

SUPREME COURT OF KOSOVO
PAII. No. 3/2013
4 September 2013

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of
EULEX Judge Bertil Ahnborg as Presiding Judge,
Supreme Court Judge Nazmije Ibrahim and
Supreme Court Judge Shukri Sylejmani as members of the panel,
in the presence of EULEX Legal Officer Holger Engelmann, acting in the capacity of a
recording clerk,
In the criminal proceedings against defendant

0-2 father's name .

in Kosovo, Kosovo Albanian, last residence in freedom
businessman by occupation, high school education, married, currently held
in the Detention Centre Prizren, in detention on remand since 19 April 2007,

Convicted in the 1st Instance by Verdict P. Nr. 155/2007, dated 17 April 2008, of the
District Court of Prizren as court of first instance, the defendant was found guilty of the
criminal offenses of **Aggravated Murder** in violation of the Article 147 paragraph 5 of
the Provisional Criminal Code of Kosovo (PCCK), committed in co-perpetration, under
Article 23 of the PCCK, of **Attempted Aggravated Murder** in violation of the Article
147 paragraph 11 and Article 20 of the PCCK, committed in co-perpetration, under
Article 23 of the PCCK, of **Unauthorized Ownership, Control, Possession or Use of
Weapons** in violation of the Article 328 paragraph 1 of the PCCK and of another count
of **Unauthorized Ownership, Control, Possession or Use of Weapons** in violation of
the Article 328 paragraph 2 of the PCCK and sentenced to an aggregate punishment of
twenty-five (25) years (of long-term imprisonment);

Found guilty in the 2nd Instance by Judgment of the Supreme Court of Kosovo AP.-KŽ.
No. 110/2011, dated 6 November 2012, modifying the previous Judgment of the Supreme
Court of Kosovo AP.-KŽ. No. 481/2008, dated 21 July 2009, after upon appeals the
Supreme Court of Kosovo in third instance by Ruling API.-KŽI. No. 9/2009, dated 28
December 2010, had returned the case for re-trial to the court of second instance, of the
criminal offences of **Murder** in co-perpetration contrary to Article 146 of the PCCK read
with Article 12 Paragraph 2 and Article 23 of the PCCK (count 1 of the Indictment) and
of **Attempted Murder** in co-perpetration, both committed in a state of diminished
mental capacity, contrary to Article 146 read with Article 20, Article 23 and Article 12

Paragraph 2 of the PCCK (count 2 of the Indictment), punished under Article 147 paragraph 1 item 11 of the PCCK and one count of **Unauthorized Ownership, Control, Possession or Use of Weapons** in violation of the Article 328 paragraph 2 of the PCCK and sentenced to an aggregated punishment of fifteen (15) years of imprisonment;

Deciding upon the appeal filed on 14 February 2013 by the State Prosecutor of Kosovo, on the appeal filed by Defence Counsel *E.R.* on 25 February 2013 and on the 'Response to Appeal' filed by Defence Counsels' *L.S.* and *B.L.* on behalf of the defendant *O.Z.* against the Judgment of the Supreme Court of Kosovo AP.-KŽ. No. 110/2011, dated 6 November 2013,

After a public session held on 4 September 2013, in the presence of Defendant *O.Z.* his Defence Counsels *E.R.* and *B.L.* EULEX Prosecutor Claudio Pala, representing the OSPK, deliberated and voted in relation to above referred appeals.

Following the deliberation and voting, the panel renders the following

JUDGMENT

The appeals filed by the Defence Counsels on behalf of the defendant *O.Z.* and the appeal filed by the prosecution are **PARTIALLY GRANTED**. The Judgment of the Supreme Court of Kosovo as court of second instance, AP.-KŽ. No. 110/2011, dated 6 November 2012 is **MODIFIED** as follows:

The defendant is found guilty of:

Pursuant to count 1 of the Indictment, the criminal offence of Murder committed in co-perpetration in a state of diminished mental capacity pursuant to Article 146 in conjunction with Articles 23 and 12 paragraph 2 of the Provisional Criminal Code of Kosovo (PCCK),

