BASIC COURT OF MITROVICË/MITROVICA

P 806/13

30 July 2013

IN THE NAME OF THE PEOPLE

THE BASIC COURT OF MITROVICË/MITROVICA, in the trial panel composed of EULEX Judge Roxana Comsa as Presiding Trial Judge, EULEX Judge Nuno Madureira and EULEX Judge Arkadiusz Sedek as panel members, with EULEX Legal Officer Karen Kort as the Recording Officer in the criminal case:

Against:

R. H., father's name …, mother's name …, maiden name …., born on … in the village of …, Municipality of Skenderaj/Serbica, retired, residing at street "…" …, Mitrovicë/a Municipality, Kosovar Albanian, married, with … children, of … economic status, in detention on remand from 22 November 2010 until 11 November 2011, in house detention from 11 November 2011 until 27 March 2012 and again in detention on remand thereafter;

Indicted with:

Murder, contrary to Article 146 of the CCK /Count 1/; Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph (1) of the CCK /Count 2/; Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph (2) of the CCK. - /Count 3/.

Considering the following: by the Ruling by the Court of Appeal of Kosovo, dated 26 March 2013, in which the Judgment of the (then) District Court of Mitrovicë/a P. nr. 11/2011, dated 26 March 2012, in relation to the criminal act of Murder under

Article 146 of the CCK /Count 1/, is annulled and the case is returned to the first instance court for retrial; by the same Ruling by the Court of Appeal of Kosovo dated 26 March 2013 the accused had been sentenced to 1/one/year imprisonment for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph (2) of the CCK. - /Count 3/; Defendant's acquittal for the charge of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph (1) of the CCK. /Count 2/ is maintained by the Court of Appeal.

After having held the main trial hearing in retrial from 17 until 20 June 2013, on 15 and 16 July 2013, on 29 and 30 July 2013 in the presence of the Defendant, his Defence Counsel and Prosecutor Neeta Amin. The injured party, Z. D., was present during the trial hearings of 17, 18, 19 June 20 June, 20 and 30 July 2013. The Main Trial sessions were open to the public.

Following the trial panel's deliberation and voting held on 30 July 2013;

Pursuant to Article 392 CPC, pronounced in public and in the presence of the Defendant, Defence Counsel Mahmut Halimi, the Injured Party and the Prosecutor;

In accordance with Articles 388 – 391 of the CPC;

Renders the following:

JUDGEMENT

The Accused **R. H.**, personal data as above,

is

FOUND GUILTY

Because on 18 November 2010 at around 10:45 at the place called … in Mitrovica he deprived of his life M. D. by attacking him with a knife and stabbing him eight times in different parts of the body, inflicting one stab wound to the left shoulder, one stab wound to the abdomen, two stab wounds to the trunk and four stab wounds to the chest. As a result of one of the stab wounds to the chest, affecting his heart, M. D. died on the way to the clinic in Mitrovica.

R. H., while stabbing M. D. in the chest, sufficiently foresaw that his action could result in the death of the latter and accepted it.

R. H. was fully mentally competent.

By doing so, **R. H.** committed and is criminally liable for the criminal act of Murder in violation of Article 146 of the CCK, in conjunction with Article 11, 12, and 15 (3) CCK. – /Count 1/

THEREFORE, the accused R.H.is SENTENCED

to 8 /eight/ years of imprisonment for the criminal act of Murder in violation of Article 146 of the CCK

By the Ruling by the Court of Appeal of Kosovo dated 26 March 2013 the accused had been sentenced to 1/one/year imprisonment for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph (2) of the CCK. - /Count 3/

The aggregate punishment for criminal offences under Count 1 and Count 3 is therefore determined in 8 /eight/ years and 3/three /months of imprisonment, pursuant to Article 71 Paragraph (1) and Paragraph (2) item 2 of the CCK.

The time spent in detention on remand between 22 November 2010 and 11 November 2011 and between 27 March 2012 and 30 July 2013 and the time spent in house detention from 11 November 2011 until 27 March 2012 is to be credited pursuant to Article 73 paragraphs (1) and (4) of the CCK.

The accused shall reimburse 400 (four hundred) Euro as part of the costs of criminal proceedings but he is relieved of the duty to reimburse the rest of the costs pursuant to Article 102 Paragraphs (1) and (4) of the CPCK.

REASONING

I. PROCEDURAL HISTORY

1. The (then) District Public Prosecutor of the District Public Prosecution Office of Mitrovicë/a on 15 February 2011 filed an Indictment against the accused, charging him with committing the criminal offences of Murder pursuant to Article 146 CCK */count 1/*, Unauthorized Ownership, Control, Possession, or Use of Weapons, pursuant to Article 328 Paragraph (1) of the CCK */count 2/* and Unauthorized Ownership, Control, Possession, or Use of Weapons, pursuant to Article 328 Paragraph (2) of the CCK */count 3/*. The Indictment was confirmed by the Ruling KA nr. 06/11 of the (then) District Court of Mitrovicë/a, dated 25 February 2011.

2. On 26 March 2012 the (then) District Court of Mitrovicë/a rendered a judgement finding the Defendant guilty and criminally liable for two counts, namely for the criminal act of Murder under Article 146 of the CCK /*Count 1*/ and for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph (2) of the CCK. - /*Count 3*/; the Defendant was sentenced to 8 years imprisonment for having committed Count 1 and 2 years imprisonment for having committed Count 2; the aggregate punishment was determined in 9 years imprisonment; Defendant was acquitted for the charge of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph (1) of the CCK. /*Count 2*/

3. By the Ruling by the Court of Appeals of Kosovo the Judgment of the (then) District Court of Mitrovicë/a P. nr. 11/2011, dated 26 March 2012 was annulled and the case is returned to the first instance court for retrial in relation to the criminal act of Murder under Article 146 of the CCK /*Count 1*/; by the same Ruling by the Court of Appeals of Kosovo dated 26 March 2013 the accused was sentenced to 1/one/year imprisonment for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph (2) of the CCK. - /*Count 3*/; Defendant's acquittal for the charge of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph (1) of the CCK. /*Count 2*/ was maintained by the Court of Appeals.

4. The main trial hearings in retrial were held from 17 until 20 June 2013, on 15 and 16 July 2013, on 29 and 30 July 2013. The judgement was announced on 30 July 2013, in conformity with the above mentioned enacting clause.

II. PROCEDURAL CODE

5. On 1 January 2013 a new Criminal Procedure Code came into force in Kosovo. The Criminal Procedure Code (Criminal No. 04/L-123) (CPC) replaced the Provisional Criminal Procedure Code of Kosovo (as amended) (UNMIK Regulation 2003/26) (CPCK) (Articles 545(2) and 547 of the CPC). Transitional and saving provisions apply which determine the application of the procedure under the CPC and the continued application of the CPCK in specific circumstances. According to the Legal Opinion of the Supreme Court of the Republic of Kosovo issued under No. 56/ 23 January 2013, in criminal proceedings initiated prior to the entry into force of the new Procedural Code, for which the main trial has already commenced, but has not been completed or have been completed but sent back for re-trial by means of ordinary or extraordinary legal remedy, provisions of the old Code shall apply *mutatis mutandis* until the decision becomes final.

III. COMPETENCE

6. The Law of Courts, Law no. 03/L-199 (LC) also entered fully into force on 1 January 2013 (Article 43). This regulates the territorial and substantive jurisdiction of the Court.

