence, pursuant to Article 390, par. 4 of the KCCP.

Court of Appeals, in conformity with Article 415, par. 1 of the KCCP having reviewed the pertaining case files and appeals filed by the EULEX Prosecutor, Defense Counsel of the accused and written clarification provided in the State Prosecutor Opinion found the following:

Appeals filed by the EULEX Prosecutor from Peja and Defense Counsel of the accused **MK** are unfounded.

Court of Appeals, taking into consideration that the EULEX Prosecutor Appeal does not challenge the judgment on the grounds of essential violations of provisions of both criminal procedure and criminal code, pursuant to Article 403, par. 1 of the KCCP, has *ex officio* reviewed also these appeal allegations, although they have not been mentioned in the appeal and found that judgment of the court of first instance does not contain such violations that would require its annulment.

Appeal allegations presented in the prosecution appeal were that the court of first instance has allegedly totally ignored statements of the witnesses **LP**, **GP** and **FP** given before the trial panel and rather were focused on their statements given before police and during the main trial when they were heard and that it did not take into consideration the photo lineup for the sake of identification of potential perpetrator of the criminal offence in question in spite of the fact that all these three eyewitnesses expressed their sincerity when giving their testimony during the main trial. Only little discrepancy can be found in their testimonies as their statements differ slightly with regard to the perpetrator of the criminal offence.

In addition to this, the appeal argues that when hearing the witnesses, the court of first instance based its rhetoric conclusion on percentage of certainty of witnesses when identifying the perpetrator, failing thus to explain certain issues as according to the testimony obtained from the eyewitnesses **LP** and **GP**, the identity of perpetrator of this crime is known beyond any doubt.

The court of first instance has acquitted the accused of charges for two criminal offences, described in more details in the acquittal part of the judgment. As per appeal, conclusion of the court of first instance with respect to evaluation of identification conducted

before police is incorrect due to the fact that although the photo lineup is not an ideal solution, the witnesses were still able to identify the perpetrator's face and thus the appeal claims that other distinctive features on which judgment of the court of first instance is based upon, are completely irrelevant.

Apart from this, the claim that the accused had allegedly immediately gone to hospital is another incorrect conclusion of the court of first instance – according to the appeal and this due to the fact that the accused knew that he was noticed by three kids who were the only persons that could identify him. The accused also knew that one of these three kids had been wounded and had to undergo a surgery. Accordingly, it was clear to the accused that he would not come across any of them in the hospital and thus be identified there.

In the opinion of the Court of Appeals, such allegations made by the prosecutor are unfounded due to the fact that based on evidence administered during the main trial and in particular based on basic evidence such as identification of the perpetrator of the crime – clear reference is made to the accused **MK** who was recognized and identified based on the photo lineup consisted of photographs 1 through 7, whereby the witnesses **LP**, **GP** and **FP** were able to identify him in the photo no. 3, nevertheless none of them was sure that it was the accused **MK** who committed the criminal offence in question, and that these witnesses could not further describe additional distinctive features of the perpetrator of the crime based on their identification.

According to the case files, the witness **LA** in his testimony during the main trial maintained that the accused **MK** has attended the wedding ceremony held on 31 December 2009, which according to indictment marks the day when the late **DP** was deprived of his life. One could clearly conclude that the accused could not have been in two places at the same time, then the accused **MK** had known the late **DP** but he never had any disagreement with him and this fact is also confirmed during the main trial by the witnesses **MP** and **PP**.

Based on what has been mentioned so far, the court of first instance is of opinion that the accused did not have bad relations or disagreements with the deceased, since as soon as the accused heard about the case he rushed to hospital to see what happened, therefore, the court of first instance came to a conclusion that had the accused been the real perpetrator of this crime instead of rushing to hospital – he would have acted rather differently.

The court of first instance maintains that three weeks after the victim **DP** was deprived of his life, the eyewitnesses **LP**, **FP** and **GP** when showed the photos of seven persons in a photo lineup 1 through 7, all the three of them identified the photo no. 3, but none of them could be sure whether that person who had been identified in the photo no. 3 of the lineup was the actual perpetrator of the crime or not. Furthermore, the aforementioned witnesses have failed

to mention any additional distinctive feature of the perpetrator or when they pointed to any of them – their accounts did not match with one another when identifying the perpetrator of the crime. Apart from this, the court of first instance failed to find additional technical proof as material evidence in order to support the fact that the accused **MK** is the perpetrator of the crime. In addition to this, the court of first instance holds the opinion that the accused did not have any motive that would have moved him in depriving the deceased **DP** of his life.

Taking into consideration the fact that the accused in question was attending the wedding ceremony on the critical day at **LA**'s place, he could not have been simultaneously in two places on 31 December 2009 and then just after the incident happened to rush into the hospital, as this – in opinion of the court of first instance – could not be possible for the accused to undertake such an action had he been the perpetrator of Aggravated Murder, pursuant to Article 147, par. 1, subpar. 4, and the other criminal offence of Grievous Bodily Harm, pursuant to Article 154, par. 1, subpar. 3 of the CCK. Accordingly, the court of first instance has correctly determined the factual situation, therefore the Appellate Court fully concurs with it.

When evaluating challenged judgment on the part of punishment decision by the Defense Counsel of the Accused who claims that the court of first instance did not consider the mitigating circumstances of the accused when he pleaded guilty, that the accused expressed remorse for his action, that he promised that he would no more confront the law, that he is a family man – father of five minor kids and the sole supporter of his family since his wife is jobless, that he does not have any immovable property and that he is forced to live with his next of kin as he does not own a house of his own, that the weapon seized from his house shows that the accused kept it in his possession only to prevent a potential crime from happening. As consequence of neglecting such circumstances, the court of first instance has sentenced the accused **MK** to one (1) year of imprisonment.

The Appellate Court maintains that the aforementioned allegations made by the defense of the accused do not stand as the court of first instance, when determining the punishment, considered both mitigating and aggravating circumstances, as stipulated by Article 64 of the CCK, and evaluated two important circumstances that the punishment imposed against the accused aims to prevent him and other perpetrators from committing similar acts and that under current circumstances, these criminal offences bear high social risk. Amongst such circumstances, the court of first instance has also considered those aspects referred to by defense of the accused in their appeal, which are two important aspects such as the purpose of the punishment and deterrence of other persons from committing criminal offences. Considering the punishment stipulated for this type of criminal offence, the court of first instance has imposed the minimum legal punishment envisaged by law, i.e. imprisonment in

duration of one (1) year, hence in this respect, the Appellate Court fully concurs with the court of first instance.

The Appellate Court maintains that a punishment like this fully corresponds to the degree of the criminal liability, intensity of danger, and as such the punishment imposed by the court of first instance is proportionate to the criminal offence committed making it thus acceptable for the Court of Appeals due to the fact that considered two aggravating circumstances which were decisive when determining and imposing the punishment in question. Such punishment shall serve to both individual and general deterrence from committing this and other similar criminal offences and therefore we anticipate full achievement of the purpose of the punishment, as foreseen with Article 34 of the CCK.

From what has been mentioned above, it was decided as in enacting clause of the present judgment, in conformity with Article 423 of the KCCP.

THE APPELLATE COURT OF KOSOVO

PAKR. No. 902 / 2012 dated 18 June 2013

Legal Officer,	**Panel members,**	**Presiding Judge,**
Anna Malmstrom	**Fillim Skoro,**	**Tore Thomassen**
	Vahid Halili	