COURT OF APPEALS

Case number: **PAKR 474/15**

Date: **14 January 2016**

IN THE NAME OF THE PEOPLE

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Hajnalka Veronika Karpati as Presiding and Reporting Judge, and Kosovo Court of Appeals Judges Driton Muharremi and Abdullah Ahmeti as Panel Members, with the participation of Anne-Gaëlle Denier, EULEX Legal Officer, as the Recording Officer,

in the criminal proceedings against

> **G.G.**, father's name […], born **[…]**, before detention on remand residing in the village of **[…]**, citizen of Kosovo, in detention on remand since 19 September 2014;

charged under the Indictment of the Mitrovica Basic Prosecution Office no. PP. 10/14 filed with the Court on 14 November 2014, with a clarification filed on 8 December 2014, as follows: **Aggravated Murder** in violation of Article 179(1.5) and (1.8) of the Criminal Code of the Republic of Kosovo (hereinafter "CCRK"), in conjunction with Article 31 CCRK;

adjudicated in first instance by the Basic Court of Mitrovica with the judgment P. no. 132/14, dated 30 July 2015 as follows:

G.G. was found guilty of and convicted for the criminal offence of **Aggravated Murder** in violation of Article 179(1.5) CCRK in conjunction with Article 31 CCRK.

The Trial Panel found it proven beyond reasonable doubt that on 22 March 2013, at […], the defendant **G.G.** - acting together with a co-perpetrator, **B.G.**, and being aware that the attack on **X.K.** could lead to his killing - contributed substantially to the criminal act by driving the car in which the co-perpetrator sat as passenger, by blocking the road of the car driven by the victim, thus forcing him to stop and enabling the co-perpetrator to shoot at him and disturbing the victim in his defensive action. **X.K.** died of his injuries on the same day as a result of the injuries caused by the gunshot fired by the co-perpetrator. The Trial Panel found that **G.G.** was mentally competent and acted with eventual intent, that he was aware that the attack against the victim could result in a gun fight and thus endanger the life of one or more persons as at the time of the

shooting given that there were several people walking along the same street close to the crime scene. However, the Trial Panel did not find it proven that the victim was deprived of his life because of unscrupulous revenge or other base motive. **G.G.** was sentenced to a punishment of fifteen (15) years of imprisonment with the time spent in detention in remand credited in the imposed punishment, and ordered to reimburse the sum of EUR 300 as part of the costs of the criminal proceedings;

deciding upon the appeal of Defence Counsel Mahmut Halimi on behalf of the defendant G.G., filed on 27 August 2015, against the judgment of the Basic Court of Mitrovica rendered on 30 July 2015, P. No. 132/14

having reviewed the motion of the Appellate Prosecutor filed on 13 October 2015;

after having held a public session of the Appellate Panel on 14 January 2016;

having deliberated and voted on 14 January 2016;

pursuant to Articles 389, 390, 394, 398 and 401 of the Criminal Procedure Code of Kosovo (hereinafter "CPC");

renders the following

JUDGMENT

I. The appeal of defence counsel Mahmut Halimi for defendant G.G. is <u>partially granted</u> insofar as it challenges the imposed sentence against the defendant.

II. The judgment of the Basic Court of Mitrovica no. P 132/14 dated 30 July 2015 is <u>modified</u> in its sentencing part. The sentence imposed on defendant G.G. for the criminal offence of *Aggravated Murder*, committed in co-perpetration, pursuant to Article 179 paragraph 1 subparagraph 1.5 of the CCRK in conjunction with Article 31 of the CCRK is modified as follows:

defendant G.G. is sentenced to ten (10) years of imprisonment. The time spent in detention on remand since 19 September 2014 shall be credited towards the sentence.

III. In the remaining parts, the appeal of defence counsel Mahmut Halimi for defendant G.G. is <u>rejected as unfounded</u> and the impugned judgment is <u>affirmed</u>.