7. The offence falls within the substantive and territorial jurisdiction of Basic Court of Mitrovicë/Mitrovica's (prior to 1 January 2013 the District Court of Mitrovicë/Mitrovica). The offence of murder carries a minimum sentence of at least 5 years and falls under the subject matter jurisdiction of the Basic Court in the first instance (see Article 23 Paragraph (1) subparagraph (i) of the CPCK and Article 15 Paragraphs (1.11) and (1.21) of the LC). As the Indictment alleges that offence was committed in a place called "…" , … village, Municipality of Mitrovicë/a, it falls within the territorial jurisdiction of the Basic Court of Mitrovicë/Mitrovica under Article 29 Paragraph (1) of the CPCK and Article 9 Paragraph (2.7) of the LC.

IV. EVIDENCE PRESENTED

8. During the course of the main trial the following witnesses were heard:

- Z. D. – on 17 June 2013;
- A. D. – on 18 June 2013;
- KP Officer R. P. – on 18 June 2013;
- KP Officer S. S. – on 18 June 2013;
- S. M. – on 19 June 2013;
- E. Sh. – on 19 June 2013;
- H. D. – on 19 June 2013;
- KP Officer H. B. – on 19 June 2013;

- KP Officer Rr. M. – on 20 June 2013;
- KP Officer G. K. – on 20 June 2013;
- KP Officer F. S. – on 20 June 2013;
- A. H. – on 20 June 2013;
- Expert witness Z. M. – on 15 July 2013
- Expert witness C. B. – on 15 July 2013;
- Expert witness M. G. – on 16 July 2013;
- Witness A. K. - on 16 July 2013.

9. The Panel also considered as read into the record the following:

- The testimony by expert witness M. G. given in the first main trial 2nd March 2012 [1];
- The testimony by Xh. I. given in front of the court on 16 March 2012 [2];
- The testimony of B. A. given in front of the court on 16 March 2012 [3].

10. During the course of the main trial the following exhibits were presented and examined:

- A helmet, with the identification number 2010/179, exhibit 1, date 18 June 2013;
- A knife, exhibit 2, date 18 June 2013;
- A picture of the crime scene (with the shop of witness Sh. marked with X), exhibit 3, date 19 June 2013;
- A picture of the crime scene (with the position of witness H. D. marked with X), exhibit 4, date 19 June 2013;

[1] Record of Main Trial session 18 June 2013.
[2] Record of Main Trial session 19 June 2013.
[3] Record of Main Trial session 19 June 2013.

- Forensic information on pathology of knife wounds, exhibit 5, dated 15 July 2013;
- A medical report dated 22 November 2013, exhibit 6, dated 15 July 2013;
- A list of material evidence, presented by the prosecutor, exhibit 7, date 29 July 2013;
- The clothes of the defendant, numbers 7.1, 7.2, 7.4 and 7.8 [4], date 29 July 2013.

11. On 29 July 2013 the following documents were read into the record:

- Binder 1: investigation and evidence
- Criminal Report Case number 2010 BC1284 - Threat, dated 2 September 2010, page 60-63; Initial Incident Report case No.2010-BC-1284, dated 24 August 2010 time 14:10 hours, page 64-67;
- Municipal Assembly Reply dated 3 August 2010, page 68-69;
- Request for Attending the Incident Location to the Municipal Assembly dated 3 August 2010 page 70-71;
- M. D., Record of witness interview dated 24 October 2010, page 283-286;Officer A. S., rank Number 1226, report dated 24 August 2010, page 72-73;
- Official Note of Case number 2010-BC-1284 dated 24 August 2010, page 74-75;
- Record on the Search of Premises dated 24 August 2010, at 17.45 hours, page 87-90;
- Certificate on Confiscation of Items dated 24 August 2010, at 18.30 hours, page 91-92;Forensic Report case number 2010-BC-1284 dated 23 Nov 2010, page 93-95;
- Criminal Report Case No. 2010-BC-429 Murder, dated 22 Nov 2010, page 96-99;
- Official Memorandum –Transfer of Case 2010-BC-1859 to RIU, dated 19 Nov 2010, page 100-101;
- Initial Incident Report Case no. 2010-BI-429 dated 18 Nov 2010 at 10.45, page 108-109;

[4] Prosecution binder 1, page 217.

- Police Officer's Schedule dated 18 Nov 2010 at 10.49 hours;
- Official Memorandum – Transfer of Case 2010-Bc-1284 to RIU dated 23 Nov 2010, page 110-111;
- Follow –up Report Case no. 2010-BC-1284 dated 2 September 2010, page 112-113;
- Officer's Report – (Sh. F. KP # 8080) Case No-BI-429 dated 18 Nov 2010 at 19:00 hours, page 114-155;
- Officer's Report – (S. S. KP #3449) Case No-BI-429 dated 18 Nov 2010 at 13.20 hours, page 116-119;
- Officer's Report – (F. Sh. KP #4103) Case No-BI-429 dated 18 Nov 2010 at 13.00 hours, page 120-121;
- Police Report from Incident Location (Rr. M. Kp#4709) dated 18 Nov 2010, page 122-123;
- Officer's Report (L. S. KP#8257) Case No.-BI-429 dated 18 Nov 2010 at 14.00 hours, page 124-125;
- Certificate on Confiscation of Items dated 18 Nov 2010, page 126-127;
- A. K., Record of Witness interview, dated 20 Nov 2010 at 13.10 hours, page 141-146;
- A. H., Record of Witness interview, dated 23 Nov 2010 at 13.30, page 147-152;
- A. K., Record of Witness interview, dated 9 February 2011 at 12.50 hours, page 153-156;
- Z. D., Record of Witness interview, dated 14 January 2011 at 12.00 hours, page 157-162;
- A. H., Record of witness interview, dated 9 February 2011, at 12.50 hours, page 173-176;
- Forensic crime scene examination report Case No. 2010-BI-429, dated 18 Nov 2010 at 11.15 hours, page 181-192;
- Request for ballistic expertise Case No. 2010-BC-1284 dated 28 Nov 2010, page 192-194;
- Order for KP Laboratory dated 30 Dec 2010, page 195-196;

- Request for ballistic expertise Case No. 2010-BC-1284 dated 7 December 2010, page 197-198;
- Request for expertise/analysis of evidence in the main Laboratory 7 December 2010, page 199-200;
- Order to crime lab of KP Case No. 2010-BC-1284 dated 9 December 2010, pages 201-202;
- Order for autopsy Case No-BI-429 dated 18 Nov 2010, page 203-204;
- Record from specialist physician Case No-BI-429 dated 18 Nov 2010, page 205-206;
- Forensic Report Case No-BI-429 dated 19 Nov 2010, page 207-210;
- Autopsy Report Case No-BI-429 dated 19 Nov 2010, page 211-212 ;
- Forensic File, page 213-214;
- Forensic Additional Report dated 22 Nov 2010 at 09.30 hours, page 215-218;
- Photo Album Case No-BI-429 dated 19 Nov 2010, page 220-235;
- Autopsy Report Case No-BI-429 dated 19 Nov 2011 at 10.30- 13.00 hours, page 236-253;
- Suspect/hospital discharge list dated 22 Nov 2010, page 254-256;
- Photo Album dated 22 Nov 2010;
- KP Report (V. Sh. Kp #0495) dated 18 Nov 2010 pages 269;
- Forensic File page 270-271;
- University Clinic Report dated 18 Nov 2010 at 14.30 hours, page 272-275;
- Sketch of incident location Case No-BI-429 dated 18 Nov 2010, page 276;
- Table of measurement at the incident location dated 18 Nov 2010, page 277;
- Photo Album (place of incident) Case No-BI-429 dated 18 Nov 2010;
- Photo of the search of Suspect house dated 18 August 2010, page 278-280;
- Forensic Report dated 21 December 2010, page 281-282.

