

BASIC COURT OF MITROVICA/Ë

P.nr. 64/12

23 October 2013

IN THE NAME OF THE PEOPLE

THE BASIC COURT OF MITROVICA/MITROVICË, in the trial panel composed of EULEX Judge Roxana Comsa as the Single Trial Judge (hereinafter the Court), with EULEX Legal Advisor Jana Božović as the Recording Officer in the criminal case against:

M. M., father's name M., mother's maiden name B. R., born on in N. P., Republic of Serbia, with residence in the village of , Municipality, completed elementary school, mechanic, unemployed, married, father of three children, poor economic status, previously in detention on remand from 07.02.2009 to 27.02.2009;

charged with having committed the criminal act of "Grievous Bodily Harm" under Article 154, Paragraph (3) as read with Paragraph (1) item 2) of the Criminal Code of Kosovo (CCK), according to the first Indictment PPS no. 8/12, and "Grievous

Bodily Harm” under Article 154 Paragraph (3) as read with Paragraph (1) of the CCK, according to the second Indictment PPS no. 375/11;

After having held the Main Trial hearings on 13 August and 21 October 2013, open to the public, in the presence of the Accused **M. M.**, his Defence Counsel and EULEX Prosecutor Philippe Bauduin (on 13 August 2013) and Lili Oprea (21 October 2013), the Injured Party V. M. was present only during the trial hearing of 21 October 2013; The Main Trial sessions were open to the public.

Following the trial panel's deliberation held on 22 October 2013;

Pursuant to Article 366 CPC, pronounced in public and in the presence of the Defendant, Defence Counsel, the Injured Party and the Prosecutor;

In accordance with Articles 359-366 of the CPC the Court;

Renders the following:

JUDGMENT

The accused **M. M.**, personal data as above,

is

is

FOUND GUILTY

Because, on the 7 February 2009, around 15:00 hrs, near his house in M. M. str., nn., and while being under the influence of alcohol, he physically attacked his wife, Injured Party V. M.; by using the knuckles of his right hand he hit the Injured Party in her face and head and by this fracturing her nasal bone and therefore causing her grievous bodily harm.

M. M., while attacking V. M., was aware of his act and desired its commission.

M. M. was fully mentally competent.

By doing so, **M. M.** committed and is criminally liable for the criminal act of "Grievous Bodily Harm" under Article 154 Paragraph (3) as read with Paragraph (1) item 2) of the Criminal Code of Kosovo (CCK) – Count 1.

The accused **M. M.**, personal data as above,

is

FOUND GUILTY

Because, on 19 June 2011, at around 19:20 hrs in the village of , Municipality, he attacked his wife, the Injured Party V. M.; by using his fists and legs he hit her all over her body; the victim opened the window

in order to call for help; the accused punched her in the back, causing her to fall down on the ground from a height of 3 metres; he continued to beat her and by this causing her a fracture of the medial malleolus of the right ankle, fissure of the left heel and anxious disorder, and therefore causing her grievous bodily harm.

M. M., while conducting the attack on **V. M.**, was aware of his act and desired its commission.

By doing so, **M. M.** committed and is criminally liable for the criminal act of "Grievous Bodily Harm" under Article 154 Paragraph (3) as read with Paragraph (1) of the Criminal Code of Kosovo (CCK) – Count 2.

Therefore, the accused **M. M.** is

SENTENCED

- To 1 (one) year and 6 (six) months of imprisonment for the criminal act of "Grievous Bodily Harm" under Article 154 Paragraph (3) as read with Paragraph (1) item 2) of the Criminal Code of Kosovo (CCK) – Count 1;

- To 1 (one) year and 6 (six) months of imprisonment for the criminal act of "Grievous Bodily Harm" under Article 154 Paragraph (3)

as read with Paragraph (1) of the Criminal Code of Kosovo (CCK) – Count 2.

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

The time spent in detention on remand between 7 February 2009 and 27 February 2009 is to be credited pursuant to Article 73 paragraphs (1) and (4) of the CCK.

In accordance with Article 43 and 44 Paragraphs (1) and (2), the sentence is hereby suspended for a verification period of 3 years, as per Article 43 Paragraph (2) of the CCK.

Pursuant to Article 458 of the CPC, the Court recognized and adopts the parties' agreement on the property claim. The accused will pay the Injured Party the amount of 3.250 (threethousandtwohundredfifty) Euro on monthly instalments, as follows: the amount of 550 (fivehundredfifty) Euro on 1 December 2013 and five amounts of 540 (fivehundredforty) Euro each on 1 January 2014, 1 February 2014, 1 March 2014, 1 April 2014 and 1 May 2014 respectively.