Pursuant to count 2 of the Indictment, the criminal offence of Attempted Murder committed in co-perpetration in a state of diminished mental capacity pursuant to Article 146 in conjunction with Articles 20, 23 and 12 paragraph 2 of the PCCK and

Pursuant to counts 3 and 4 of the Indictment, two (2) counts of the criminal offence of Unauthorized Ownership, Control or Possession of Weapons pursuant to Article 374 paragraph 1 of the Criminal Code of the Republic of

Kosovo (CCRK, in force since 1 January 2013), committed on the dates of 10 October 2005 and 19 April 2007.

Pursuant to Article 71 paragraph 1 of the PCCK the following punishments are pronounced:

Pursuant to count 1 of the Indictment, a sentence of eight (8) years of imprisonment for the criminal offence of Murder committed in co-perpetration in a state of diminished mental capacity pursuant to Article 146 in conjunction with Articles 23 and 12 paragraph 2 of the PCCK,

Pursuant to count 2 of the Indictment, a sentence of four (4) years of imprisonment for the criminal offence of Attempted Murder committed in co-perpetration in a state of diminished mental capacity pursuant to Article 146 in conjunction with Articles 20, 23 and 12 paragraph 2 of the PCCK,

Pursuant to count 3 of the Indictment, a sentence of one (1) year and six (6) months imprisonment for the criminal offence of Unauthorized Ownership, Control or Possession of Weapons pursuant to Article 374 paragraph 1 of the CCRK committed on the 10 October 2005 and

Pursuant to count 4 of the Indictment, a sentence of six (6) months imprisonment for the criminal offence of Unauthorized Ownership, Control or Possession of Weapons pursuant to Article 374 paragraph 1 of the CCRK committed on the 19 April 2007,

Resulting in an aggregate sentence of twelve (12) years of imprisonment.

The time spent in detention on remand since 19 April 2007 is credited against the punishment imposed.

As for the remaining parts, the appeals are REJECTED AS UNGROUNDED.

REASONING

Procedural history of the case

Background

In the afternoon of 10 October 2005 at about 16:20 hours in the green market of Xerxe/Zerze village, Municipality of Prizren, two perpetrators acting in concert as co-perpetrators approached the Kosovo Albanian persons *H.R.* and his brother *N.R.* with handguns. *H.R.* was shot and killed. *N.R.* was shot at as well, but in the course of events he eventually got wounded and was hospitalized afterwards.

Dated 16 July 2007, the District Public Prosecutor in Prizren drew up an Indictment against the defendants *O.Z.* and a second alleged perpetrator (PP 230/2005), which was filed with the District Court of Prizren on 17 July 2007. Both defendants were indicted for the criminal offenses of Aggravated Murder committed in Co-Perpetration pursuant to Article 147 paragraph 5 and Article 23 of the PCCK; Attempted Aggravated Murder committed in Co-Perpetration pursuant to Article 147 paragraph 11; Articles 20 and 23 of the PCCK; Unauthorized Ownership, Control, Possession or Use of Weapons pursuant to Article 328 paragraph 1 of the PCCK and the defendant *O.Z.* alone as well for a second count of Unauthorized Ownership, Control, Possession or Use of Weapons pursuant to Article 328 paragraph 2 of the PCCK.

The Indictment was consolidated by the confirmation decision of the District Court of Prizren (KA 112/2007) on 30 August 2007.

The District Court

The public Main Trial before the District Court of Prizren against *O.Z.* and one co-accused was held between 31 January and 17 April 2008.

During the main trial the accused *O.Z.* and the co-defendant were examined and a number of witnesses gave testimony.

During the trial medical staff were continuously consulted in order to make sure that the defendant *O.Z.* who suffers several physical and psychological diseases, would be physically and mentally able to follow the proceedings.