<u>REASONING</u>

I. RELEVANT PROCEDURAL BACKGROUND

The events giving rise to this criminal case occurred on 22 March 2013 on […] Street in […]. **G.G.** was driving a red Golf II, with **B.G.** sitting in the front passenger seat and a third passenger at the back of the vehicle. Seeing the victim **X.K.** approaching from the opposite side of the street in a dark blue Mercedes, **G.G.** stopped the Golf and **B.G.** went out of the vehicle. **B.G.** walked in direction of the Mercedes while **G.G.** turned the Gold over to the left lane of the road and blocked the road for the Mercedes. **B.G.** fired a gun shot in direction of **X.K.** and injured him, gunshot injury which led to his death later that day. **G.G.** immediately left the Golf and ran towards the Mercedes and opened the passenger front door. At the same time, **X.K.** fired four gun shots, two of these shots hitting **B.G.**, causing lethal injuries.

On 21 July 2014 the Pre-Trial Judge, upon the request of the Prosecutor, issued an arrest order for the defendant. The Prosecutor suspended the investigation on 25 August 2014. The defendant turned himself to the police on 19 September 2014, and has been in detention on remand since this date.

On 14 November 2014 the Basic Prosecution Office of Mitrovica filed the Indictment PP. no 10/14, with a clarification dated 8 December 2014, charging the defendant **G.G.** with Aggravated Murder in violation of Article 179(1.5) and (1.8) CCRK.

On 8 and 23 December 2014 the initial hearing was held.

The main trial in the case was held on 30 June, 2, 9, 24 and 28 July 2015, with deliberations and vote on 28 July 2015. On 30 July 2015, the verdict was announced.

The written judgment was served to **G.G.** on 13 August 2015 and to the EULEX Prosecutor on 12 August 2015. On 27 August 2015 **G.G.**, through his defence counsel, appealed the judgment.

On 14 September 2015 the EULEX Prosecutor filed a response to the appeal.

The case was transferred to the Court of Appeals for a decision on the appeal on 8 October 2015.

On 13 October 2015 the Appellate State Prosecutor filed a motion.

The session of the Court of Appeals Panel was held on 14 January 2016 in the presence of the defendant **G.G.**, his defence counsel Mahmut Halimi, and the Appellate Prosecutor.

The Appellate Panel deliberated and voted on 14 January 2016.

II. SUBMISSIONS OF THE PARTIES

A. Appeal of **G.G.**

Defence Counsel Mahmut Halimi on 27 August 2015 timely filed an appeal dated 26 August 2015 on the grounds of:

- Essential violation of the provisions of criminal procedure law
- Erroneous and incomplete determination of factual situation
- Violation of the criminal law
- Determination of the punishment.

The defence counsel proposes that the accused should be acquitted of the charge as it has not been proven that he committed the offence he is charged with, or the judgment of the first instance court should be annulled and the case sent back for re-trial, or the judgment should be modified as to the legal qualification of the criminal act as Participation in a Brawl under Article 190(1) CCRK and the punishment should be as lenient as possible.

The defence counsel argues that the enacting clause of the judgment is obscure as it does not contain the determination of all facts and circumstances that are required for qualification of the criminal act as aggravated murder. The qualifying element is described only on general terms as the persons whose lives were put in danger were not identified. Also, the reasoning of the judgment fails to address the arguments presented in the closing statement of the defence that ruled out any involvement or contribution of the accused to the killing of the victim. These substantial violations of the procedure require that the Appellate Court *ex officio* annul the judgment as foreseen in Article 402(1.1) CPC.

Concerning the erroneous and incomplete determination of factual situation, the Defence Counsel argues that the reasoning of the first instance judgment violates Article 1(2) CPC which sets the rules to guarantee that no innocent person shall be convicted and Article 3(2) CPC, the principle of *in dubio pro reo*. The defence counsel claims that the trial panel watched the footage from the closed circuit camera only formally, although the panel refers to it as "main source of information and assessment as to what happened in […] street in […] on 22 March when the criminal offence happened" and the reasoning of the judgment claims that the panel has watched the footage several times at normal speed in slow motion and image after image. The defence counsel gives detailed analyzes of the video footage and states that the panel made in some parts absolutely wrong, in other parts inexact and illogic conclusions contrary to what can be seen in the video footage. He claims that the panel's conclusions are also in contradiction with other evidence like photo documents and crime scene records and this approach questions the objectivity of the trial panel and led to an erroneous determination of the factual situation.

