COURT OF APPEALS

Case number: **PAKR 102/13**

Date: **12 December 2013**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Annemarie Meister as Presiding and Reporting Judge and EULEX Judge Bertil Ahnborg and Judge Xhevdet Abazi as members of the Panel, with the participation of Anna Malmström, EULEX Legal Officer, acting as Recording Officer, in the criminal proceeding against:

1. **SA**, born on X 19XX in , Municipality, son of **HA** and **SA**, citizen of Kosovo, residing in , Municipality, married with secondary school education, profession machinery technician of average financial situation;

2. **DH**, born on X 19XX in , son of **SH** and **GH**, citizen of Kosovo;

3. **BS**, born on X 19XX in , Municipality, son of **HS** and **FS**, citizen of Kosovo;

4. **SS**, born on X 19XX in , Municipality, son of **HS** and **HS**, citizen of Kosovo, residing in , married, with secondary school education, profession farmer of average financial situation;

5. **SU**, born on X 19XX in , , son of **US** and **XU**, citizen of Kosovo;

charged in the Indictment PPS 460/09 filed on 29 July 2011 and amended on 15 September 2011 with the following criminal offences in co-perpetration:

Count 1: **SA**, **BS** and **SU**, *Aggravated Murder*, under Article 30 (1) and (2) of the Criminal Law of the Socialist Autonomous Province of Kosovo (CLSAPK), in conjunction with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 146 and 147 (3) and Article 23 of the Criminal Code of Kosovo (CCK);

Count 2: **SA**, **SU**, **DH** and **BS**, *Attempted Aggravated Murder*, under Article 30 (1) and (2) CLSAPK and Article 19 and 22 CCSFRY, currently criminalized under Articles 146 and 147 (3) CCK in conjunction with Article 20 and 23 CCK;

Count 3: **SU**, **DH** and **SS**, *Attempted Aggravated Murder*, under Article 30 (1) and (2) CLSAPK and Article 19 and 22 CCSFRY, currently criminalized under Articles 146 and 147 (3) CCK in conjunction with Article 20 and 23 CCK;

found guilty by the Judgment of the District Court of Pristina, P 592/11, dated 17 December 2012 (hereinafter Impugned Judgment) as follows:

SA for the criminal offence of Aggravated Murder in co-perpetration under Article 30 (1) and (2) CLSAPK in conjunction with Article 22 CCSFRY, currently criminalized under Articles 146 and 147 (3), (5) and/or (11) CCK (Count 1); sentenced to a term of twelve (12) years of imprisonment;

DH for the criminal offence of Attempted Aggravated Murder in co-perpetration under Article 30 (1) and (2) CLSAPK in conjunction with Articles 19 and 22 CCSFRY, currently criminalized under Articles 146 and 147 (3), (5) and/or (11) CCK in conjunction with Articles 20 and 23 CCK (Count 3); sentenced to a term of seven (7) years of imprisonment;

BS for the criminal offence of Aggravated Murder in co-perpetration under Article 30 (1) and (2) CLSAPK in conjunction with Article 22 CCSFRY, currently criminalized under Articles 146 and 147 (3), (5) and/or (11) CCK (Count 1); sentenced to a term of twelve (12) years of imprisonment;

SS for the criminal offence of Attempted Aggravated Murder in co-perpetration under Article 30 (1) and (2) CLSAPK in conjunction with Articles 19 and 22 CCSFRY, currently criminalized under Articles 146 and 147 (3), (5) and/or (11) CCK in conjunction with Articles 20 and 23 CCK (Count 3); sentenced to a term of eight (8) years of imprisonment;

SU for the criminal offence of Aggravated Murder in co-perpetration under Article 30 (1) and (2) CLSAPK in conjunction with Article 22 CCSFRY (Count 1) and Attempted Aggravated Murder in co-perpetration under Article 30 (1) and (2) CLSAPK in conjunction with Articles 19 and 22 CCSFRY, currently criminalized under Articles 146 and 147 (3), (5) and/or (11) CCK in conjunction with Articles 20 and 23 CCK (Count 3); sentenced to terms of fourteen (14) years of imprisonment (Count 1) and nine (9) years of imprisonment (Count 3) with the aggregated punishment determined to fifteen (15) years of imprisonment;

***acting upon* the Appeals of Defence Counsel Fehmije Gashi-Bytyqi and Basri Jupolli filed on behalf of SU on 20 March 2013, Defence Counsel Ramiz Krasniqi filed on behalf of DH on 21 March 2013, Defence Counsel Ali Beka filed on behalf of BS on 21 March 2013, Defence Counsel Haxhi Millaku on behalf of SS on 25 March 2013 and Defence Counsel Ilaz Kadolli filed on behalf SA on 28 March 2013 all against the Impugned Judgment;**

having considered the Response of the Appellate Prosecutor of Kosovo no PPA/I 45/13 dated and filed on 17 May 2013;

after having held a public session on 12 December 2013 in the presence of the accused **SA** and **SS**, Defence Counsels Naim Qelaj (replacing Ilaz Kadolli), Ramiz Krasniqi, Ali Beka, Haxhi Millaku, Fehmije Gashi-Bytyqi and Basri Jupolli, State Prosecutor Kari Lamberg and injured party **AS**;

having deliberated and voted on 12 December 2013,

pursuant to Articles 420 and the following of the Kosovo Code of Criminal Procedure (KCCP)

renders the following

JUDGMENT

I. The Judgment of the District Court of Pristina no. P 592/ dated 17 December 2012 is hereby *ex officio* MODIFIED as follows:

Count 1: SA, BS and SU, each with the personal details as above are found guilty of Aggravated Murder, under Article 30 (1) and (2) CLSAPK, in conjunction with Article 22 CCSFRY, currently criminalized under Articles 146 and *147 (3) and(5)* CCK and Article 23 CCK.