- Binder 2: Records of initial trial
- Ruling of Kosovo Court of Appeal to annul Judgment P.no. 11/2011 and to send the case for retrial, 26 March 2013, page 01-11;

- Judgment P.no. 11/2011, 26 March 2012, page 12-54;
- Appeal of the defence counsel Mahmut Halimi against Judgment P. no 11/2011, 9 July 2012, page 55-86;
- Opinion of Mitrovica DPPO on the appeal, 27 July 2012, page 87-96;
- Prosecution Closing Speech –R.H.,22 March 2012, page 97-131;
- Defence Councel Closing Speech, 22 March 2012, page 132-156;
- Record of the Main Trial 21 February 2012, page 157-208:
- Z. D.-injured party (son of the deceased), page 161-173;
- Witness A. K., page 173-181;
- A. D.-brother of injured party (son of the deceased), page 183-188;
- Witness A. K., recalled, page 188-189;
- Confrontation of A. D. and A. K., page 190-191;
- Witness A. H., page 181-207;
- Record of the Main Trial 22 February 2012, page 209-222:
- Witness R. P.-police officer, page 213-222;
- Record of the Main Trial 23 February 2012, page 223-255;
- Witness S. S.-police officer, page 224-234;
- Witness H. B.-police officer, page 234-239;
- Witness S. M., page 239-251;
- Record of the Main Trial 2 March 2012, page 256-299:
- Witness Rr. M.-police officer, page 258-266;
- Witness G. K.-police officer, page 266-268;
- Expert witness Z. M.-ophthalmologist, page 269-276;
- Expert witness M. G.-emergency doctor, page 277-283;
- Witness E. Sh., page 283-297;
- Record of the Main Trail (English-Albanian) 12 March 2012, page 300-312;
- Record of the Main Trial 16 march 2012, page 313-335:
- Witness F. Sh.-police officer, page 314-323;
- Witness B. A., page 323-326;
- Witness H. D., page 326-328;

- Witness Xh. I., page 328-330;
- Statements of Xh. S. given in front of the DPP declared inadmissible, page 332;
- Record of the Main Trial 22 March 2012, page 336-358:
- Expert witness C. B.-forensic expert, page 342-352;
- Presenting exhibits 7.1, 7.4 and 7.5, 7.3, page 353-355;
- Examination of the accused-reading of statement given by the accused, page 355-358;
- Record of the Main Trial 23 March 2013, page 259-365:
- Closing statement of prosecutor, page 360-363;
- Closing statement of the injured party Z. D., page 363;
- Record of the Main Trial 26 March 2013 page 366-372:
- Closing statement of the defence counsel, page 367-369;
- Reply of the prosecutor, page 369-370;
- Reply of the defence counsel, page 370-371.

V. ADMISSIBILITY OF EVIDENCE

12. The District Public Prosecutor in the Indictment PP nr. 146/2010, filed on 15 February 2011, proposed that Xh. S. be heard as a witness. The Court summoned Mr. S. for the main trial session of 18 June 2013 but according to the information received from the Post Office, the witness was abroad.

13. On 17 June 2013 the Court ordered the Police to make inquiries about the whereabouts of this witness and his eventual return to Kosovo.

14. On 18 June and 9 July 2013, the Court was informed by the Police that the witness Xh. S. lives abroad. The witness' father did not give any other contact

details, nor did he inform the Police about possible future visits of his son to Kosovo.

15. On 16 July 2013 the Prosecution motions the Court to hear the witness via skype as the latter had consented to testify by these specific means. He would not be willing to provide his address or to assist the Court in any other way. On the same date the Court rejected the application[5].

16. On 17 July 2013, the Prosecution Office informed the Court by e-mail that they will not put forward an application for International Legal Assistance (hereinafter ILA) in relation to this witness; the witness conveyed to Task Force Mitrovicë/a that he will not comply voluntarily with the summonses and will not reveal his address; therefore he is unreachable by the courts and police abroad for the purpose of giving evidence via ILA. This standpoint has been reaffirmed by the Prosecutor during the Main Trial hearing of 29 July 2013. However, the Prosecution motioned for the witness' previous statements given in the investigation stage to be read into the record pursuant to Article 368 of the KCCP.

17. During the main trial session of 29 July 2013 Defence Counsel Mahmut Halimi opposed the above request by the Prosecution and raised the issue of admissibility of statements given by witness Xh. S. to the Police and the Public Prosecutor. The basis for the challenge was the fact that Defence Counsel was not present during the interviews. The Defence Counsel also stated that he was not informed about the date of the interviews.

18. The witness Xh. S. was interviewed by the Police on 23 November 2010 and by the Public Prosecutor on 09 February 2011.

[5] Record of Main Trial session 16 July 2013, page 15.

19. The Trial Panel thoroughly addressed the issue of admissibility of evidence raised by the Defence Counsel.

20. Article 153 Paragraph (1) of the KCCP explicitly states that evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the Code or other provisions of the law expressly so prescribe.

21. Article 156 Paragraph (2) of the KCCP stipulates that a statement of a witness given to the Police or the Public Prosecutor may be admissible evidence in court only when the defendant or Defence Counsel has been given the opportunity to challenge it by questioning that witness during some stage of the criminal proceedings.

22. The Trial Panel ascertained that the law is very clear in this regard and that there is no place for discretion in applying Article 156 Paragraph (2) of the KCCP. It is established based on the evidence given by witness Xh. S. to the Police and the Prosecutor that the Defence Counsel was not present during the interview and throughout the proceedings never had the opportunity to challenge the said evidence.

23. Therefore, on the above date, pursuant to Article 153 Paragraph (1) of the KCCP and Article 156 Paragraph (2) of the KCCP, the Trial Panel declared the following evidence as inadmissible [6]:

    Xh. S., Record of the witness interview, compiled on 23 November 2010; Xh. S., Record of witness interview, compiled on 09 February 2011.

VI. MAIN TRIAL

VI.1. Summary of evidence

[6] Record of Main Trial session 29 July 2013, page 2.

24. The evidence administered in this re-trial concern only the charge of Murder. A full list of evidence presented and rendered admissible in this criminal case is listed in section IV of this judgment (above). This evidence forms the basis for the Trial Panel's decision in this case.

25. The Trial Panel has sought the testimony of *a* number of 19 witnesses to determine the facts of the incident of 18 November 2010 that resulted in the death of M. D.. Their testimonies can be assorted into the following three categories:

- Persons present near or at the crime scene before/during/after the criminal offence: A. K. [7], A. H. [8], E. Sh. [9], S. M. [10], H. D.[11]; the previous testimony of witness Xh. I. was considered as read into the record on the 19 June 2013 [12].
- Police officers participating in the investigation and present at the crime scene: R. P. [13], S. S. [14], H. B. [15], Rr. M. [16], G. K.[17], F. Sh. [18].
- Expert witnesses (medical and forensic experts): Z. M. [19], C. B. [20] and M. G. [21]; the previous testimony of expert witness M. G. was also considered as read into the record on 18 June 2013 [22].