The violations of the criminal procedure and the erroneous determination of factual situation resulted in violation of the criminal law to the detriment of the accused. The defence counsel challenges the trial panel's arguments under the part "Legal Classification" of the judgment. He claims that the panel erred in qualifying the criminal offence as aggravated murder. For this qualification an abstract risk of endangering another or other persons' lives is not sufficient,

there should be a proven concrete risk and the perpetrator should intentionally endanger another person's life when committing the murder. When the risk is abstract such as using weapon at public place then that is a constitutive element of the criminal offence of endangering general safety. The defence counsel refers to the legal practice and attaches a Court of Appeals judgment and two Supreme Court judgments to support his arguments.

The appeal also challenges the reasoning of the first instant court concerning which actions of **G.G.** constitute co-perpetration arguing that the court failed to establish beyond reasonable doubt that

- the accused knew the victim or his vehicle
- he had prior agreement with **B.G.** to attack the victim and that **B.** gave any sign towards the Golf driven by **G**. – as was wrongly concluded by the panel from the video footage
- the accused knew that **B**. had weapon with him as there was no evidence presented confirming this allegation.

The defence counsel argues that what was undeniably established by the evidence is that

- **G**. noticed that **B**. opened the door of the Mercedes and started a physical confrontation with its driver
- Knowing the personality of **B**. as aggressive and intolerant he got out of the vehicle to prevent any escalation of the confrontation
- **G**. did not have anything in his hands, he grabbed the front right door of the Mercedes. Then shots followed as could be concluded from the video footage showing that in this moment two passersby walking there started to run away
- **G**. bend his head inside the Mercedes and 2 seconds later he was blown backwards due to the compression from firing 4 bullets by the victim and **G**. began to run away from the crime scene.

The defence counsel concludes that **G.G.** gave no essential contribution to the killing of the victim and he did not have the slightest intent, not even eventual intent to cause the consequences of the actions that took place on the critical day.

He argues that in the worst case the accused' actions could be considered as his participation in a physical attack-brawl against **X.K.**, therefore the criminal act should be qualified as Participation in a Brawl under Article 190(1) CCRK which carries a much more lenient punishment. He presents in his appeal two cases in support of his arguments concerning this qualification.

Concerning the punishment, the defence counsel claims that the first instance court imposed a severe punishment as a result of violation of criminal procedure, erroneous determination of factual situation which resulted in violation of the criminal law. The accused had no power over the actions of **B.G.** or **X.K.** and he showed no intent at all to commit a criminal offence, he actually risked his life to prevent the evil that unfortunately resulted in the loss of two lives.

Therefore, he should be acquitted of the charges or in the worst case he should receive a very lenient punishment in relation to the criminal offence of Participating in a Brawl. As mitigating circumstances the Court should consider his young age, that he is married and has a child, he is the main supporter of the family, his parents and two siblings, his work is required in the family's agricultural and cattle farm and he has no criminal record.

B. Response of the Prosecutor to the appeal

Prosecutor Lili Oprea filed a response to the appeal of defence counsel Mahmut Halimi on 14 September 2015. She states that the claims in the appeal are unfounded, the first instance Court's reasoning is valid and in accordance with the provisions of the criminal law and criminal procedure law. The Court assessed every piece of evidence presented during the main trial including the video recording. She points and analyzes sections of the video recording that make the defence claim ungrounded and support the reasoning of the judgment. She stands by the "Legal Classification" of the judgment and strongly opposes this ground of the appeal. The actions in the part of the video footage that is not contested by the defence counsel do not constitute any element of the criminal offence of Participation in a Brawl under Article 190(1) CCRK. Moreover, the defence has not complied with the provisions of Article 382(3) CPC. The defendant was rightly convicted for the criminal offence of Aggravated Murder under Article 179(1.5) CCRK in conjunction with Article 31 CCRK. The mitigating and aggravating factors were correctly assessed. The Prosecutor proposes the Court of Appeals to reject the appeal and affirm the judgment.