The remaining part of the enacting clause under Count 1 remains the same.

Count 3: SU, DH and SS, each with the personal details as above are found guilty of Attempted Aggravated Murder, under Article 30 (1) and (2) CLSAPK and Articles 19 and 22 CCSFRY, currently criminalized under Articles 146 and *147 (5)* CCK, in conjunction with Articles 20 and 23 CCK.

The remaining part of the enacting clause under Count 3 remains the same.

II. The Appeals of Defence Counsel Ramiz Krasniqi filed on behalf of DH on 21 March 2013, Defence Counsel Ali Beka filed on behalf of BS on 21 March 2013 and Defence Counsel Haxi Millaku filed on behalf of SS on 25 March 2013 are hereby partially granted.

III. The Judgment of the District Court of Pristina no. P 592/11 dated 17 December 2012 is hereby MODIFIED, on the grounds of the appeals filed on behalf of DH, BS and SS and *ex officio* in relation to SA and SU, as follows:

Pursuant to Article 391 (5) KCCP the sentences imposed shall include the time the defendants have spent in detention until their first instance imprisonment sentences and the determination of the appeals.

IV. Other grounds of the Defence Appeals are hereby rejected as ungrounded and the remaining part of the Judgment of the District Court of Pristina no. P 592/11 dated 17 December 2012 is hereby affirmed.

REASONING

I. Procedural history of the case

1. The indictment in this case, PPS 460/09, was filed on 29 July 2011 and later amended on 15 September 2011. With the indictment the defendants were charged with the above mentioned criminal offences. The indictment was confirmed on 6 October 2011.

2. The main trial commenced on 3 February 2012 before a panel of the District Court of Pristina composed of two EULEX judges and one Kosovar judge. 43 more sessions were held throughout the year 2012 until the trial was completed on 14 December 2012. On 17 December 2012 the judgment was announced in which the defendants were found guilty of the above mentioned criminal offences. The Trial Panel further modified the legal qualification of count 2 of the indictment to Attempted Kidnapping, pursuant to Article 164 (1) CCSFRY in conjunction with Articles 19 and 22 CCSFRY, currently criminalized under Article 159 (1) CCK in conjunction with Articles 20 and 23 CCK. The Trial Panel rejected the charge under count 2 due to expiry of the period of statutory limitation.

3. The following appeals were timely filed: on 20 March 2013 by Defence Counsels Fehmije Gashi-Bytygi and Basri Jupolli on behalf **SU**, on 21 March 2013 by Defence Counsel Ramiz Krasniqi on behalf of **DH** and Defence Counsel Ali Beka on behalf of **BS**, on 25 March 2013 by Defence Counsel Haxhi Millaku on behalf of **SS** and on 28 March 2013 by Ilaz Kadolli on behalf of **SA**.

4. A response to the appeals was filed by the Special Prosecutor on 26 April 2013 and the opinion of the Appellate Prosecutor was filed on 17 May 2013.

II. Submissions of the parties

1. The Appeal SA

5. Defence Counsel Ilaz Kadolli challenges the Impugned Judgment on behalf of **SA** on the following grounds:

- Substantial violation of provisions of criminal procedure, Article 384 (1) item 1.12 CPC
- Erroneous and incomplete determination of the factual state, Article 386 (1), (2) and (3) CPC
- Decision on punishment, Article 387 CPC

The Defence Counsel proposes the Court of Appeals to annul the Impugned Judgment and acquit **SA** or to return the case for re-trial. The Defence Counsel submits the following.

6. The enacting clause of the Impugned Judgment is incomprehensible and in contradiction with the reasoning and the content of the judgment. None of the acts of **SA** in the murder are substantiated nor justified with evidence or content of the documents in the case file. The evidence of **NB** does not corroborate with the evidence of the victim's family members. Further, the Court did not approve the proposal of the defence for a psychological examination of **NB** even though there were many indications of health problems. He was treated in a private neuropsychiatric institution.

7. **SA** is persuaded that the factual situation is totally different from the one described in the judgment. The judgment is utterly grounded on the statement of the cooperative witness. None of the other witnesses confirm or prove the participation of **SA**. **NB** was aware that **SA** was a successful businessman, he own immovable and movable property of great value and he had business contacts with **FG**. This is the main motive why **NB** implicates **SA**. The Prosecution witnesses **MI** and **ST** are not credible. They are notoriously known by judicial bodies as recidivists of criminal offences and they have been punished for threats by Ferizaj and Pristina Courts for various criminal offences. The Prosecution failed to provide evidence as regards to forensic or autopsy reports in order to establish the circumstances of the murder. The four Defence witnesses heard established that **SA** had an alibi. He was at a feast for his son at the time of the murder.

8. The punishment of 12 years' imprisonment is a high and ungrounded sentence.

2. The Appeal of DH

9. Defence Counsel Ramiz Krasniqi challenges the Impugned Judgment on behalf of **DH** on the following grounds:

- Substantial violation of provisions of the criminal procedure under Article 403 (1) item 12 KCCP
- Erroneous and incomplete determination of the factual situation under Article 405 (2) KCCP
- Violation of criminal law under Article 404 KCCP
- Decision on punishment

The Defence Counsel proposes the Court of Appeals to modify the Impugned Judgment and acquit **DH** due to lack of evidence. The Defence Counsel submits the following.