The accused shall reimburse 50 (fifty) 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 453 of the CPC.

Reasoning

A. Procedural Background

The Indictment PPS no. 14/09 filed on 26 February 2009 by the District Public Prosecution Office of Mitrovica, and later transferred under the competence of the Municipal Public Prosecution Office of Mitrovica with PPS no. 8/12 – KA no. 2/12, filed on 26 January 2012, charged **M. M.** with Grievous Bodily Harm under Article 154 Paragraph (1) item 2) of the Criminal Code of Kosovo (CCK);

The Indictment PPS no. 375/11-KA no. 20/11, filed on 03 November 2011 by the Municipal Prosecution Office of Mitrovica, charged **M. M.** with Grievous Bodily Harm under Article 154 Paragraph (3) as read with Paragraph (1) of the CCK.

EULEX Judges took over the case on 24 October 2011.

On 6 February 2012, EULEX Confirmation Judge joined proceedings in both cases PPS no. 8/12- KA no. 2/12 and PPS 375/11- KA no. 20/11.

On 26 March 2012, both Indictments were confirmed by EULEX Confirmation Judge.

The Main Trial hearings commenced on 13 August and 21 October 2013 before the EULEX Judge.

On 13 August 2013, the Injured Party V. M. did not appear in Court despite having been duly summoned. The reason of her absence is that she gave birth to a child the day before. The Court was duly notified about that.

On 21 October 2013, the accused **M. M.** pled guilty to the charges, in the presence of the EULEX Prosecutor Lili Oprea and Injured Party V. M.. The Court accepted the guilty plea and the judgment was rendered the same day.

B. Competence of the Court

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.

The offence falls within the substantive and territorial jurisdiction of Basic Court of Mitrovica (prior to 1 January 2013 the District Court of Mitrovica). Basic Courts in the first instance are competent to hear criminal cases involving charges for which the law allows the imposition of a penal sentence, minimum of at least five years. Pursuant to Article

29 Paragraph (1) of the CPC, territorial jurisdiction is proper with the court in the district where a crime is alleged to have been committed.

The accused is charged with the criminal offence of “Grievous Bodily Harm” under Article 154 Paragraph (3) as read with Paragraph (1) item 2) of the Criminal Code of Kosovo (CCK) – Count 1; and, with the criminal offence of “Grievous Bodily Harm” under Article 154 Paragraph (3) as read with Paragraph (1) of the Criminal Code of Kosovo (CCK) – Count 2.

Since the alleged criminal offences were committed in the Municipality of _____, the competent Municipal Court should have been the Municipal Court of _____. However, due to the current non-functioning of the Court, on 24 January 2012 the President of the District Court of Mitrovica issued a decision to transfer the competence from the Municipal Court of _____ to the Municipal Court of Mitrovica-temporarily based in Vučitrn.

Therefore, the Basic Court of Mitrovica is the competent judicial body to hear this criminal proceeding.

On 24 October 2011, following a hearing, the President of the Assembly of EULEX Judges issued a decision for EULEX judges to take over the case pursuant to Articles 3.3 and 3.5 of the Law on Jurisdiction¹ and

¹ Law nr. 03/L-053, Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo.

assigned it to EULEX judges in the Mitrovica District Court. Therefore, EULEX Judges assigned to the District Court of Mitrovica, currently Mitrovica Basic Court are competent to try this criminal case.

The Trial Panel was composed of EULEX Judge Roxana Comsa, acting as Single Trial Judge.

None of the parties objected to the competence of the court or to the composition of the Trial Panel.

C. Applicable Procedural Law:

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 (CPCCK) (Articles 539 and 541 (2))). Transitional and saving provisions apply which determine the application of the procedure under the CPC and the continued application of the CPCCK in specific circumstances. According to the Legal Opinion of the Supreme Court of the Republic of Kosovo issued under No. 56/23 January 2013, provisions of the new Code shall apply as the main trial had not commenced already under the old one

D. Summary and analysis of the evidence. Legal qualification. Criminal liability and intent.

D.1. Summary and analysis of the evidence. *Actus reus* and legal qualification.