26. The Trial Panel also heard the testimony of the injured party Z. D. [23], son of the victim M. D., who primarily gave testimony about the background of the

[7] Record of Main Trial session 16 July 2013, page 16.
[8] Record of Main Trial session 20 June 2013, page 2.
[9] Record of Main Trial session 19 June 2013, page 20.
[10] Record of Main Trial session 19 June 2013, page 2.
[11] Record of Main Trial session 19 June 2013, page 27.
[12] Record of Main Trial session 19 June 2013, page 32.
[13] Record of Main Trial session 18 June 2013, page 9.
[14] Record of Main Trial session 18 June 2013, page 20.
[15] Record of Main Trial session 19 June 2013, page 13.
[16] Record of Main Trial session 20 June 2013, page 16.
[17] Record of Main Trial session 20 June 2013, page 26.
[18] Record of Main Trial session 20 June 2013, page 20.
[19] Record of Main Trial session 15 July 2013, page 2.
[20] Record of Main Trial session 15 July 2013, page 8.
[21] Record of Main Trial session 16 July 2013, page 3.
[22] Record of Man Trial session 18 June 2013, page 8.

relationship between the accused and the victim and about the habits and physical state of the injured party and his behaviour right before his death.

27. The Trial Panel also interviewed A. D. [24], another son of the victim, in order to determine whether witness A. K. was an eye-witness to the criminal offence of Murder or not. He also testified about his father's behaviour prior to his death.

28. The police officers testified as to their observations and actions upon arrival at the crime scene on 18 November 2010 and further collection and handling of evidence in the case.

29. The expert witness Z. M. testified about the injuries and health condition of the accused and the Court considered the testimony given by expert witness M. G. during the first main trial related to the same aspects.

30. The expert witnesses C. B. and M. G. testified about the injuries suffered by M. D. and the autopsy performed on the victim.

31. On the critical day, witness S. M. happened to be in a bus station nearby the place of the incident. However, he stated that he did not see how the confrontation between the two parties started or evolved. He denied any intervention of his in separating them. He only saw a motorbike turned over on the road close to the place of the incident.

32. Witnesses H. D. and Xh. I. were the workers present at a construction site near the crime scene on the day of the incident (18 November 2010), but none of them provided an eye-witness account of the fight between the accused and M. D..

[23] Record of Main Trial session 17 June 2013, page 10.
[24] Record of Main Trial session 18 June 2013, page 2.

33. Witnesses A. H., A. K. and E. Sh. were identified as being present at or near the crime scene on the day of the incident but none of them testified as to how the conflict between the accused and M. D. started. The witnesses gave testimony about the outcome of the fight and what they saw when the confrontation between the two men was already in progress or over.

34. The witness A. H. is a taxi driver who on the critical day happened to pass by the place of the incident; on that occasion he was riding in the passenger's seat while the taxi was driven by his friend, witness Xh. S.. The two witnesses were the ones who transported the injured party to the hospital. A. H. gave his first statement to the Police on 23 November 2010, i.e. only five days after the criminal offence took place. H. described what he encountered at the bridge, stating that when he approached the scene with his friend, they saw two persons involved in a fight who then fell down and rolled down off the road. Both of the persons involved in the fight had knives in their hands. When they fell down, one of them remained lying and the second one had a bloody face and was standing with knife in his hand which he then threw away in Shipol direction. He saw the person who was heavier to be on top of the other one and hitting him. Present was also a third person who was trying to separate the bloody person. A. H. gave another statement on 9 February 2011 to the Public Prosecutor where he essentially reiterated his statement to the Police. During the first main trial, A. H. was questioned on 21 February 2012. The witness initially stated that his statements to the Police and the Public Prosecutor were truthful and has also recognized his own signature on both Records of statements taken. When questioned in Court, the witness however, retracted from certain parts of his initial statements, in particular with regard to whether he saw the two men fighting and whether they had knives. He also denied having recorded the event with his mobile phone. The Trial Panel confronted the witness with these discrepancies but the witness provided no satisfactory answer as to why his account of the events had suddenly changed. In general lines, the witness maintained his latest position also during this re-trial. He

maintained that he and Xh. S. saw a motorbike down the road close to the place of the incident and they stopped their car, thinking that maybe a traffic accident occurred. Once they stopped, they could see the two parties who were "down there", 15-20 m away. Having previously stated that "the heavier" person was on top of the other, during this re-trial he indicated the defendant as being the heavier. The victim was lying on his back and the defendant was bleeding in the face area, and was being" held by two people and brought forward". The witness recalls the presence of 4-5 other witnesses at the place of the incident, one of which could be E. Sh.. However, he cannot decisively indicate the identity of any of these persons. He maintained that he did not see any sequence of the fight. He also denied having recorded the event with his mobile phone. Similarly to the first main trial, the witness could not provide a credible explanation as to why he changed his previous account. He also confirmed once more the authenticity of his signature on all his previous statements.

35. The Trial Panel considers the witness' initial statements to the Police and the Public Prosecutor as the true testimony of what the witness actually saw for the following reasons: the witness was questioned shortly after the event when his memory of the event was still fresh and it is less likely that he was influenced as to his statement. Moreover, he does not offer any credible explanation as to how those details, which he later claimed to be untrue, were inserted in his statements given in the investigation phase.

36. Witness A. K. owns a shop situated nearby the place of the incident. He did not witness the fight between the accused and the victim and only heard from others that a fight between two men broke out. He did witness the accused driving past his shop, and also saw a red bag in his trunk.

37. Witness E. Sh. also owns a hardware shop in the vicinity of the place of the incident. He testified that he saw two elderly men fighting, both were initially

lying and the defendant stood up. He was the one that called the Police but did not stay any longer at the crime scene, and he returned to his shop instead.

38. The defendant **R. H.** gave his testimony during the Main Trial session of 29 July 2013[25]. *He* stated that on the critical day, while he was driving his motorbike towards Mitrovica where he would have breakfast, he was stopped by the injured party who was standing on the …. The latter then attacked the defendant with the knife; in his turn, the defendant used his pocket knife and hit the injured party to defend himself.

VI.2. Analysis of evidence with regard to the charge of Murder (Article 146 of the CCK) [Count 1]

Facts proven

The Trial Panel considers it proven that on 18 November 2010 at around 10:45 at the place called …. in Mitrovica, the accused **R. H.** attacked the victim **M. D.** with a knife and stabbed him eight times in different parts of the body, causing four stab wounds in the chest, two stab wounds to the trunk, one stab wound to the left shoulder and one stab wound to the abdomen. The injuries to the chest in the area of the heart resulted in the death of M. D. on the way to the medical clinic. The accused **R. H.** suffered minor injuries in the incident, namely a pressure injury to the socket of the eye with incision wounds of the eye lid, of the external temporal region, incision wounds of the head region of the back

[25] Record of Main Trial session 29 July 2013, page 4.

part, incision wound puncture wound of the thorax region of the left side, facial injuries of the skin, the face and to the part of the gland.

39. The above are based on the opinion of the medical and forensic experts expert witnesses Z M [26], C B [27] and M G [28] and on the medical reports [29] drafted in the case, all considered as highly credible and reliable.

40. There is no doubt that the accused and the injured party M. D. engaged in a fight on 18 November 2010 around 10.45h at … in Mitrovica. The accused himself admits that during this fight he 'hit' the deceased with his knife several times. It is also uncontested that M. D. died as a result of injuries suffered during the incident.

41. The full autopsy performed on the deceased revealed eight injuries identified by DFM [30] – Forensic Doctor as stab wounds, notably one stab wound to the left shoulder, one stab wound to the abdomen, two stab wounds to the trunk and four stab wounds to the chest. The cause of death, as determined by the Forensic Medical Doctor, was a stab wound to the chest of M. D., affecting the heart.

42. It is therefore undisputed that on the critical day the accused caused stab wounds to the deceased; the stab wound to the heart resulted in D.'s death; there was no third party involved who would cause injuries of the accused and/or the victim.