10. The enacting clause of the judgment is incomprehensible and contradictory to the judgment's content and reasoning. The description of the incriminating acts is unclear rousing many dilemmas concerning the activities of **DH**. It is not known when the event took place.

11. The reasoning part of the judgment does not consist of decisive facts and there are no assessments of the contradictory evidence. The reasoning part of the judgment does not correspond with the enacting clause. To trust only two witness testimonies is insufficient. The two testimonies don't match each other and the court is avoiding the discrepancies. There is no evidence to prove the participation of **DH** and we don't know exactly his actions in this event. Therefore the factual situation is not fully and justly confirmed.

12. The Court has concluded that **AS** acted in self-defence. In order to confirm self-defence criminal procedures against him should have been opened. Only through criminal procedures can it be confirmed if anyone has acted in self-defence.

13. The decision on punishment is severe and properly unjustified and it is not in line with practice. Time spent by **DH** in detention has not been credited to the punishment.

3. The Appeal of BS

14. Defence Counsel Ali Beka challenges the Impugned Ruling on behalf of **BS** on the following grounds:

- Substantial violation of the provisions of the criminal procedure, Article 403 KCCP
- Violation of the criminal law, Article 404 KCCP
- Erroneous and incomplete determination of the factual situation
- Decision on punishment

The Defence Counsel proposes the Court of Appeals to modify the Impugned Judgment and acquit **BS** or to annul the judgment and return the case for re-trial. The Defence Counsel submits the following.

15. The enacting clause of the judgment is incomprehensible and contradictory to the judgment's content and reasoning and it is based on selective and inserted evidence. The witnesses heard were not precise and correct and they gave no ground to conclude that **BS** participated in the criminal offence. While the Court was justifying which cases it did not trust **NB** it only confirmed the contradictions of the reasoning of the judgment with conclusions and explanations being more theoretical than assessing evidence and their credibility. The Court does not give explanations regarding the allegations of the Defence about **NB**'s mental health condition, family problems etc. The Court has tried to diminish contradictions through theoretical explanations.

16. The reasoning of the Impugned Judgment is also inconsistent with the enacting clause because in the enacting clause the Court says that **BS** was announced guilty for Aggravated Murder, pursuant to Article 30 (1) and (2) CLSAPK read with Article 22 of CCSFRY now punishable by Articles 146 and 147 (3) (5) and (11) and Article 23 CCK whereas the reasoning of the judgment states that the Court considers a more acceptable qualification of murder according to Article 30 par 2 sub-par 1 of CLSAPK/ Article 147, point 3 CCK. The legal qualification of count 1 is in contradiction with the principle of legality as it appears as if **BS** is found guilty both of the criminal offence of Murder from Article 30 (1) CLSAPK and for the criminal offence of Aggravated Murder from Article 30 (2) CLSAPK.

17. The Impugned Judgment is based only on one witness, and that being a cooperative witness, without relying on any other evidence which is a violation of Article 157 (1) and (4) KCCP. The Court further examined the witness **KV**, a privileged witness, without being released by the competent body. He, in his statement, violated the duty of confidentiality of official and military secrets by testifying, in violation of Article 403 (2) point 1 in relation with Article 159 (1) KCCP.

18. From the point of view of the factual situation it is very difficult to assess the Impugned Judgment because it does not contain valid reasoning but only theoretical explaining regarding the evaluation of evidence. When **NB** was given the status of cooperating witness there was a legal violation. It was given to him without any general examination of him and we cannot and were not supposed to trust him. None of the Prosecution witnesses were direct or circumstantial witnesses meaning that none of them has given the smallest contribution to confirm the factual situation.

19. The Court while rendering the decision on punishment considered as an aggravating circumstance qualification of the crime as an organized crime. When qualifying it as organized crime the Court went beyond its legal competence. Further the Court did not credit the time spent in detention when imposing the punishment.

4. The Appeal of SS

20. Defence Counsel Haxhi Millaku challenges the Impugned Judgment on behalf of **SS** on the following grounds:

- Substantial violations of provisions of the criminal procedure, Article 403 KCCP
- Violation of the criminal law, Article 404 KCCP
- Erroneous and incomplete determination of the factual situation
- Decision on punishment

The Defence Counsel proposes the Court of Appeals to modify the Impugned Judgment and acquit **SS** or to annul the judgment and return the case for re-trial. The Defence Counsel submits the following.

21. The enacting clause of the Impugned Judgment is indistinct and contradictory with the content and reasoning provided. It is not based on selective and introduced evidence but only of the story of one person. The Court has provided reasons for in which cases it believes **NB** and in which cases it doesn't which only confirms the contradictions of the judgment and the findings and explanations are more theoretical than real evaluations of the evidence. The Court has concluded that there are inconstancies in the statements of **NB**.

22. The provisions of Article 157 (1) and (4) KCCP were violated because the Impugned Judgment is based on a single witness, a cooperative one, and no other evidence. The Court has also committed a violation of Article 403 (2) item 1 KCCP in conjunction with Article 159 (1) KCCP by questioning the witness **KV** without being released by the competent authority. He may have violated his duty on keeping official and military secrets. The rights of the defendant were violated because the Court did not summon the witness the defence proposed after the witness **KV** deposited a name.

23. From the point of view of the factual situation it is very difficult to assess the Impugned Judgment because it does not contain valid reasoning but only theoretical explaining regarding the evaluation of evidence. There was no material evidence except that in favour of the defence such as the proof that **NB** had signed he owed **SS** €84 000. The only reason **NB** was accusing him was to not have to pay back the dept. A witness should not be granted cooperative status before a general examination of him (his personality, his past, mental health status etc.) has been done. **NB** is an unreliable witness. He is a person with mental health problems, immersed in business affairs with partners, in a lot of debt and banned from his family for a variety of reasons.