The verdict of guilty for Aggravated Murder in violation of Article 147 paragraphs 4, 5 and 8 of the PCCK and Attempted Murder in violation of Article 147 paragraph 11 and Article 20 of the PCCK, both committed in Co-Perpetration according to Article 23 of the

PCCK, and for Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 paragraph 1 of the PCCK against both defendants as well against the defendant O.Z. alone for an additional count of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 paragraph 2 of the PCCK was pronounced on 17 April 2008, imposing an aggregate 25 (twenty-five) years prison sentence against each of the defendants.

The Supreme Court of Kosovo as court of second instance (first time)

The Judgment was timely appealed by both Defence Counsels of the defendant O.Z. and E.R. on 04 August 2008.

On 29 October 2008, Defence Counsel Av. E.R. forwarded to the Court a letter of the defendant O.Z. and asked to have it attached to the appeal. In the letter O.Z. admitted that he had murdered H.R. and wounded his brother N.R. and that only he is responsible.

Also the Defence Counsel of the former co-defendant, Av. R.H., timely appealed the District Court Judgment on 11 August 2008.

Dated 1 December 2008, the OPSK gave an opinion according to Article 409 paragraph 2 of the Kosovo Code of Criminal Procedure (KCCP), thus proposing to reject all appeals as being ungrounded and without merits. The Public Prosecutor did not appeal.

Dated 21 July 2009, the appeals panel of the Supreme Court of Kosovo pronounced its Judgment (AP.-KŽ. 481/2008), thus partially granting the appeal of the defendant O.Z. as to the legal qualification under counts 1 and 2 of the 1st Instance Judgment, which was qualified as one Aggravated Murder in violation of Article 147 paragraph 11 of the PCCK, and as to the legal qualification under count 3 of the 1st Instance Judgment, thus stating that the defendant O.Z. had committed the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 paragraph 2 of the PCCK only. For the remaining parts the appeals were rejected and the First Instance Judgment was confirmed.

The co-defendant was acquitted from all charges due to lack of evidence.

The Supreme Court of Kosovo as court of third instance

The three Defence Counsels of O.Z., Av E.R., Av F.C. and Av T.G. timely appealed the Judgment of the appeals panel of the Supreme Court of Kosovo as issued in the 2nd Instance dated 21 July 2008 (AP.-KŽ. No.481/2009).

The Supreme Court of Kosovo in third instance, by Ruling API.-KŽI. No. 9/2009, dated 28 December 2010, partially granted the three defence appeals and annulled the Judgment of the Supreme Court of Kosovo, AP.-KŽ. No. 481/2008, dated 21 July 2009. The case was returned to the Supreme Court as court of second instance for re-trial. As for the remaining part the appeals were rejected.

The judgment was annulled on the ground of a substantial violation of the provisions of criminal procedure pursuant to Article 403 paragraph 2 KCCP, on the ground of a violation of criminal law according to Article 404 item 2 KCCP and also because of an erroneous and incomplete determination of the factual situation.

In particular, the court of second instance had failed to determine whether circumstances exist which preclude or limit criminal liability.

In addition, it had not assessed and taken into consideration the statement of the defendant submitted in writing before the appeal session and his statement in the session admitting that he had "murdered H.R. and wounded his brother". The panel did not concur with the second instance court's reasoning that the statement qualifies merely as a kind of guilty plea but rather finds that such a statement has to be considered as relevant, necessary and in fact essential evidence to establish the guilt of the accused.

The Supreme Court of Kosovo as court of second instance (second time)

On 6 November 2012 the Supreme Court of Kosovo as court of second instance held a hearing as instructed by the previous Ruling of the Supreme Court.

However, already on 14 November 2011 the presiding judge, *ex officio* and upon recommendation of the Third Instance Court, issued an order for psychiatric expertise of O.Z. to be carried out at the Psychiatric Department of the University Clinic Centre of Kosovo. The order was amended on 12 March 2012.

The Commission of Experts who performed the expertise was composed of Doctor F.D., psychiatrist, Doctor S.H., psychiatrist and S.H.V. clinical psychologist. The report of Super Expert Analysis of O.Z. was filed with the court registry on 6 September 2012 and was communicated to the parties.