43. Based on the above, the Trial Panel concludes that it is proven that M. D. died as a result of a stab wound inflicted on him by the accused.

[26] Record of Main Trial session 15 July 2013, page 2.
[27] Record of Main Trial session 15 July 2013, page 8.
[28] Record of Main Trial session 16 July 2013, page 2.
[29] Prosecution binder 1, page 207, 208, 211, 215, 236-244, 254, 274 and 275.
[30] Department of Forensic Medicine.

44. The topical aspect to be established in this re-trial is the dynamics of the incident between the two parties. According to the Court of Appeals' Ruling, the panel has to establish in re-trial "specially whether there is intent of the accused to commit the criminal offence as in the indictment or are in fact dealing with a different criminal offence because it is indisputable the fact that the deceased has also hit the accused with the knife. The court must also verify that for what reason precisely on the critical day the victim takes the knife with him". The Court of Appeals also reinforces that "what remains contestable is the fact in relation to who first attacked who, was it the accused first attacked or was it the deceased and whether the accused has acted on necessary defence as claimed in the appeal by the defence, none of which the first instance court has precisely confirmed."

45. In light of the above and also of the line of defence, the main issue before the Trial Panel is whether the accused, when inflicting the wound that resulted in D.'s death, was acting in necessary defence (self-defence) as he claims.

46. In other words, can it be established that it was the victim M. D. the one who suddenly attacked/provoked the accused and did the latter pull his knife and stabb D. in fear for his own life? If the answer is in the affirmative, the act of the accused would not constitute a criminal offence.

47. Pursuant to Article 8 CCK an act committed in necessary defence namely does not constitute a criminal offence. An act committed in necessary defence is defined as *"when a person commits the act to avert an unlawful, real and imminent attack from himself, herself or another person and the nature of the act is proportionate to the degree of danger posed by the attack".*

48. In assessing the self-defence aspect, the Trial Panel notes the following considerations stemming from doctrine and jurisprudence:

49. When alleging self-defence, the interested party has to sufficiently substantiate it. Claiming self-defence has to amount to more than a mere defensive allegation. It has to be grounded on elements that make the claimed self-defence probable, plausible, possible and likely to have occurred. If the Prosecution does not produce sufficient evidence to rule out self-defence, then the standard of proving beyond reasonable doubt the unlawfulness of the Defendant's action cannot be reached. Therefore, in such an instance, a judgement of acquittal shall be rendered. In order to convict a Defendant, it is required to exclude with certainty that he acted in self-defence. Doubt about self-defence throws doubt on the unlawfulness of Defendant's actions and therefore on their very criminal nature. And this is exactly when the principle "in dubio pro reo" comes into play. If the doubt regarding the unlawfulness of the Defendant's actions still subsists even after assessing the overall evidentiary material, then this should act in Defendant's favour and trigger his acquittal. In other words, a judgement of conviction can only be rendered if the self-defence thesis is entirely repelled.

50. These are the main aspects that the Court had to establish based on the overall evidence. The findings of the Court are the following:

51. Being heard by the Court [31] the accused **R. H.** declared that he does not recall accurately what he had previously stated, but the acknowledges his signature on the statement he gave to the Public Prosecutor on 10 January 2011[32]. He now gave the following account of the incident:

52. On the critical day he left his house by motorbike. He was riding the bike slowly, wearing a helmet and was heading towards Mitrovica with the intention of having breakfast. Close to the … in Mitrovica he noticed M. D. standing by the left side of the road with both hands in his pockets. The latter took out his left hand and waved to the accused to stop. The accused, according to his statement,

[31] Record of Main Trial session 29 July 2013, page 4 onwards.
[32] Record of Main Trial session 29 July 2013, page 13 and 14.

slowed down and started to prop up the motorbike on its kick-stand. While he was attempting this, M. D. approached him and straight away grabbed the accused at his throat. Musa pulled the accused towards him and dragged him on the opposite side of the road (left side as you drive towards Mitrovica). The accused noticed the victim was holding a knife. Musa hit the accused with the handle of the knife first on the left eye, then, this time using the blade, on his chest near his heart and on the head where the knife penetrated the accused's helmet. At this moment the accused pulled out his flick knife from the pocket of his jacket, pressed it open and started hitting the deceased. He dealt all the blows on the victim after the latter had finished his attack[33]. He did not recall where exactly or how many times he hit M.. He was trying to defend himself by using the flick knife. During this scuffle M. pushed him, the accused "could not hold it any longer"; they both rolled downhill from the main road; the accused "twisted and rolled around" and eventually fainted. He could not specify how long he was unconscious but when he came to, he noticed that his sight was obscured because of the bleeding; he wanted to head towards Zhabari road, when he heard a policeman's voice. He was then taken to the hospital where he was given first aid. The accused used a flick knife whose blade was about 5-6 cm and which could be clicked open by pressing a button[34]. He did not report to the police or other authorities that he had been attacked by the injured party[35]. The accused could not think of any reason why the injured party attacked him; in fact, he could have never imagined that such an incident could occur between them, as he believed they had sorted out all their previous issues[36].

53. The Trial Panel undertook extensive efforts to identify and hear all possible direct witnesses or others who could provide relevant testimony regarding the fight. During the re-trial, the Trial Panel heard the testimony of as many as sixteen witnesses in order to determine whether the account of the incident

[33] Record of Main Trial session 29 July 2013, page 36.
[34] Record of Main Trial session 29 July 2013, page 18.
[35] Record of Main Trial session 29 July 2013, page 20 and 21.
[36] Record of Main Trial session 29 July 2013, page 31 and 32.

given by the accused was accurate. The statements of other three witnesses were considered as read into the record. However, none of the witnesses identified at the scene during the incident gave testimony about the actual fight between the two men and how it began and evolved; this despite the fact that the incident took place on a public street in a relatively densely populated area and in the middle of the day.

54. It is established that on 18 November 2010, at around 10h00-10h30, the accused left his house towards Mitrovica. He was riding his motorbike when he approached the place called … where he saw the injured party standing by the left side of the road. It cannot be established that either one of the parties pursued the other; we cannot conclude that injured party was standing by the road with the intention of crossing the defendant's way; Z. D. and A. D. testified that on the critical date their father left the house and was heading to the bank to deposit some money. The victim did not know where the accused would be that day and had no intention to meet with him and, as the accused suggests, to attack him.

55. It is indeed true that on the critical day the injured party had a knife on him; this is contrary to what both his sons testified that their father never carried a knife. However, the fact that on that day the victim had a knife is not necessarily indicative of his intention to attack the defendant. He could have carried it for protection as he was carrying a large amount of money on him (2696,40 Euros[37]). Moreover, it is completely illogical that out of all available opportunities, the victim would choose to approach the defendant exactly on the occasion when he was taking that considerable amount of money to the bank. The mere fact that the injured party would know the defendant's habits could not be conclusive of the fact that the victim pursued the latter. The parties were neighbours and under those circumstances it is not unusual that they are aware

[37] Prosecutor's binder page 183.

of each other habits and daily routines. Moreover, as the parties' houses are situated next to each other, it would have been much easier for the injured party to confront the defendant nearby his house, in an area which was more familiar to him, more remote and less exposed to the public. The same argument applies also for the defendant. The Panel takes note of Z. D.'s testimony that the victim was afraid of the accused and prior to the incident has been consistently avoiding him. However, in absence of any other evidence to corroborate this, it is a mere speculation to conclude that on that specific day the defendant would have jumped on his motorbike and rode it with the intention to follow the injured party. It is equally probable that the defendant carried the flick knife for utility purposes.