24. The legal qualification of count 3 is in contradiction with the principle of legality. The court, with the contradictions between the reasoning and the enacting clause on the legal qualification has made an analogue interpretation of the provisions of KCCP. **SS** was found guilty of the criminal offence in Article 30 (1) and (2) of CLSAPK in conjunction with Articles 19 and 22 of

CCFSRY which correspond with Articles 146 and 147 (3) CCK in conjunction with Articles 20 and 23 CCK. Under this legal qualification it appears that **SS** is guilty of both the criminal offence of Attempted Murder and the criminal offence of Attempted Aggravated Murder since paragraph 1 of Article 30 means regular murder which corresponds to murder in 146 CCK whereas paragraph 2 of Article 30 means attempted aggravated murder which corresponds to Article 147 (3) CCK in conjunction with Articles 20 and 23 CCK. You cannot have both attempted murder and attempted aggravated murder, it must be either one.

25. Upon deciding on punishment the Court has wrongly evaluated as an aggravated circumstance the character of being "such a well-organized group". It has considered it as an aggravated circumstance and as an Organized Crime. When qualifying it as organized crime the Court has exceeded its legal powers as Organized Crime is not in the indictment.

26. The Court has also violated the criminal law since it did not calculate the time **SS** spent in detention into the punishment. In post-war Kosovo nobody has been punished with eight years' imprisonment in a case where there was no damage, no bodily injuries and no material evidence or facts.

5. The Appeal SU

27. Defence Counsel Fehmije Gashi-Bytyqi and Basri Jupolli challenges the Impugned Judgment on behalf of **SU** on the following grounds:

- Substantial violation of the provisions of criminal procedure
- Violation of the Criminal Code of Kosovo
- Erroneous and incomplete determination of the factual situation
- Decision on the imposed punishment

The Defence Counsel proposes the Court of Appeals to modify the Impugned Judgment and find **SU** not guilty or to return the case to the Court of first instance for reconsideration or retrial. The Defence Counsel submits the following.

28. The judgment is based on inadmissible evidence because the court puts trust in the statements of cooperative witness **NB**. The Defence since the beginning of the criminal proceedings objected to the announcement of **NB** as a cooperative witness but the court did not consider the requests. **NB** was not only proclaimed a cooperative witness, his statements served as the most relevant and the only evidence on which the court finally based its judgment. This is a violation of Article 157 KCCP. The Defence proposed a medical examination of **NB** to determine his mental status and an announcement that his statements are inadmissible evidence but this was not considered by the court.

29. The content of the judgment is characterised with evident contradictions, uncertainties, significant contradictions as well as other omissions which makes the judgment inconsistent and with logical and semantic mistakes. The court committed substantial violations by not sufficiently separating and clearly qualifying the proposed evidence. The statements of **NB** are characterised by discrepancies, contradictions, inaccurate allegations, confusion and other negative labelling.

30. The provisions of CCK were violated because in no way did the acts of **SU** manifest the elements of the criminal offence Aggravated Murder. There was no piece of evidence establishing the role of **SU** and on none of the counts did the court have evidence that established the separate roles of each of the accused. None of the other accused or witnesses of prosecution claimed the participation of **SU**.

31. The punishment is completely unlawful and unreasonable because, in lack of material evidence, such a high sentence was imposed for crimes **SU** did not commit.

6. The Response by the Special Prosecutor

32. The Special Prosecutor in his response holds that the Impugned Judgment is fully comprehensible, clear and precise. It accurately describes the facts the court deemed being proven beyond reasonable doubt. The Trial Panel made a very detailed analysis of the testimony of **NB** and explained in a very clear and concise manner why he is to be considered a credible witness. **NB** incriminated himself of serious offences in a moment when there was no investigation against him at all. His detailed statements, being logical, plausible and corroborated, show that he indeed was present when the crimes were committed. The Impugned Judgment addressed with accuracy all the relevant circumstances regarding the facts described in the indictment and gave specific reasons as why those circumstances had been proven.

7. The Response by the Appellate Prosecutor

33. The Appellate Prosecutor moves the Court of Appeals to assess the correctness of the inclusion in the calculation of the punishment for **SU** of aggravating circumstances foreseen in Article 30 (3) CLSAPK as considered equal to Article 147 item 11 CCK, to credit in the imposed sentence the time spent by the defendants in detention and to reject all the other grounds for appeals and to affirm the Impugned Judgment.

34. The Appellate Prosecutor submits that he shares the Trial Panel's opinion that considered as a whole the evidential material made available to the court suffices the establishment of the guilt of the defendants beyond reasonable doubt. The Trial Panel sufficiently and positively assessed the issue of the credibility of **NB**. The statements of **NB** have been corroborated by direct and

circumstantial evidence. In particular his accounts were corroborated by direct evidence provided by the witnesses **DK**, **AK** and **AS** as to the behaviour of the perpetrators and the course of the criminal actions. The Appellate Prosecutor shares the view of the Trial Panel about the unlikelihood of a fabrication that would directly and indirectly fit so perfectly the corroborating evidence in count 1 and count 3 and that would go so far as to unnecessarily attribute oneself the role of the direct perpetrator of the offence described in count 1. The Defence Counsel and the defendants limited themselves to the fabrication of **NB**'s account instead of producing tangible evidence other than some alibis that revealed themselves untrue and/or unverified.