C. Motion of the Appellate Prosecutor

Appellate Prosecutor Claudio Pala in his Proposal dated 13 October 2015 concurs with the response of the Prosecutor and considers it as integral part of his motion. He is of the opinion that the Court provided a proper and thorough analyzes of the relevant evidence including any possible evidence supporting the defendant's arguments. Also the facts upon which the defendant was found guilty were properly determined and the legal qualification attributed to the facts by the trial panel is the correct one. He points out that the very same case law enclosed to the appeal clearly states that the acts of the defendant would amount to the criminal offence of Brawl only if the defendant was not a co-perpetrator in the commission of the murder. In the present case, it was proven beyond reasonable doubt that the defendant acted with indirect intent to deprive **X.K.** of his life. Also, the same case law enclosed to the appeal clearly states that the aggravating circumstance of endangering the life of others requires proof of the danger and this danger was proven beyond reasonable doubt in the present case. Considering the circumstances of the case the decision on punishment is fair.

The Appellate Prosecutor proposes to reject the appeal as unfounded and to confirm the judgment in its entirety.

III. FINDINGS OF THE APPELLATE PANEL

A. Competence of the Panel

Pursuant to Article 472(1) CPC the Panel has reviewed its competence and since no objections were raised by the parties the Panel will suffice with the following. In accordance with the Law on Courts and the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273 and clarified through the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, the Panel concludes that EULEX has jurisdiction over the case and that the Panel is competent to decide the respective case in the composition of one EULEX judge and two Kosovo appellate judges.

B. Admissibility of the appeal

The impugned judgment was announced on 30 July 2015 and finalized on 6 August 2015. The written judgment was served to **G.G.** on 13 August 2015. The appeal was filed on 27 August 2015, within the 15-day deadline pursuant to Article 380(1) CPC, by the authorized persons, and contains all other information pursuant to Article 376 *et seq* CPC. It is therefore admissible.

C. Findings on the merits

The Appellate Panel will discuss the challenges raised in the appeal of the defendant **G.G.** under relevant headings below: (i) substantial violation of provisions of criminal procedure; (ii) erroneous or incomplete determination of factual situation; (iii) violation of criminal law; and (iv) error in the decision on the criminal sanction.

1. Allegations of substantial violations of the provisions of criminal procedure

With respect to the defence's contention that the enacting clause of the impugned judgment is obscure, the Appellate Panel considers on the contrary that the enacting clause is clear, logical and does not contradict itself or the reasoning. It provides a comprehensive description of the decisive facts and contains all the necessary data prescribed by Article 370(3) and (4) CPC in conjunction with Article 365 CPC.

The defence points to no jurisprudence according to which the names of the endangered persons pursuant to Article 179(1.5) CCRK would have to be specifically identified in the enacting clause. Furthermore, the enacting clause clearly refers to the real and specific danger for the life of other persons, referring to the two persons present inside the Kebab shop and persons walking along […] Street close to the crime scene.

Therefore, the Court of Appeals rejects the defence's contention that the factual determination in the enacting clause does not allow for the qualification of Aggravated Murder pursuant to Article 179(1.5) CCRK.

While it is correct that the impugned judgment does not expressly refer to the arguments set forth by the defence in its closing statement attached to the minutes of 28 July 2015, the Court of Appeals is not persuaded that the Basic Court failed to consider these arguments. In addition, the Panel notes that the closing submissions merely contain comments and interpretation of the evidence adduced at trial, evidence that was duly and thoroughly assessed and referred to by the Trial Panel in the impugned judgment. In addition, the Appellate Panel observes that the impugned judgment also took into consideration **G.G.**'s statements that he had no involvement whatsoever in the acts of **B.G.**.