One of the experts, Doctor F.D. was summoned to appear in court to provide further explanations on the super expertise findings.

The Panel concluded from the findings that the defendant had the capacity to recognize the unlawfulness of his criminal activity and the ability to act correspondingly. On the other hand, it clearly appeared that due to his disturbed personality and the diagnosis Post Traumatic Stress Disorder (PTSD) his capacity to abstain from committing the criminal acts has been diminished. The Panel thus held that when the defendant committed the criminal offences of murder and attempted murder he was in such an emotional state that his ability to control his acts was seriously weakened. This would, according to the Panel, lead to a significant reduction of the punishment according to Article 12 paragraph 2 and Article 64 and 66 of the PCCK.

When elaborating on the question of *intent and premeditation*, the panel was of the opinion that even though O.Z. acted in a state of diminished mental capacity, there was no doubt that he intentionally fired on the Rrustemi brothers. The panel found that he was fully aware of the fact that he shot two persons aiming at killing them, knowing that shots from a short distance would have high probability to cause the death of the attacked persons. Thus, the panel found that he acted at least with *eventual intent*. Finally, the panel held that the criminal offences Murder and Attempted Murder under Article 146 of the PCCK do not require *premeditation*.

As a result, by Judgment AP.-KŽ. 110/2011, the first instance judgment was modified. The defendant was found guilty for the criminal offences of Murder of H.R. in co-perpetration in a state of diminished mental capacity contrary to Article 146 read with Article 23 and 12 paragraph 2 of the PCCK (count 1 of the Indictment), Attempted Murder of N.R. in co-perpetration in a state of diminished mental capacity contrary to Article 146 read with Articles 20, 23 and 12 paragraph 2 of the PCCK (count 2 of the Indictment) and one count of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 paragraph 2 of the PCCK (count 4 of the Indictment). One count of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 paragraphs 1 and 2 of the PCCK was subsumed under counts 1 and 2 of the Indictment. The court pronounced for the counts 1 and 2 pursuant to Article 147 item 11 of the PCCK a single punishment of 14 years imprisonment and for the count 4 of the Indictment a punishment of 2 years of imprisonment, resulting in an aggregate sentence of 15 years imprisonment. The defendant's time spent in detention was credited and his motion to terminate detention on remand was rejected as ungrounded.

The Appeals and Arguments of the Parties

The Appeal of the Prosecution

On 14 February 2013 the OSPK filed an appeal against the Judgment AP.-KŽ. 110/2011 of the Supreme Court of Kosovo, dated 6 November 2012, on the grounds of violations of the criminal law and the decision on criminal sanctions. The OSPK in particular finds that the single punishment imposed for the criminal offences of Murder and Attempted Murder (counts 1 and 2 of the Indictment) based on Article 147 item 11 of the PCCK violates the provision of Article 64 paragraph 1 of the PCCK. The mentioned Article provides that “The court shall determine the punishment of a criminal offence within the limits provided for by law for such criminal offence ...”. While the court had found the defendant guilty for Murder of *H.R.* committed in co-perpetration and in a state of diminished mental capacity pursuant to Articles 146, 23 and 12 paragraph 2 of the PCCK and Attempted Murder of *N.R.* committed in co-perpetration and in a state of diminished mental capacity pursuant to Articles 146, 20, 23 and 12 paragraph 2 of the PCCK, Article 147 item 11 of the PCCK defines elements and punishment for a different criminal offence.

The OSPK also challenges the finding of the court that “The criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 paragraphs 1 and 2 of the PCCK (count 3 of the Indictment) is subsumed under counts 1 and 2.” According to the OSPK submission, the court was not authorized to apply in that respect either the principle of ‘consumption’ by or ‘inclusion’ within the criminal offences of count 1 and 2. Murder does not contain the elements of Unauthorized Ownership, Control, Possession or Use of Weapons, nor is the seriousness of the offence insignificant compared to Murder. The two offences are directed against different protected social values. The offence of Unauthorized Ownership, Control, Possession or Use of Weapons holds significant danger for society on its own and should be punished separately.