56. It is therefore established that on the critical day the parties encountered each other by chance at …. It is exactly because of the unexpected nature of the encounter that the defendant, when he noticed the injured party standing by the road, stopped the motorbike and collected a stone which then he placed in the motorbike basket inside a red linen bag. To establish this last aspect the Trial Panel considered the fact that the stone and the red bag were found at the crime scene[38] and A. K.'s testimony given to the police and prosecution[39]. According to his statements, the witness noticed the defendant carrying a red bag in his hands; he also heard from others that the defendant, before approaching the victim, picked up a stone and put it in the red bag. As previously presented, this pre-trial testimony is considered as being more reliable compared to the account the witness gave before the Court.

57. Moreover, the defendant's explanation regarding the red bag and its content cannot be accepted. He alleges that "many times the kids put various things inside", such as fruits, branches from trees or fruits[40]. The accused noticed that

[38] Prosecutor's binder page 284.
[39] Prosecutor's binder page141 and 153.
[40] Record of Main Trial session 29 July 2013, pages 14 and 15.

the red bag was in the bike's basket when he left the house; however he did not check its content. The Court finds this explanation difficult to believe, and so is the Defendant's claim that he would always leave the red linen bag in the basket, in open air and in a winter month (November).

58. Having established that the defendant picked up a stone right before coming near the injured party, the Panel then excludes the accused's explanation as to why he had stopped. More exactly, he stated that he stopped the bike as the injured party waived to him; allegedly, this made the defendant believe that injured party wanted to greet him, as it was the 3rd day of Eid celebration[41]. This explanation – that the defendant expected a friendly encounter - comes in contradiction with the fact that the defendant in fact had picked up the stone right before meeting the injured party. This is also not consistent with what the defendant himself stated that on previous occasions the injured party would not speak to him or even greet him, not even when they were face to face in the same minibus; the defendant even confronted the injured party about this.[42].

59. There are no witnesses who could tell us what happened after the two parties encountered and how their conflict started and developed. The testimony of witnesses A. H. and E. Sh. are the only testimonies that directly concern the dynamics of the fight. But even these accounts refer only to the final part of the incident. They could be relevant for establishing aspects related for instance to exceeding self-defence by one of the parties. Yet, for self-defence to be exceeded, we have to start by establishing who was acting in self-defence in the first place. Therefore, the Panel will assess first the evidence relevant to how the incident started and which of the parties acted in self-defence. This evidence consists of the defendant's statements, the medical report on the defendant[43], the autopsy

[41] Record of Main Trial session 29 July 2013, page 5.
[42] Record of Main Trial session 29 July 2013, page 25.
[43] Prosecutor's binder, page 254.

report of the Injured Party [44], and the testimonies of expert witnesses Z. M. [45], C. B. [46] and M. G. [47].

60. As presented above, it is excluded that the accused believed the injured party attempted to have a friendly conversation. Therefore, we have established two possibilities:

a. the accused expected that injured party would be aggressive towards him, or

b. the accused approached the injured party with aggressive intentions,.

61. To act in self-defence, it is crucial that the stabbing be otherwise unavoidable. Killing someone must be a last resort, when all alternatives have failed. If one can escape, then he has to resort to this. In our case, the defendant was riding his bike and the injured party was standing on the opposite side of the road. The accused could have easily ridden away, to escape and avoid any confrontation with injured party.

62. Not only that the accused did not choose to avoid confrontation, but he even took a more active stance towards it. He did not simply stop the motorbike and stood up astride on it while waiting for the injured party to approach him. Instead, he chose to prop up the motorbike on its kick-stand[48]. The accused's explanation is that he proceeded this way out of respect, as it is not polite to talk to someone while standing on the bike. This explanation is simply deemed not credible. In a situation of conflict, social conveniences would be the last of concerns for any reasonable human being. In reality, this proves that the accused took an active role in the conflict and that it was him who in fact

[44] Prosecutor's binder, page 236.
[45] Record of Main Trial session 15 July 2013, page 2 onwards.
[46] Record of Main Trial session 15 July 2013, page 8 onwards.
[47] Record of Main Trial session 16 July 2013, page 3 onwards.
[48] Record of Main Trial session 29 July 2013, page 37 and 38.

approached and got closer to the injured party. In support of this conclusion comes also the fact that the incident occurred while the parties were on the left side of the road (direction Skenderaj-Mitrovica). This is situated on the side where the injured party was initially standing and opposite from the lane where the defendant pulled over his bike[49]. According to the defendant's statement [50] it was the injured party who crossed the street, made his way to the right side of the road where the accused was, grabbed the latter and pulled him to the left side; it was only after they reached the left side of the road when injured party started attacking the defendant. This explanation is deemed to be lacking any logic. Why would someone choose to lose momentum and the surprise element of an attack by bringing the target from one side of the road to the other? The Panel establishes that the location of the conflict (the left side of the road) is indicative of the fact that it was actually the defendant who pursued the injured party. This in the view of the Trial Panel supports the conclusion that it was not the accused that was suddenly attacked by the victim but precisely the other way around.

63. There are other aspects in support of the same finding. The accused at the scene was seen to be covered in blood and has sustained certain injures himself. Doctor Z. M. testified to the injuries suffered by the accused and said that he suffered a pressure injury to the socket of the eye with incision wounds of the eye lid, of the external temporal region, incision wounds of the head region, of the thorax region of the left side, facial injuries of the skin, the face and to the part of the gland [51].The same is recorded also in documentary evidence, namely the Discharge List for the accused, dated 22.11.2010[52]. In his statement, the accused also confirms the blow he received in the eye was inflicted with the handle of the knife and not with the blade. He explains that the injured party drew the first blow with the handle of the knife in the socket of the accused eye;

[49] Record of Main Trial session 29 July 2013, page 37.
[50] Record of Main Trial session 29 July 2013, page 35 and 37.
[51] Record of Main Trial session 15 July 2013, page 4.
[52] Prosecutor's binder page 254.

then the injured party twisted the knife and by using the blade hit the accused in his chest and then head region, more precisely in the helmet. According to his account, the defendant first received all the blows from the injured party; only after this he reached for his flick-knife in his pocket, opened it and in his turn started to hit back the injured party[53].

64. It is highly unlikely that the injured party, had he initiated the attack, would chose to use the less harmful part of the knife- its handle. It is also be quite an unusual and unnatural position to hold a knife when attacking someone. Equally unnatural would be the movement by which injured party twisted the knife in his right hand while in process of carrying out the attack.

65. If the victim truly would have had the intention to attack and harm the accused, it also remains unexplained why he would not target the heart area first, which was unprotected; or wait for the accused to take off his helmet and be more exposed. It makes little sense for a person who plans an attack to hit another person on the helmet, while he could have simply waited for a few seconds for him to remove the helmet. Indeed, again, it is a much more logical explanation that the attack was planned by the accused who kept the helmet on as a protection.

66. The stab wounds to the face, chest and helmet of the accused support the victim acted in self-defence. This also explains why the injured party initially struck the accused with the handle. The victim was caught by surprise, took the knife out of his pocket but did not have sufficient time to point the blade towards the accused.

67. The Panel also cannot accept the defendant's account that he only retaliated. The Panel does not believe the defendant, in full composure, drew the knife from his pocket, engage the blade and inflict as many as eight stab wounds on

[53] Record of Main Trial session 29 July 2013, page 36 and 37.

the victim, one of which was fatal. He claims to have done this after suffering an eye wound which temporarily obscured his vision and covered his face in blood and then fainting after completing the above actions. This despite the fact that the victim was "standing on higher ground" and was younger, taller and better built than the accused.[54] And all this despite of the fact the precarious state of health of the defendant, who had used his oxygen respiratory device and had taken pills right before leaving his house[55]. This is simply not credible.