35. On the issue of the admissibility of the statement of **KV** the Appellate Prosecutor shares the opinion of the Special Prosecutor expressed during the main trial that the Trial Panel has one of two options; that a privileged witness should either be authorized to testify by the competent authority or should not be examined at all. There is no third possibility foreseen in the code. Be that as it may the Appellate Prosecutor shares the view of the Trial Panel that the credibility of **NB**'s account is not affected by the evidential uncertainty relating to the alleged involvement of the SHIK in the events at stake.

36. The Appellate Prosecutor concurs with the Trial Panel that the murder of **IK** was done with premeditation as shown by the fact that the defendants acted as a group, having prepared and planned the murder well in advance. The murder was committed in the presence of the victim's wife and at the victim's home - a place where a person usually feels secure and lowers his or her alertness. The Appellate Prosecutor is of the opinion that the statements of **NB** related to the events on 6 August 1999 are consistent, detailed, credible, logical without any significant contradictions and corroborated by the testimonies of the witnesses **DK** and **AK**, and by the unverified alibi of **SA** as well as by the depositions of **MI** and **ST**.

37. In relation to count 3 the Appellate Prosecutor concurs with the Trial Panel that the acts of which the defendants were convicted constitute a well-organized and planned attempted murder committed by a resourceful group of people having both time and the needed material support at their disposal. The criminal offence was committed with premeditation and also it was committed in an insidious way; monitoring the victim for about two months and setting the ambush by using two cars, one of which meant to slow down or stop the victim's vehicle while the other pulled over in order to allow **SS** to shoot. The Appellate Prosecutor is of the opinion that the statements of **NB** related to the events on 12 June 2012 are consistent, detailed, credible, logical without any significant contradictions and corroborated by the testimony of the witness **AS** and by the fabricated alibis of **SS** and **SU** as well as by the depositions of **MI** and **ST**.

38. The Appellate Prosecutor is of the opinion that the sentences imposed on the defendants are in general adequate to the role played by each defendant as well as the nature and the manner of commission of the crimes. In calculating the punishment, the Panel correctly took into consideration the fact that the violations described in Counts 1 and 3 were well organized and committed by the defendants acting as a resourceful group structured based on a well-defined

hierarchy and leadership and having adequate time, weapons and cars available to monitor the injured parties well in advance, to prepare and plan the crimes and execute them.

39. With specific reference to the defendant **SU** the Appellate Prosecutor notes that the Panel refers to the provision of Article 30 (3) CLSAPK which, in the Trial Panel's opinion, would permit the applicability of the thereby mentioned aggravating circumstance even in a case like this in which the defendant is convicted of Aggravated Murder and Attempted Aggravated Murder. The Appellate Prosecutor does not share that view. Article 30 (3) CLSAPK foresees the aggravating circumstance of intentionally committing two or more murders as completed events which resulted in the death of the victims. Instead the applicable provision in a case like this, where no apparent links were found between the aggravated murder and the attempted aggravated murder, seems that of Article 48 CCSFRY which deals with the situation where the perpetrator, by one or more acts, commits several criminal offences for which he or she is tried at the same time. It is up to the Court of Appeals to decide whether, based on the foregoing, the imposed punishment should be modified.

III. The Findings of the Court of Appeals

1. Competence of the Court of Appeals

40. The Court of Appeals is the competent court to decide on the Appeal pursuant to Article 17 and Article 18 of the Law on Courts (Law no. 03/L-199).

41. The Panel of the Court of Appeals is constituted in accordance with Article 19 Paragraph (1) of the Law on Courts and Article 3 of the Law on the jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo (Law no 03/L-053).

2. Applicable law

42. The criminal procedural law applicable in the respective criminal case is the (old) Kosovo Code of Criminal Procedure that remained in force until 31 December 2012 (KCCP).[1] The proper interpretation of the transitory provisions of the (new) Criminal Procedure Code (CPC), in force since 1 January 2013, stipulates that in criminal proceedings initiated prior to the entering into force of the new Code, for which the trial already commenced but was not completed with a final decision, provisions of the KCCP will apply *mutatis mutandis* until the decision becomes final. Reference in this regard is made to the Legal opinion no. 56/2013 of the Supreme Court of Kosovo, adopted in its general session on 23 January 2013.

[1] Kosovo Code of Criminal Procedure, in force since 06.04.2004 until 31.12.2012.

43. In relation to applicable criminal law the Court of Appeals concurs with the District Court's findings that the most favorable and therefore applicable law is the Criminal Law of the Socialist Autonomous Province of Kosovo (CLSAPK) with a maximum punishment for Aggravated Murder of 15 years' imprisonment.

3. Findings on merits

3.1. Substantial Violation of the Provisions of Criminal Procedure

44. The Court of Appeals finds that there has not been a violation of the provisions of criminal procedure.

45. The Court of Appeals finds the enacting clause of the Impugned Judgment clear. It entails all relevant details needed and required by law, Article 391 KCCP. The Court of Appeals further finds the reasoning of the judgment clear. A judgment must be read in its entire context and only if when read entirely there are such discrepancies and/or inconsistencies that the enacting clause remains incomprehensible can a judgment be declared unlawful and be annulled.[2] The Defence claims that the Impugned Judgment lacks decisive facts or assessments of contradictory evidence. The Court of Appeals disagrees. The District Court Trial Panel has assessed all evidence even if only what was deemed relevant is referred to in the judgment. The credibility of both **NB** and the corroborating witnesses has been described in the judgment. The inconsistencies and discrepancies in their statements have been addressed. Also contradictory evidence, such as the statements of the defendants and their alibi witnesses have been assessed and addressed in the judgment.