Consequently the court should have pronounced separate punishments for the criminal offences pursuant to all four counts of the Indictment and imposed an aggregate punishment in accordance with Article 71 of the PCCK. In respect to the offence of Unauthorized Ownership, Control, Possession or Use of Weapons, the court should have applied Article 374 paragraph 1 of the Criminal Code of the Republic of Kosovo (CCRK), in force since 1 January 2013, as the most favourable law to the defendant.

The OSPK proposes to modify the challenged Judgment in the way mentioned before.

The Appeal of Defence Counsel | E.R.

On 25 February 2013 av. E.R. on behalf of the defendant filed an appeal against the aforementioned Judgment of the Supreme Court of Kosovo. The appeal is based on the grounds of substantial violation of the provisions of criminal procedure, violation of the criminal law, erroneous and incomplete determination of the factual situation and finally a wrongful decision on criminal sanctions.

The appeal challenges that the enacting clause is incomprehensible and internally inconsistent since the decision on criminal sanctions is based on a different provision of the criminal law than the conviction decision. Since the court found that the criminal offence of count 1 of the Indictment was committed in a state of diminished mental capacity, it should have convicted the defendant for Murder Committed in a State of Mental Distress pursuant to Article 148 of the PCCK. In respect to the offence of Attempted Murder, the Supreme Court during the hearing on 6 November 2012 did not examine the facts related to the charges of count 2 of the Indictment. In particular, the court failed to establish the *mens rea*. Without premeditation to kill the victim there can be no such criminal offence. Moreover that, the action of the defendant resulted only in wounding | N.R. and even that occurred accidentally and without intent. The court has not taken into consideration all relevant mitigating circumstances and consequently pronounced an inadequately harsh punishment. The Defence Counsel proposes to convict the defendant for the criminal offence of Murder Committed in a State of Mental Distress, pursuant to Article 148 of the PCCK and Unauthorized Ownership, Control, Possession or Use of Weapons, pursuant to Article 328 paragraph 2 of the PCCK while acquitting him from the charges for Attempted Murder pursuant to Article 146 in conjunction with Article 20 of the PCCK.

The Response to Appeal of Defence Counsel | L.S.

On 5 March 2013 Defence Counsel | L.S. filed on behalf of the defendant a document titled 'Response to Appeal' with the Basic Court of Prizren. He proposes partially granting the appeal of the State Prosecutor and to modify the Judgment of the Supreme Court. The Defence Counsel supports the OSPK's claim not to qualify the offences pursuant to counts 1 and 2 of the Indictment as one but as two separate actions. An essential element of Article 147 item 11 of the PCCK is missing since only one murder was committed. Therefore the provision cannot be applied and separate criminal sanctions should be imposed. The offence according to count 2 of the Indictment should be qualified as Grievous Bodily Harm pursuant to Article 154 paragraph 1 of the PCCK since the defendant had no motif for killing | N.R. For the offence according to count 1 of the Indictment more lenient sanctions should be imposed. For counts 3 and

4 of the Indictment the more favourable provision of Article 374 paragraph 1 of the CCRK should be applied and a fine of 1,000 Euro instead of the imprisonment sentence should be imposed. He proposes to pronounce punishments as follows: 10 years imprisonment for count 1, 2 years imprisonment for count 2 and a fine of 1,000 Euro for counts 3 and 4 of the Indictment.