68. The Trial Panel observes that comparing the injuries suffered by the accused and the victim, the latter sustained much more serious and consistent injuries than the accused. The Trial Panel in particular makes reference to the fact that the majority of the stab wounds inflicted on the victim were to the area of the chest (four).

69. This in the view of the Trial Panel supports the same conclusion that it was the accused who was the attacker. If the fight would have been started by the victim, as the accused states, the accused would have been the one to suffer the serious injuries. However, it was the victim who suffered very serious injuries and was in fact consistently stabbed in the area of the chest by the accused. The victim caused minor, superficial injuries to the accused, which were in fact mostly smaller incisions and in any case, injuries of a less severe nature. These injuries are in the view of the Trial Panel indicative of the fact that the victim was the one caught by surprise (i.e. attacked) and the one who was defending himself. The victim did not anticipate the attack and was defending himself.

70. It was exactly the unexpected nature of the attack that gave the defendant an advantage over an younger, stronger and more fit individual. The defendant maintained this advantage throughout the fight and remained in a dominant

[54] Defendant's statement, record of Main Trial session 29 July 2013, page 18 and statement Z. D., record of Main Trial session 17 June 2013, page 17 and 18.
[55] Record of Main Trial session 29 July 2013, pages 5 and 29.

position even after the victim went lying on the ground. The statement of the witness A. H. given to the police only 5 days after the incident is a reliable account of what he saw. He noticed that "the person who was heavier was above the other hitting him". In front of the Court, he indicated the defendant as being the heavier person between the two [56]

71. Relevant is also the accused's behaviour after the fight.

72. Witness A. H. [57] declared in his statement that the person standing had a bloody face and had a knife in his hand which he threw away in … direction. As a result, the knife was indeed never found by the police[58]. This is indicative of the fact that the accused intended to dispose of the weapon and he was therefore aware of having done something illegal and trying to cover it up.

73. The defendant also stated that immediately after the scuffle he lost consciousness; when he came to, his vision was obscured and he started to walk away from the place of the incident towards the Zh. road. According to the accused, the last thing he recalled in relation to the injured party was when the two of them rolling downhill together[59]. However, later on in his statement, the accused declares that he was not afraid that injured party would chase him, and he "knew he (injured party) was left on the ground"[60]. The accused was not concerned that the injured party would follow him or would pose a threat in any way. In the Trial Panel's view this could only be explained by the fact that the former was well aware of the seriousness of the wounds inflicted on the victim and of the fact that the victim was immobilized on the ground.

74. In fact the defendant proved to be more concerned about his material possessions rather than being chased by the victim. After the incident the

[56] Record of Main Trial sessionsession 20 June 2013, page 13.
[57] Minutes of witness interview 23 November 2010, page 148.
[58] Record of Main Trial hearing 18 June 2013, page 13.
[59] Record of Main Trial session 29 July 2013, page 20.
[60] Record of Main Trial session 29 July 2013, page 31.

accused proved to act in full composure when he asked the police if he could make a phone call and when he also asked them not to seize the motorbike. [61] By contrast, immediately after the incident the injured party was confused and when transported to the hospital he kept on asking what had happened[62].

75. It is also relevant to note that the accused either at the crime scene or later on, never reported that he was attacked by the victim or that it was the victim who had started the fight. It is highly unusual that a person who has just been attacked would not state this to the Police who arrived at the scene. Moreover, he did not report anything to any authority even the next day after the incident, when he found out that the victim died[63]. In fact he did not mention anything about the attack to the police, medical personal or prison staff in Dubrava[64], and it was only within the legal proceedings that he first resorted to this line of defence. This affirms the Trial Panel's belief that the statement of self-defence is fabricated.

76. The Trial Panel further notes that the background of the relationship between the victim and the accused additionally supports the conclusion that the accused was not acting in self-defence but was the one who initiated the attack. Throughout the proceedings no information as to why would D. want to attack the accused has been provided. The accused himself was unable to explain or give any reason about why D. would suddenly want to attack him. In his statement he mentions "I never believed up until he grabbed me by the throat…I never thought that such a thing could happen to us"[65].

[61] Record of Main Trial session 20 June 2013, page 23.
[62] Record of Main Trial session 20 June 2013, page 4.
[63] Record of Main Trial session 29 July 2013, page 30.
[64] Record of Main Trial session 29 July 2013, page 20 and 21.
[65] Record of Main Trial session 29 July 2013, page 31.

77. On the other hand, the analysis of this background, as correctly pointed out by the Public Prosecutor in her final statement, reveals a motive for the accused's attack on the late M. D..

78. On 24 August 2010, less than 3 months before the attack, the victim filed a complaint with the Kosovo Police about the threat made against him by the accused. The complaint, read into evidence and part of the Record[66], reveals that the victim feared for his safety. The accused was aware of the complaint and himself gave a statement in response to the allegations made by the victim. This was followed by a search when police seized a weapon from the accused. It was therefore the accused who had a reason, aggravated by the electric cable issue and by the complaint made to the Police against him, to attack the victim and not vice-versa.

79. Further, at the crime scene, as testified by Police Officer S. S., the accused was specifically asked what the argument was about and he answered that it was about an electricity cable[67]. The Defendant radically changed position in his statement in front of the Court, where he repeteadly declared that any past issue between himself and injured party had been long solved; that he was holding no grudges towards injured party, and that the disagreements in the past had been solved in a civilized way[68]. However, on the basis of the evidence previously pointed out, the Trial Panel finds the Defendant's statement as being inconsistent and dishonest.

80. What is more, the victim was clearly afraid of the accused and prior to the incident has been consistently avoiding him. This was confirmed through the testimony of the victim's son Z. D.. The latter testified that his father was for a

[66] Kosovo Police Official Memorandum 24 August 2010, case no. 2010-BC-1284, prosecutors binder 1.
[67] Record of Main Trial session 23 February 2012, page 4 and 5.
[68] Record of Main Trial session 29 July 2013, page 24, 25, 26, 32, 33 and 34.

long time afraid to leave the house, fearing an encounter with the accused, anticipating that the accused would attack him[69]

81. To conclude, on the basis of material evidence, including forensic evidence and considering the mentioned inconsistencies and fallacies in the accused's statements the Trial Panel is convinced that the accused was not acting in self-defence when stabbing the victim, but was in fact the one who initiated the attack.

82. In light of this the legal defence of necessary defence pursuant to Article 8 of the CCK is excluded.

83. The Trial Panel now turns to evaluate whether the subjective elements (so called *mens rea*) of the accused, are established.

84. Pursuant to Article 11 Paragraph (1) of the CCK, a person is criminally liable if he or she is mentally competent and has been found guilty of the commission of a criminal offence. Pursuant to the same provision, a person is guilty of the commission of a criminal offence when he or she commits a criminal offence intentionally or negligently.

85. Firstly, there is no doubt as to the fact that the accused was fully mentally competent when he committed the offence. Nothing in the case-file suggests otherwise and no such challenge has been raised by the Defence.

86. Secondly, the accused, when committing the crime, acted with intent.

87. A criminal offence may be committed with direct or eventual intent. A person acts with direct intent when he or she is aware of his or her act and desires its commission. A person acts with eventual intent when he or she is aware that a

[69] Record of Main Trial hearing 17 June 2013, page 18.

prohibited consequence can occur as a result of her act or omission and he or she accepts its occurrence.