The Appellate Panel recalls that whether the conclusions of the Basic Court on determination of facts were correct and complete is a separate issue and this will be assessed in the next section of this judgment.

2. Allegations of erroneous and/or incomplete determination of the factual situation

Before assessing the merits of the arguments presented by the defence counsel, the Appellate Panel recalls the standard of review regarding the factual findings made by the Trial Panel. It is clear from the definitions of "erroneous determination of the factual situation" and "incomplete determination of the factual situation" provided in Article 386 CPC that it is not sufficient for the defendant to demonstrate only an alleged error of fact or an incomplete determination of fact by the Trial Panel. Rather, given that the criminal procedure code requires that the erroneous or incomplete determination of the factual situation relates to a "material fact", the defendant must also establish that the erroneous or incomplete determination of the factual situation indeed relates to a material fact, namely, a fact that is critical to the verdict reached. Furthermore, it is a general principle of appellate proceedings that the Court of Appeals must give a margin of deference to the finding of fact reached by the Trial Panel because it is the Trial Panel which is best placed to assess the evidence. The Appellate Court has an obligation to ensure that the facts which are important to rendering a lawful decision are established truthfully and completely.

In light of the above, and after having thoroughly reviewed the evidence and the analysis made by the Basic Court of this evidence, the Court of Appeals is not persuaded by the submissions of the defendant **G.G.**. It is on the other hand fully persuaded by the conclusions and reasoning of the Basic Court in the impugned judgment. The Appellate Panel is further satisfied that the Trial Panel performed a careful and meticulous analysis of the evidence administered at trial as a whole and in a fair manner.

More specifically, the Appellate Panel fails to see any blatant contradiction or inconsistency between the findings of the Trial Panel and the evidence adduced at trial such as the video

footage or the pictures and records from the crime scene. The Panel finds that the defence has failed to substantiate or identify any specific contradiction in this respect.

After several meticulous viewings of the video footage, and notably a thorough consideration for the specific times referred to by the defence, the Court of Appeals finds that the video cannot possibly lead to the conclusion that the defendant was trying to park on the left side. On the contrary, the Panel is satisfied that the video undeniably shows that while the Golf was waiting for a little while on the right side of the road, it suddenly moved to the left side in a deliberate attempt to block the Mercedes driven by **X.K.**. The Appellate Panel fails to see any error in the Trial Panel's assessment of the evidence in this respect.

Furthermore, while the Panel agrees with the defence that the quality of the video is not sufficient to allow establishing beyond reasonable doubt that **B.G.** gave a sign to **G.G.** for blocking the road to the Mercedes, the Panel finds that, irrespective of this fact, the video indisputably reveals that the attack against the victim **X.K.** was planned among the three co-perpetrators and that **G.G.**'s actions were coordinated and deliberate. Likewise, while the video does not enable to confirm whether **B.G.** was already holding his gun when exiting the Golf and walking towards the Mercedes, the Court of Appeals finds that the only reasonable inference resulting from the succession of **G.G.**'s actions as shown in the video is that he could not ignore the fact that **B.G.** had a gun and intended to attack **X.K.**.

In conclusion, the Appellate Panel is satisfied that the Basic Court completely and correctly established the factual situation and that the arguments raised in the appeal filed on behalf of **G.G.** do not undermine these findings.

3. Allegations of violations of criminal law

With respect to the defence's argument that the Basic Court erred in the legal classification of the criminal offence as Aggravated Murder for endangering the life of other persons pursuant to Article 179(1.5) CCRK, the Court of Appeals finds, contrary to the defence's contention, that the risk of endangering other persons' lives was not an abstract risk but was real and specific. It notes in this respect that, as acknowledged by the defence, the video footage shows people starting running away in the street, out of fear because of the gunshots. In addition, people in the Kebab shop had to take immediate action in order to protect themselves from the gunfire.