The Reply of the OSPK on the Appeal of the defence (OSPK opinion)

The OSPK, with a response filed on 30 May 2013, claims that Defence Counsel *ER* appeal is self-contradictory. The prosecution also points out that the two defence counsel have made contradictory submissions as to the legal qualification of the offence pursuant to count 1 of the Indictment. The enacting clause of the contested Judgment is clear, the facts are precisely described and the sentencing part is comprehensible. There is no contradiction between enacting clause and reasoning. Apart from the shortcomings challenged in the OSPK's appeal, the Judgment is free from violations alleged by the defence. Article 148 of the PCCK cannot be applied to qualify the offence according to count 1 of the Indictment since there has been no uninterrupted temporal continuity between the actions of the injured party and the modified mental state of the perpetrator caused by these. Such legal qualification would also be in contradiction to the expertise and testimony of the psychiatric expert, Dr. *FD* who described that the term 'mental distress' refers to short-term emotional state. In addition, the OSPK submits that it has not been contested by the defence that the offence had been committed in co-perpetration - a way of committing a criminal offence that requires an amount of planning and co-operation, which is irreconcilable with the qualification of Article 148 of the PCCK. In regard to the proposed legal qualification of count 2 of the Indictment, the OSPK finds the defence arguments illogical. While on one side the Defence Counsels claim that the wounding of *N.R* was accidentally, on the other side they suggest to find the defendant guilty for the criminal offence of Grievous Bodily Harm pursuant to Article 154 paragraph 1 of the CCK. The prosecution proposes to reject the appeal as unfounded.

The Findings of the Supreme Court

Admissibility of the appeals

The appeals of OSPK and Defence Counsel *ER* a on behalf of defendant are both timely filed

The Response to Appeal of Defence Counsel *L. S.* on behalf of the Defendant, although labelled *Response*, makes separate proposals for legal qualifications of the criminal offences and sanctions to impose. It is consequently more than a mere response to the appeal of the OSPK. It should therefore be considered as a separate appeal in its own right. Since it was filed on 5 March 2013, 14 days after service of the judgment to the defendant, it was also timely filed and admissible.

Competence and applicable procedural law

Pursuant to Article 545 I CPC, since Indictment was filed under old procedural code, the current appeal was processed *mutatis mutandis* according to the provisions of the Kosovo Code of Criminal Procedure (KCCP).

The panel was constituted in compliance with Article 21 paragraph 6 of the Law on Courts (Law No. 03/L-199, dated 22 July 2010), and Article 3.7 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (“Law on Jurisdiction”)

Issues to address

The issues to address by this Panel are the following: the legal qualifications of counts 1 and 2 of the Indictment, including the *mens rea* regarding the criminal offence of the count 2, the determination of punishment for counts 1 and 2 of the Indictment, whether the offence of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 paragraph 1 of the PCKK under count 3 of the Indictment should be subsumed under the offences of Murder and Attempted Murder under count 1 and 2 or not, which law to apply concerning the *weapons offences* and the determination of punishment for these offences, the determination of an aggregate punishment, and finally an alleged internal inconsistency or contradiction within enacting clause or between enacting clause and reasoning, as has been put forward by the Defence.

Legal qualification of the charge pursuant to count 1 of the Indictment

Defence Counsel *E. R.* argues in his appeal that since the Supreme Court in the challenged judgment found that the criminal offences of count 1 of the Indictment was committed in a state of diminished mental capacity, it should have convicted the defendant for Murder Committed in a State of Mental Distress pursuant to Article 148 of the PCKK.

This Panel does not agree with the Defence but finds that the criminal liability was correctly evaluated and assessed by the previous Panel, based on expertise and expert witness opinion explained during hearing.

Article 148 of the PCCK states:

Whoever deprives another person of his or her life in a state of mental distress after being brought, through no fault of his or her own, into a state of severe shock caused by an attack, maltreatment or grave insult by the murdered person, shall be punished by imprisonment of one to ten years.

It is obvious that Article 148 is not applicable in this situation. Although *D.* *Z.* has made *H.R.* responsible for the death of his brother, this had happened years before. This provocation cannot constitute that kind of a state of severe shock at the time of the shooting, as is required by the Article since there is no uninterrupted temporal continuity between the two actions. In addition, this Panel agrees with the Prosecution in its opinion that the fact that the act was committed in co-perpetration points to at least some degree of planning and control of the own actions.

As the previous Panel found, the act shall be qualified as Murder in co-perpetration in a state of diminished mental capacity, pursuant to Article 146, read with Articles 23 and 12 paragraph 2 of the PCCK.