According to Article 2 Paragraph (1) of the CCK: "The law in effect at the time a criminal offence was committed shall be applied to the perpetrator". The Accused committed the criminal offenses he is charged with in the course of 2009 and 2011 respectively, when the applicable law was the Criminal Code of Kosovo, which entered into force on 06 April 2004 under the name of Provisional Criminal Code of Kosovo (PCCK). That was amended on 06 November 2008 merely by changing its name to Criminal Code of Kosovo. On 1 January 2013 a new Criminal code entered into force. However, there are no subsequent legislative changes which occurred would be more favourable to the Accused, pursuant to Article 2 Paragraph (2) of the CCK. Therefore, it is the old CCK which is the law applicable to the defendant.

In the following, the Panel assess the administered evidence and criminal liability of the defendant for each of the criminal offenses he is charged with.

No witnesses were called to testify before the Court due to the guilty plea of the accused at the Main Trial stage, pursuant to Article 326 of the CPC.

Upon acceptance of the guilty plea of **M. M.** on 21 October 2013 by the Court, both the Defence Counsel of the accused and the EULEX Prosecutor presented their closing statements.

Count 1

In relation to the case file Ref.no. 2009/BE/038, the Court considers all evidence collected during the course of the investigation admissible. Police Report indicates that on 7 February 2009 around 15:00 hrs, **M. M.**, after he attended the celebration of the birth of his cousin's child where he consumed alcohol, returning home with his wife **V.**, he started to attack her and hit her a couple of times with a closed fist in the head area. He did all that while driving and in the presence of their underage daughter who started crying. **V.** started bleeding from her mouth and nose and she started sniffing blood to prevent it falling onto her child. However, **M.** ordered her "not to sniff" and hit her on the head a couple of times with a fist. When they reached the house, **M.** went in and asked **V.** to fetch his phone from the vehicle in order for him to call his sister. When she inquired about the reason of the call he once again physically assaulted her splattering her blood on the wall. After that, to avoid further beating, **V.** managed to escape to the neighbours. From a window in the neighbourhood she saw **M.** taking their terrified child into the car and leaving in an unknown direction.

In the meantime, the victim V. M. was taken to the Hospital Center in for receiving the treatment and after that to Hospital Center in Kosovska Mitrovica where the doctors diagnosed her with fracture of nose bone.²

The above established facts are also supported by the following::

- The Initial incident report (see pages 213-218) of the PP binder vol.1/1;
- Police report dated 7 February 2009 (see pages 219-222) of the PP binder vol.1/1;
- Reports of Breathalyzer tests as performed (see pages 223-226) of the PP binder vol.1/1;
- Police report with photo album (see pages 237-241) of the PP binder vol. 1/1;
- Medical reports (see pages 235-236) of the PP binder vol.1/1;
- The injured party's statement (see pages 242-248) of the PP binder vol. 1/1.

Count 2

² See: The Criminal Report, 9 February 2009. Prosecution binder vol.1/1, p. 209-213.

The Court considers all evidence collected during the course of the investigation admissible. The case file Ref.no. 2011-BE-155³ contained police reports which indicate that on 19 June 2011 around 19:00 hrs in the village _____, Municipality, **M. M.** attacked his ex-wife (they had been divorced for 5 months) and that he inflicted heavy bodily injuries to her. The victim opened the window in order to call for help. The accused punched her in the back, causing her to fall down on the ground from a height of 3 metres. He continued to beat her and caused her a fracture of the medial malleolus of the right ankle, fissure of the left heel and anxious disorder. A police patrol visited the crime scene and at the crime scene found the victim **V. M.** who was sitting in front of a rented house. According to the officers report **V.** had visible injuries to the head and legs. She was subsequently transferred by ambulance to the Health Centre in _____ and from there to Health Center Kosovska Mitrovica.

The witness **R. M.** made a written statement⁴ to the police describing the course of the events.

During the course of investigation the witness **M. D.** from village _____ gave also a statement testifying that **M. M.** was beating his ex-wife **V.**.

The above established facts are also supported by the following: - medical report/certificate issued on 21 June 2011 by Orthopaedist **A. Božović** in HC Kosovska Mitrovica⁵.

3 See: Criminal Report against **M. M.**, Investigating Officer Zorica Vukadinović, case Ref.nr. 2011/BE/155, 21 June 2011.

4 See: the witness statement of **R. M.** dated 19 June 2011, case Ref.nr. 2011/BE/155, Prosecution binder vol.1/1, p. 336-341; see the witness statement of **M. D.** dated 20 June 2011, case Ref.nr. 2011/BE/155, Prosecution binder vol.1/1, p. 348-353.