46. The Impugned Judgment is not based on inadmissible evidence. The Defence has argued that the statements of **NB** are inadmissible and that this claim by the Defence during the main trial was not considered by the Trial Panel. The Court of Appeals disagrees. The admissibility of the evidence, in particular the statements of **NB**, was considered by the District Court Trial Panel on 2 March 2012 and 13 April 2012. The Trial Panel found the statements admissible. **NB** was declared a cooperative witness prior to the commencement of the trial in this case. It is not covered by the Impugned Judgment and can therefore not be subject to the Court of Appeals' review of the appeals in this case. The Court of Appeals has found no legal grounds for declaring the statements inadmissible. The Defence has argued that **NB** is unreliable but this is a separate issue from whether his statements are admissible or not. The inadmissibility of witness statements is regulated in Article 161 KCCP and only when the law explicitly so prescribes are witness statements inadmissible, regardless of if the witness had the status of a cooperative witness, Article 153 KCCP.

[2] For similar arguments see judgments issue by the Supreme Court of Kosovo on 12 April 2010 (Pkl-Kzz 114/09) and on 27 November 2012 (Ap-Kz. 314/2012).

47. The Defence further claims a violation of Article 157 (1) and (4) KCCP because the Impugned Judgment was based solely on one single witness. The Court of Appeals' assessment is that the Impugned Judgment is not based solely on one witness statement. Both charges have been corroborated by other witnesses and forensic evidence. The Defence has not argued why Article 157 (1) KCCP has been violated. The Court of Appeals has not found any testimony or other evidence that the Defence has not been able to challenge.

48. The request for a medical examination of **NB** has been considered by the District Court Trial Panel on 3 March 2012, as opposed to what has been claimed by the Defence. The issue has also been covered in detail in the Impugned Judgment. The Trial Panel found that there was no apparent indication that he was not a person in reasonable control of himself. The Court of Appeals finds no reason to make any other assessment than what the District Court Trial Panel has done. **NB** was present during several days of the main trial, giving long, detailed testimonies. There is nothing in his behavior during the main trial or what comes out of his previous testimonies that make the Court of Appeals doubt the Trial Panel's assessment.

49. The Court of Appeals finds that a violation of Article 159 KCCP was committed when **KV** was questioned without being released by the competent body. In its decision on 17 October 2012 the District Court Trial Panel chose not to take an explicit stand on the legitimacy of the SHIK but stated that it was open to the possibility that the witness was in possession of official and military secrets. The Court of Appeals shares the view of the Prosecution that in such a case the witness in question may not be examined at all. It cannot be left up to the witness to decide which questions to answer or not. The Court of Appeals will however not further explore this. The Defence has as the ground for the appeals argued that the District Court violated Article 403 (2) item 1 in conjunction with Article 159 (1) KCCP as the court omitted to apply or applied the provision incorrectly. In order for there to have been a substantial violation of the criminal procedure under Article 403 (2) KCCP it is required that the violation has influenced or might have influenced the rendering of a lawful and proper judgment. The Court of Appeals finds that it is clear from the Impugned Judgment that the statement of **KV** did not influence the judgment. **KV** testified about the structure and work done by SHIK. As stated by the Trial Panel in the Impugned Judgment the possible involvement of SHIK in the criminal offences was only relevant to establish a possible motive and motive is something different from the intent. Whether or not SHIK was involved somehow in the criminal offences does not affect the intent or the guilt of each individual defendant.

50. Lastly the Defence claims that its rights have been violated because the District Court did not summon the witness the Defence proposed after **KV** deposited a name. This is a very vague claim by the Defence and has to be treated as such. From the minutes of the main trial it can be read that the Defence requested by the Trial Panel to *ex officio* summon the person who's name **KV** wrote on a piece of paper and handed to the Prosecution on 20 June 2012. Assuming this is what the Defence is referring to in the appeal it is correct that this person was not summoned by the Trial Panel. Whether to *ex officio* summon a witness is completely up to the discretion of the

Trial Panel. As far as the Court of Appeals has been able to deduct from the case file the request was never considered by the District Court Trial Panel which is a violation of the defendant's rights. Regardless of this a violation of the rights of the Defence is only a substantial violation of criminal procedure if it has influenced or might have influenced the rendering of a lawful and proper judgment. It is not clear form the appeal to whom the Defence is referring and it is even less clear to what this witness was to testify. Not summoning this person did not affect the rendering of a lawful and proper judgment.

3.2. Violation of the Criminal Law

51. The Court of Appeals finds that there has been a violation of the criminal law in the sense that the time spent by the defendants in detention was not credited to the punishments. The Court of Appeals also finds that there has been a violation of the criminal law when the District Court Trial Panel applied Article 30 (3) CLSAPK to qualify the criminal offences for **SU** as aggravating. The Court of Appeals finds no other violations of the criminal law.

52. The Court of Appeals will first address the violations claimed by the Defence. Whether **AS** acted in self-defence or not has no impact or relevance on the establishment of guilt for the defendants. The defendants are convicted on their own actions and intent. Since **AS** is not a defendant in the case it is not for the Court of Appeals to review his guilt.

53. The defendants were found guilty of Aggravated Murder/Attempted Aggravated Murder and the District Court Trial Panel has in the enacting clause made reference to Article 30 (1) and (2) CLSAPK. It is argued by the Defence that this is a wrongful legal qualification because as it appears the defendants have been convicted of both "regular" murder and aggravated murder, and in the case of count 3 in the attempted form. The Court of Appeals finds this to be a wrongful interpretation. Article 30 (1) and (2) CLSAPK reads as follows:

(1) Whoever takes another person's life shall be punished with at least five years of imprisonment.
(2) The term of imprisonment of at least ten years or a death penalty shall be pronounced against:

Hereafter follows a list of in which cases the higher punishment shall be imposed.