Legal qualification of the charge pursuant to count 2 of the Indictment

The Defence Counsel *E.R.* claims in his appeal that the Supreme Court did not examine the facts related to the charges of count 2 of the Indictment and, in particular, the court failed to establish the *mens rea* since without the premeditation to kill there can be no such criminal offence as Attempted Murder. This Panel does not agree with the Defence in this respect and wishes to refer to the paragraph 36 of the challenged Judgement:

*36. With regard to the question of the intent and premeditation, the Supreme Court of Kosovo is of the opinion that though (*O.Z.* has acted in a state of diminished mental capacity, there is no doubt that he intentionally fired on *H.* and *N.R.* Pursuant to Article 15 paragraph 1 of the PCCK, a criminal offence may be committed with direct or eventual intent. The lawmaker describes in Article 15 paragraph 2 the direct intent as when a person "is aware of his or her act and desires its commission". The Defendant was fully aware of the fact that he shot the two persons aiming at killing them. Even considering his statement in court that he felt transferred*

back to the time of war, he had the willingness to kill his alleged adversaries with his weapon knowing that shots fired from short distance would have high probability to cause the death of the attacked persons. At least, he acted with eventual intent in the sense or Article 15 paragraph 3 of the PCCK, being aware that the prohibited consequences could occur and he acceded to their occurrence.....

It is therefore quite clear that the previous Supreme Court Panel fully evaluated the criminal act as charged by the count 2 of the Indictment including all subjective elements of the crime and explained it in its reasoning.

This Panel concurs in all with the findings of the previous Panel regarding count 2 of the Indictment and that the criminal act must be qualified as Attempted Murder under Article 146, read with Article 20 of the PCCK, in co-perpetration under Article 23 and with diminished mental capacity under Article 12 paragraph 2 of the PCCK.

This Panel however also wishes to underline the following. The legal qualification of count 2 must be made in the context of the assessment of count 1 of the Indictment, Murder. If someone in one moment intentionally kills a person with his gun and seconds later aims at another person with the gun and fires it, there can be no doubt that there is at least an eventual intent to kill also the second person, *dolus eventualis*. The fact that the Defendant during earlier time refrained from attacking *N.R.* when meeting him, which the Defence stressed during the session, or the fact that the Defendant did not have a motif for killing *N.R.*, as Defence Counsel *L.S.* brings forward in his Response to Appeal, do not alter this conclusion. Thus the criminal act cannot be qualified as Grievous Bodily Harm.

Decision on punishment for criminal offences pursuant to counts 1 and 2 of the Indictment

Pursuant to Article 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. Article 71 paragraph 1 of the PCCK states:

If a perpetrator, by one or more acts, commits several criminal offences for which he or she is tried at the same time, the court shall first pronounce the punishment for each act and then impose an aggregate punishment for all of these acts.

This Panel, as did the previous Panel, has found *O.Z.* guilty of Murder and Attempted Murder in co-perpetration in a state of diminished mental capacity, pursuant to Article 146, read with Articles 20, 23 and 12 paragraph 2 of the PCCK. They are two separate criminal acts. Therefore, this Panel cannot follow the view of the previous Panel

that the offences of counts 1 and 2 of the Indictment can be punished pursuant to Article 147 item 11 of the PCCK. Article 147 item 11 of the PCCK cannot be interpreted as mere rule for punishment. It cannot be the intention of the lawmaker. Article 147 regulates another crime, *Aggravated Murder*, which, as the Prosecutor points out, defines elements and punishment for a different criminal offence, and, as Defence Counsel L.

S. underlines, an essential element is missing since only one murder was committed. It would thus according to this Panel be a violation of primarily the provision of Article 64 paragraph 1 of the PCCK to decide the punishment according to Article 147. Consequently, two single punishments for the criminal acts committed pursuant to the charges of count 1 and 2 of the Indictment shall be imposed.

When deciding on the criminal sanctions this Panel, while regarding the seriousness of the crimes, like the previous Panel, also takes into consideration as mitigating circumstances that O.Z. admitted the shootings, and especially the fact that he committed the criminal acts in a diminished mental capacity.