A careful review of the jurisprudence referred to by the defence in that regard does not allow the Appellate Panel to conclude that any of these situations can be applicable to the circumstances of the present case.

In the judgment of the Court of Appeals PAKR n. 321/2014 of 28 October 2014, the Court of Appeals found that, while there were other persons present in the café when the attack took place, it was not proven that their lives were in danger since it took into consideration that the gun could be controlled, thus avoiding a concrete risk for others. It was also found that two

gunshots only were fired, and the evidence did not reflect that the second bullet could have hit someone else besides the injured party.

While in the case at stake, the Appellate Panel recalls that the evidence established that at least six gunshots were fired, and that the trajectory of some bullets was erratic since the persons firing were not in control of their weapons anymore. In addition, the Panel is satisfied that the risk was real and concrete given that, as demonstrated by the evidence adduced, people walking along the crime scene started running away, and given that the persons inside the Kebab shop either had to lay on the ground or to hide behind a pillar to protect themselves.

In the ruling of the Supreme Court AP n. 344/2011 dated 8 March 2012, it was found that, according to the case file, one bullet hit the injured party in his premises, while no other person was present, the window of an empty premise was also hit, and there was no person passing by. Thus, the Supreme Court found that there was no real and specific danger, and that as a result the accused did not endanger the life of anyone.

On the contrary, in the present case, the evidence establishes that several people were walking in the street close to the crime scene at the time of the attack, and that there were persons present inside the Kebab shop when a bullet entered the shop and hit the refrigerator. Therefore, in the view of the Appellate Panel, the risk was real and specific and the circumstances of the respective cases clearly differ.

The Panel considers that the defence also fails to point to any jurisprudence that would require specific identification of the persons in danger. In any event, the Panel notes that two persons present in the Kebab shop, B.Q. and A.M., were identified and testified in court.

Furthermore, the Appellate Panel is satisfied that the co-perpetration under Article 31 CCRK is also properly established since the actions of the defendant demonstrate his substantial contribution to the commission of the crime. Indeed, his actions of blocking the Mercedes and of rushing towards the passenger's door of the Mercedes in order to disturb **X.K.** in his defensive action were central to the commission of the criminal offence by co-perpetrator **B.G.**. The Panel further finds that without **G.G.**'s essential contribution, **B.G.** could not have completed the criminal offence by himself.

The Court of Appeals is of the view that whether or not **G.G.** knew the victim or had a prior agreement with **B.G.** to kill **X.K.** is irrelevant to the legal classification of the criminal offence and to the finding that he possessed eventual intent. Likewise, it is irrelevant that **G.G.** did not have anything in his hands. This element is not disputed and is not a requirement to the legal classification of the criminal offence.

The Panel fully concurs with the Basic Court's assessment that **G.G.** was aware that his action, namely driving the Golf towards the Mercedes and blocking its way, as well as disturbing **X.K.** in his self-defense, could lead to the killing of **X.K.** and made a conscientious choice in doing so.

In the view of the Court of Appeals, the evidence, especially the video, undeniably reflects that the defendant's actions in the attack were planned and coordinated with the acts of the other co-perpetrators.

Turning to the jurisprudence referred to by the defence counsel in his appeal allegedly supporting a requalification of the criminal offence as Participation in a Brawl under Article 190(1) CCRK, the Appellate Panel is not persuaded that any of these cases could be applicable to the present case since every situation is easily distinguishable.

In the judgment of the Supreme Court AP n. 45/2010 of 28 October 2010, the Supreme Court held that the attacker who is not a co-perpetrator in a murder or grievous bodily injury should be held responsible for the criminal offence of Participation in a Brawl. It further held that the criminal offence of Participation in a Brawl involves "*participation in the mutual physical conflict between several persons*".

However, in the present case, the Basic Court rightly found established by the evidence that **G.G.**'s actions amounted to co-perpetration. In addition, his participation in the criminal offence does not amount to *physical conflict* with the victim **X.K.** and **B.G.**, and it has not been proven that there was any physical contact with the victim.