From the reading of the law it is clear that a reference should be made to both paragraphs of Article 30 as done by the Trial Panel. It is in paragraph 1 the *actus reus* part, i e the definition of the criminal offence, can be found. Paragraph 2 lists only the aggravated circumstances and the two paragraphs should therefore be read together.

54. In reference to the legal qualification it has also been argued by the Defence that the District Court Trial Panel has unlawfully qualified the criminal offences as organized crime. The Court of Appeals finds it clear that the criminal offences have not been legally qualified as organized crime. The Trial Panel considered as an aggravating circumstance when deciding on the punishments that the crimes were committed in an organized manner. This does in no way mean that the crimes have been re-qualified as the separate criminal offence of organized crime, which has also been pointed out by the Trial Panel in the Impugned Judgment. Any claim of re-qualification is clearly unfounded.

55. The Court of Appeals finds that there has been a violation of the criminal law because time spent by the defendants in detention was not included in the punishment. The period of time spent in custody (detention) awaiting trial as well as each deprivation of freedom related to a criminal act shall, according to Article 50 CCSFRY, be counted as part of the sentence of imprisonment. An equal provision can be found in CCK, Article 73. Not including the time spent in detention is a violation of the criminal law which according to Article 404 (6) KCCP is a ground for appeal. Only the defendants **DH**, **SS** and **BS** have used this ground for their appeals. It does however fall within the *ex officio* review the Court of Appeals shall perform according to Article 415 (4) KCCP. Therefore the Impugned Judgment must be modified in relation to all five defendants so that the time spent in detention is credited to the punishment.

56. The Court of Appeals further finds that there has been a violation of criminal law in relation to the legal qualification of the criminal offences committed by **SU**. The District Court Trial Panel has convicted **SU** of Aggravated Murder and Attempted Aggravated Murder. From the reasoning of the Impugned Judgment it can be deducted that as an aggravated circumstance that has been used to qualify the criminal offences as aggravated the Trial Panel has considered that **SU** has been found guilty of both criminal offences. The Trial Panel has applied Article 30 (3) CLSAPK (equivalent to Article 147 (11) and (12) CCK). The Court of Appeals finds this to be unlawful.

57. Article 30 (3) CLSAPK reads as follows:

> (3) The punishment as per Para 2 of this Article shall be imposed on a person who committed several premeditated murders, (…) disregarding the fact that he is being tried for all the murders by application of the regulations relating to concurrence or the fact that he was previously convicted of another murder.

The Court of Appeals finds the use of the word *disregarding* somewhat confusing and unfortunate. A similar provision can be found in the later amended 1977 Criminal Code of the Socialist Republic of Serbia (No. 26/77) in which it said "The punishment from paragraph 2 of this Article shall be pronounced upon a person who with premeditation commits several murders (…) regardless of whether they are being tried for all these murders by application of provisions on concurrence or they have been previously convicted of a certain murder.

58. The use of the word *regardless* makes the reading of the Article clearer and it is further clarified in one of the commentaries of the code from 1981[3]:

> 11. *Paragraph 3* prescribes punishment for the perpetrator who committed several murders with premeditation, (…), regardless of whether the perpetrator is on trial: a) for murder committed with application of the provision on concurrence or b) for murders some of which he was previously convicted for.[4]

The Court of Appeals takes the approach that Article 30 (3) CLSAPK should be read in this way and that only in these two cases the Article is applicable. **SU** has not previously been convicted of any murders and the Court of Appeals finds that there is no legal basis for interpreting the word *previously* as to include convictions in the same criminal case. On the contrary the above mentioned commentary of 1981 clarifies the trying of a recidivist as "trying a person being tried for a premeditated murder who has already been sentenced for such a murder".[5]

59. With the interpretation taken by the Court of Appeals Article 30 (3) CLSAPK can only be applied against **SU** if the two criminal offences were committed in concurrence. Concurrence is clarified in later commentaries of the code from 1995 as to mean *ideal concurrence* (when the consequence occurs as the result of a single act) or *real concurrence* (as the result of several individual acts.[6] It is clear that the two criminal offences of **SU** were not a result of one single act as in ideal concurrence. The notion of real concurrence does however require some further clarification and on this the Court of Appeals makes reference to the clarification given by the ICTY:

> "Real concurrence" occurs when the perpetrator commits several crimes, albeit in a single transaction, either by violating the same criminal provision against more than one person or by violating a number of distinct provisions through disparate acts. (…). Since this is a well-known concept in civil law countries and examples proliferate in the case-law, the Trial-Chamber will mention, as an instance of the former sub-class, the commission of more than one murder by killing several people in a spray of gunfire; an example of the latter would be reckless driving and failure to assist a person injured as a result of the reckless driving, where there are disparate acts of driving recklessly and of not stopping after knowingly colliding with someone.[7]

60. The Court of Appeals finds that Article 30 (3) CLSAPK is not applicable on **SU** as there is no link between the two criminal offences and with the definition of concurrence established

[3] SRZENTIC, Nikola – STAJIC, dr. Aleksandar – KRAUS dr. BOZIDAR – LAZAREVIC, dr. Ljubisa – DJORDJEVIC, dr. Miroslav, COMMENTARY ON THE CRIMINAL LAWS OF SR OF SERBIA, SAP KOSOVO AND SAP VOJVODINA 1981. "SAVREMENA ADMINISTRACIJA" BELGRADE.
[4] Page 56, English version.
[5] Page 57, English version.
[6] SRZENTIC NIKOLA – LJUBISA LAZAREVIC, COMMENTARY OF THE CRIMINAL CODE OF SERBIA, 1995, 5TH EDITION,"SAVREMENA ADMINISTRACIJA" BELGRADE, page 24, English version.
[7] IT-95-16-T, Kupreskic et al, para. 661.