The Supreme Court sentences O.Z. to eight (8) years of imprisonment for Murder, pursuant to count 1 of the Indictment, and to four (4) years of imprisonment for Attempted Murder, pursuant to count 2 of the Indictment.

Unauthorized Ownership, Control, Possession or Use of Weapons committed on 10 October 2005 pursuant to count 3 of the Indictment

In the challenged Judgment the Supreme Court of Second Instance considered that the use of weapon was subsumed under the offences of Murder and Attempted Murder. However, the Indictment against O.Z. on this count also includes the other elements of this criminal offence: unauthorized ownership, control or possession of weapon. It is noteworthy that the Defendant obviously had the weapon in his possession before he carried out the attack against the R. s.

This Panel concurs with the OSPK that the two offences, Murder and the *weapons offence* contain different elements and are directed against different protected social values and that the latter holds significant danger for society on its own and should be punished separately. The Court should then have applied Article 374 paragraph 1 of the Criminal Code of the Republic of Kosovo (CCRK), in force since 1 January 2013, as the most favourable law to the Defendant. Referring to the mentioned Article, this Panel determines the punishment for the mentioned criminal offence as one (1) year and six (6) months imprisonment.

Unauthorized Ownership, Control, Possession or Use of Weapons committed on 19 April 2007 pursuant to count 4 of the Indictment

As mentioned above under count 3, the correct Article to apply for this crime is Article 374 paragraph 1 of the Criminal Code of the Republic of Kosovo (CCRK), in force since 1 January 2013, since it is the most favourable law to the defendant. In applying this Article, this Panel decides the punishment for criminal offence charged by count 4 of the Indictment to be six (6) months imprisonment.

Aggregate punishment

The Supreme Court has sentenced the Defendant to eight (8) years imprisonment for count 1 of the Indictment, four (4) years for count 2, one (1) year and six (6) months for count 3 and six (6) months for count 4 of the Indictment. The Panel imposes an aggregate punishment of twelve (12) years imprisonment pursuant to Article 71 of the PCCK.


Internal inconsistency or contradiction within enacting clause or between enacting clause and reasoning

Defence Counsel *E.R.* argues that the challenged Judgment contains substantial violations pursuant to Article 403 paragraph 1, subparagraph 12 of the PCCK as the enacting clause of the Judgment is incomprehensible and contradictory with the reasoning and lacks in decisive facts. The Defence also argues that the enacting clause is vague as from the same one cannot be understood as what kind of criminal offence the Defendant has committed and against which offences the punishment was announced.

Although this Panel has modified the appealed Judgment to a certain extent, it cannot agree with the Defence Counsel, who, in the view of this Panel, has not pointed out the contradiction between the enacting clause and the reasoning. On the contrary, no internal inconsistency or contradiction within enacting clause or between enacting clause and the reasoning can be found. As the OSPK underlines in its Reply, the enacting clause is clear and the sentencing part is comprehensible. Thus these arguments by the Defence are rejected by this Panel.

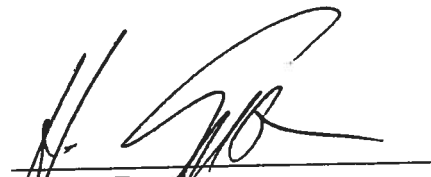
For the foregoing reasons the Supreme Court of Kosovo decides as in the enacting clause.

Presiding Judge:



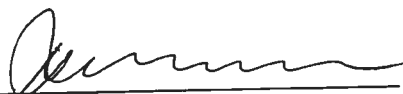
Bertil Ahnborg
Presiding Judge, EULEX Judge

Recording Officer:



Wolger Engemann
Legal Officer

Panel Members



Nazmije Ibrahim
Supreme Court Judge



Shukri Sylejmani
Supreme Court Judge

**Supreme Court of Kosovo
PAII. No. 3/2013
Prishtinë/Priština
4 September 2013**