Finally, in the rulings from the Bihaq Canton in the case KTZ 155/08, it was found that, given that the injured party was empty handed and not in a position to resist the second defendant who was armed with a "ready to shoot" gun, therefore, the action of the defendant, by assaulting the victim with a chair, could not be considered as assistance in the commission of the attempted murder.

In the present case, on the contrary, it is noteworthy that the victim, **X.K.**, was armed and was in a position to resist to the attack, as demonstrated by the evidence since he was able to fire back and deadly injured **B.G.**. In any event, the Panel notes that this case dealt with assistance of attempted murder, and not co-perpetration, so any comparison should be deemed irrelevant.

In light of the above, the Court of Appeals rejects the defence's submission that the criminal offence should be requalified as Participation in Brawl under Article 190(1) CCRK.

4. Allegations on account of decision on criminal sanction

Turning to the decision on the punishment, the Appellate Panel carefully reviewed the aggravating and mitigating circumstances established by the Basic Court and the challenges raised by the defendant's appeal in this regard.

Having in mind the principle of proportionality established in Article 33(3) of the Constitution of the Republic of Kosovo, while determining the punishment within the legal limits, the sanction cannot exceed the guilt of the perpetrator, or be lower than the necessary to ensure individual and

general prevention. Its calculation will consider all specific mitigating and aggravating circumstances enumerated in Article 74 CCRK.

The Panel accepts the argument of the defence that the Basic Court, in finding that the only mitigating circumstance was the fact that reconciliation had been reached between the G. and K. families, failed to take into consideration the family situation of the defendant, namely that he is married and father of one child and that he is the main supporter of his family, including his parents, as well as the fact that he has no prior criminal record. The Court of Appeals is of the view that these factors should have been taken into account as mitigating circumstances. However, the Court of Appeals rejects the defence counsel's contention that **G.G.** risked his own life in an attempt to prevent the worst from happening.

The Appellate Panel also notes that, while the defendant was a co-perpetrator and while he essentially contributed to the commission of the criminal offence, and while Article 31 CCRK provides that the co-perpetrators to a criminal offence should be liable and punished as prescribed for the criminal offence, he was not the principal perpetrator and did not pull the trigger himself. Therefore, the Panel finds that the degree of **G.G.**'s participation in the criminal offence cannot amount to an aggravating circumstance pursuant to Article 74 CCRK.

Furthermore, the Panel *ex officio* finds that the fact that the defendant voluntary surrendered amounts to a mitigating circumstance pursuant to Article 74(3.8) CCRK. This fact should have been taken into account by the Basic Court when determining the sentence.

In light of the mitigating and aggravating circumstances correctly established by the Basic Court and giving due regard to the additional mitigating circumstances of the family status of the defendant, the absence of prior criminal conviction, and his voluntary surrender, and considering that the minimum punishment foreseen for Aggravated Murder is ten (10) years of imprisonment pursuant to Article 179(1) CCRK, the Panel finds that the sentence of fifteen (15) of imprisonment imposed by the Basic Court is disproportionate. The Court of Appeals finds that a sentence of ten (10) years of imprisonment would reflect an appropriate punishment in view of the circumstances of the case. The Court of Appeals therefore modifies the impugned judgment in its sentencing part in this respect.

D. Conclusion

The Appellate Panel, for the reasons elaborated above, partially grants the defence's appeal, modifies the sentencing part of the impugned judgment, and imposes a sentence of ten (10) years of imprisonment to **G.G.**. The Court of Appeals rejects the remaining parts of the appeal and affirms the remaining parts of the impugned judgment.

Done in English, an authorized language. Reasoned Judgment completed on 4 February 2016.

Presiding Judge

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Hajnalka Veronika Karpati
EULEX Judge

Panel member

_____

Driton Muharremi
Kosovo Court of Appeals Judge

Panel member

_____

Abdullah Ahmeti
Kosovo Court of Appeals Judge

Recording Officer

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Anne-Gaëlle Denier
EULEX Legal Officer

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