88. The Trial Panel concluded the Defendant acted with *animus necandi*. Intention to kill, being a volitional element buried in the person's conscience, can only be inferred from the evidence about the observed conduct of the Defendant. Probative elements susceptible of revealing the person's intention are, amongst others: his behaviour before, during and after the aggression, comprising what was said, threatening expressions, the assistance given to the victim, etc.; the weapon or instrument used during the aggression; the body area targeted by the attack; the intensity of the blow or blows that represent the aggression; the number of blows; and generally any other information that might result from the specifics of the case.

89. The accused used a knife to stab the victim. He stabbed the victim eight times; four of the stabbings were made to the chest to the area of the heart, which is indicative of his intention to deprive the victim of his life. The accused drew the blows in the heart area and it is common knowledge that strikes to the heart are most likely to result in death. The accused did not stab the victim only once but repeatedly within seconds. He was fully aware of the potential consequences of his actions. The Trial Panel also takes note of the accused's behavior immediately after the attack, namely that he was composed and calm and did not perceive the victim as being a threat any more. This is indicative of the fact that he was not acting in any way irrationally when attacking the victim and that he was fully aware and he accepted the consequences of his attack.

90. Based on the above, the Trial Panel has found the accused criminally liable for committing the criminal offence of Murder pursuant to Article 146 of the CCK. The accused committed the offence with indirect intent.

VII. SENTENCE IMPOSED

91. When imposing the punishment upon the accused convicted for a particular crime, the Court must bear in mind both the general purpose of the punishment – i.e. to suppress socially dangerous activities by deterring others from committing the same offences, and the specific purpose - i.e. to prevent the offender from re-offending. According to Article 34 of the CCK: "The purposes of punishment are: 1) to prevent the perpetrator from committing criminal offences in the future and to rehabilitate the perpetrator; and 2) to deter other persons from committing criminal offences". Two other sentencing objectives commonly referred to by criminological and penal experts are retribution and rehabilitation.

92. Accordingly, the Trial Panel must take all these objectives into account when determining the punishment.

93. Also, on 01 January 2013 a new Criminal Code entered into force. Therefore, the Panel has to consider the principle of peremptory applicability of *lex mitior*[70], the Trial Panel had to *in concreto* consider what law would be more favorable for the Defendants when calculating the sentence. As stated by the European Court of Human Rights (ECtHR), *lex mitior* is the one which is more favorable to the Defendant, taking into account his or her characteristic, the nature of the offence and the circumstances in which the offence was committed[71]. Therefore, the *lex mitior* has to be found *in concreto*[72].

VII.1 Calculation of punishment under the old CCK

[70] See *case of Scoppola no.2,ECHR.*
[71] *Scoppola v Italy (no. 2)*, no. 10249/03, para. 109, 17 September 2009*; Maktouf and Damjanovic v Bosnia and Herzegovina*, separate opinions, page 43.
[72] See above, *Maktouf and Damjanovic v Bosnia and Herzegovina*, page 44.

94. The criminal offence of Murder pursuant to Article 146 of the CCK carries a minimum punishment of five years of imprisonment.

95. Concerning the general rule of punishment of imprisonment, Article 38 Paragraph (1) of the CCK states that 'The punishment of imprisonment may not be shorter than fifteen days or longer than twenty years'.

96. The **applicable sentencing range** for the criminal offence of '**Murder'** is, therefore, from five **to twenty years of imprisonment**.

97. According to Article 64(1) of the CCK: "The Court shall determine the punishment of a criminal offence within the limits provided for by law for such criminal offence, taking into consideration the purpose of the punishment, all the circumstances that are relevant to the mitigation or aggravation of the punishment (*mitigating and aggravating circumstances*) and, in particular, the degree of criminal liability, the motives for committing the act, the intensity of danger or injury to the protected value, the circumstances in which the act was committed, the past conduct of the perpetrator, the entering of a guilty plea, the personal circumstances of the perpetrator and his or her behaviour after committing a criminal offence. The punishment shall be proportionate to the gravity of the offence and the conduct and circumstances of the offender".

98. The Trial Panel considers the accused's attack on his neighbour a particularly grave criminal act. Such ways of settling disputes between people in the community cannot be tolerated and the punishment imposed must reflect this.

99. The Trial Panel, when determining the sentence also took into consideration the following circumstances as mitigating circumstances: old age of the accused, poor health of the accused, the fact that the accused does not have a criminal record.

100. Considering the above noted mitigating and aggravating circumstances, the Trial Panel sentenced the accused to 8 /eight/ years of imprisonment for the criminal act of Murder in violation of Article 146 of the CCK.

101. As presented above, by the Ruling by the Court of Appeal of Kosovo dated 26 March 2013 the accused had been sentenced to 1/one/year imprisonment for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph (2) of the CCK.

102. Pursuant to Article 71 Paragraph (1) of the CCK and Article 71 Paragraph (2) Item 2) of the CCK, regulating the imposition of punishment for concurrent criminal offences, the aggregate punishment would be situated between the range of 8 – 9 years imprisonment; the Trial Panel imposed on the accused the aggregate sentence of 8 /eight/ years and 3/three /months of imprisonment, pursuant to Article 71 Paragraph (1) and Paragraph (2) item 2 of the CCK.

VII.2 Calculation of punishment under the new CCK

103. With regard to the criminal offence of Murder, Article 178 of the new CCK also foresees a punishment of not less than five years.

104. However, Article 45 Paragraph (1) of the new CCK states that 'The punishment of imprisonment may not be shorter than thirty days or more than twenty five years'.

105. The **applicable sentencing range** for the criminal offence of 'Aggravated Murder' is, therefore, **from five to twenty-five years of imprisonment**.

106. On the basis of the same mitigating and aggravating circumstances, the Trial Panel would have, therefore, imposed against the Defendant a sentence **of ten (10) years of imprisonment** for the Murder.

107. Pursuant to Article 80 Paragraph (1) and Paragraph (2) item 2.2) of the CCK, the aggregate punishment between the current punishment and the punishment of 1/one/year imprisonment imposed by the Court of Appeals for the criminal act of Unauthorized Ownership, Control of Weapons - the aggregate punishment would have be situated between the range of 10 – 11 years imprisonment; it would have been calculated in **(10) years and three(3) months of imprisonment**.

VII.3 Lex mitior and final calculation

108. The Trial Panel considered that **the most favorable outcome for the Defendant would be in concreto reached** by applying the old CCK.

109. The time spent in detention on remand between 22 November 2010 and 11 November 2011 and between 27 March 2012 and 30 July 2013 and the time spent in house detention from 11 November 2011 until 27 March 2012 has been credited pursuant to Article 73 paragraphs (1) and (4) of the CCK.

VIII. COSTS AND MISSCALENOUS

110. Due to his poor economic status, the accused shall reimburse only400 (four hundred) Euro as part of the costs of criminal proceedings but he is relieved of the duty to reimburse the rest of the costs pursuant to Article 102 Paragraphs (1) and (4) of the CPCK.

Roxana Comsa

EULEX Presiding Trial Judge

Nuno Madureira

Panel Member

EULEX Judge

Arkadiusz Sedek

Panel Member

EULEX Judge

Karen Kort

EULEX Legal Officer

Authorized persons may file an appeal against this judgment the Basic Court of Mitrovicë/a within fifteen (15) days of the day the copy of the judgment has been served, pursuant to Article 398 Paragraph (1) of the CPK.