above the crimes cannot be said to have been committed in concurrence. Article 30 (3) CLSAPK was applied by the District Court Trial Panel, constituting a violation of the criminal law pursuant to Article 404 (4) KCCP. A violation of the criminal law must *ex officio* be rectified by the Court of Appeals, pursuant to Article 415 (1) item 4 KCCP. Therefore the enacting clause of the Impugned Judgment must be modified as to not include the reference to Article 147 (11) CCK (a reference to Article 30 (3) CLSAPK was not made in the enacting clause). This will, however, not change the legal qualification of the criminal offences of **SU** as the Court of Appeals finds that other grounds for qualifying the offences as aggravated exist, which will be further elaborated below.

3.3. Erroneous Establishment of the Factual Situation

61. The Court of Appeals concurs with the factual situation as established by the District Court Trial Panel. The Court finds that it has been proven that on 6 August 1999 the defendants **SA**, **SU** and **BS**, in co-perpetration with each other and **NB**, murdered **IK** as described in the Impugned Judgment. The murder was done with clear premeditation; the defendants acted as a group and planned the murder well in advance. The murder was committed in front of the victim's wife in his own home after the defendants in a deceitful way convinced the wife to fetch her husband. All these factors amount to a murder committed in an insidious manner qualifying the offence as Aggravated Murder.

62. The Court of Appeals further finds that it has been proven that on 12 June 2000 the defendants **SU**, **DH** and **SS**, acting in co-perpetration with each other and **NB**, attempted to murder **AS** as described in the Impugned Judgment. The attempted murder was well organized and planned well in advance. The murder was planned to take place near the victim's home while he was seated in his car, giving him little opportunity to escape. Based on this the Court of Appeals concurs with the District Court Trial Panel finding the criminal offence to be Aggravated Attempted Murder.

63. The Court of Appeals finds that all the main points of the indictment have been corroborated, by the evidence presented. The Court finds the testimony of **NB** to be consistent, detailed, credible and logical, without any significant contradictions. The Court finds it very unlikely that a person who was not present would have been able to give such detailed accounts as **NB** has. Count 1 is corroborated by the testimonies of **DK** and **AK** and Count 3 is corroborated by the witness **AS**. Both counts are also corroborated by the depositions of **MI** and **ST**. There are some inconstancies between the accounts of **NB** and those of other witnesses. These have in detail been analyzed by the District Court Trial Panel and the Court of Appeals shares their analysis paying particular attention to the long time that has passed since the crimes were committed.

64. Finally the Court of Appeals finds the contradictory evidence, in particular the alibi witnesses untrustworthy. In the cases of **SS** and **SU** the alibis are clear fabrications and in the case of **SA** the alibi is unverified. It has not been verified that the party for **SA**'s son happened on 6 August 1999 as none of the witnesses have given any plausible explanation to why they are able to remember the exact date of the party.

3.4. Decision on Punishment

65. When deciding on punishment the trial panel has, according to Article 64 CCK, to consider both the aggravating and the mitigating circumstances, not to be confused with the aggravating circumstances considered to qualify the criminal offences as aggravating.

66. The District Court Trial Panel has considered the issues raised in Article 64 CCK and the Court of Appeals fully concurs with its findings of the aggravating and mitigating circumstances. No arguments relating to aggravating or mitigating circumstances were raised in the appeals. The Court of Appeals finds the imposed punishments reasonable and proportionate. The appeals are therefore rejected as ungrounded in this part. As already concluded by the Court of Appeals the time spent in detention will be credited to the punishments and the appeals on behalf of defendants **DH**, **SS** and **BS** are accepted in relation to this part.

67. In relation to **SU** it has been suggested by the Appellate Prosecutor that as an aggravating circumstance when deciding on the punishment the District Court Trial Panel applied Article 30 (3) CLSAPK. The Court of Appeals does not share this interpretation of the judgment. When reading the Impugned Judgment it is clear that Article 30 (3) CLSAPK was applied to establish an aggravating circumstance in the *qualifying* of the criminal offences as aggravated, it was not applied as an aggravating circumstance when deciding on the punishment. The same aggravating circumstance cannot be used both to qualify the criminal offence and to decide the punishment as this would mean that the defendant receives an increase in the punishment twice. The Court of Appeals has decided to modify the Impugned Judgment so as to not qualify the criminal offences as aggravated on the grounds of Article 30 (3) CLSAPK. The criminal offences are however qualified as aggravated on the grounds of Article 30 (2) CLSAPK. The Court of Appeals therefore finds no grounds for modifying the imposed sentence as the Court finds that the District Court Trial Panel has imposed appropriate sentences for both the criminal offences as well as the aggregate sentence.

4. Conclusion

68. In conclusion the Court of Appeals finds that the appeals filed on behalf **DH**, **BS** and **SS** are partially grounded in relation to the crediting of time spent in detention. On all other grounds the appeals are ungrounded. The Court of Appeals further finds that there has been a violation of

criminal law because the District Court Trial Panel applied Article 30 (3) CLSAPK when qualifying the criminal offences of **SU** as aggravated. It is therefore decided as in the enacting clause.

Presiding Judge

_____

Annamarie Meister

EULEX Judge

Panel member	Panel member	Recording Officer
_____	_____	_____
Bertil Ahnborg	Xhevdet Abazi	Anna Malmström
EULEX Judge	Judge	EULEX Legal Officer

Prepared in English, an authorized language. Reasoned Judgment completed and signed on 21 February 2014.