5 Medical report/certificate, Orthopaedist **A. Božović**, 21 June 2011. Prosecution binder vo. 1/1, p.365-366.

- amended Criminal report filed by Kosovo Police on 30 June 2011 Ref.no. 2011/BE/155 to the Municipal Public Prosecution-Mitrovica⁶

- Minutes from the hearing of the Injured Party V. M. dated 30 June 2011 (see pages 339-344) of the PP binder vol.1/1;
- Police report with photo album (see pages 332-335) of the PP binder vol.1/1;
- Discharge list from HC Kosovska Mitrovica with epicrisis on the name of V. M. (see pages 195-197) of the PP binder vol.1/1;
- Medical findings on the name of V. M. (see pages 198-199) of the PP binder vol.1/1;
- Decision on agreement on divorce of marriage (see pages 200-205) of the PP binder vol.1/1.

The facts established above support the guilty plea agreement by the defendants.

Therefore, it is considered proven beyond reasonable doubt that the defendant has committed the two criminal offences described above.

D.2. *Mens rea*. Criminal liability.

⁶ See: Amended Criminal Report, 30 June 2011. Prosecution binder vol.1/1, p. 185-205.

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.

Three are, therefore, the elements to be considered: the commission of the criminal offence, the mental capability of the person and the intent to commit or the negligence in committing such criminal offence.

Firstly, it was established that each of the Accused committed the criminal offences described in the two Counts above.

Secondly, there is no doubt as to the fact that the Accused was fully mentally competent when he committed the offences as nothing in the case-file suggests otherwise and no such challenge has been raised by the Defence.

Thirdly, the accused, when committing the crime, acted with intent. Article 15 of the CCK, when describing the notion of intent, states that: "(1) A criminal offence may be committed with direct or eventual intent. (2) A person acts with direct intent when he or she is aware of his or her act and desires its commission. (3) A person acts with eventual intent when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission and he or she accedes to its

occurrence". The Court established that the accused, when attacking, pursuing and repeatedly hit the injured party committed the offence with direct intent.

E. Sentencing

When imposing the criminal sanction, the Court had to consider both the general purpose of punishment, namely to suppress socially dangerous activities by deterring others from committing similar criminal acts, and the specific purpose, that is to prevent the offender from re-offending. According to Article 34 of the PCCK: "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". Bearing this in mind, the Trial Panel decided to apply the imposed sentence.

According to Art 64 of the PCCK: " 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”.

The Court considered as mitigating circumstances the fact that the accused admitted his criminal offence and pleaded guilty. Also, the accused is actively involved in raising and supporting their two underage children.

The Court considered as aggravating circumstances the fact that one of the criminal offences - Count 1- was committed in front of his minor child

For the criminal offence of “Grievous Bodily Harm” under Article 154 Paragraph (3) as read with Paragraph (1) item 2) of the Criminal Code of Kosovo (CCK) – Count 1; and, with the criminal offence of “Grievous Bodily Harm” under Article 154 Paragraph (3) as read with Paragraph (1) of the Criminal Code of Kosovo (CCK) – Count 2., the law foresees a punishment of imprisonment of at least one year up to five years. The Court imposed a sentence of one (1) year and six (6) months imprisonment for each count and established two (2) years of imprisonment as the aggregate punishment.

The time spent in detention on remand between 7 February 2009 and 27 February 2009 and between 19 June 2011 and 21 June 2012 is to be credited pursuant to Article 73 paragraphs (1) and (4) of the CCK.

In accordance with Article 43 and 44 Paragraph (1) and (2), the rent of the sentence is hereby suspended for a verification period of 3 years, as per Article 43 Paragraph (2). The Court believed that this modality of imposing the sentence will suffice to achieve the purpose of punishment. It will also allow the defendant to provide the means to support his children and cover the compensation claim.

F. Property claim

Pursuant to article 458 of the CPC, the Court recognizes and adopts the parties' agreement on the property claim. The accused will pay the Injured Party the amount of 3.250 (threethousandtwohundredfifty) euro on monthly instalments, as follows: the amount of 550 (fivehundredfifty) euro on 1 December 2013 and five amounts of 540 (fivehundredforty) euro each on 1 January 2014, 1 February 2014, 1 march 2014, 1 April 2014 and 1 May 2014 respectively.

G. Costs

The accused shall reimburse 50(fifty) 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 453 of the CPC. The Court took into account his poor economic status.

Basic Court of Mitrovica/ë

P. nr. 64/12

Jana Božović
Recording Officer

Roxana Comsa
Single Trial Judge

Legal remedy:

All parties have 15 days from service of this judgment to appeal in accordance with Articles 380 (1) and 381 (1) of the CPC. Any appeal must be filed with the Court of first instance under Article 388 (1) of the CPC.