

**COURT OF APPEALS
PRISTINA**

IN THE NAME OF THE PEOPLE

Case number: PAKR 229/15
Date: 30 November 2015
Basic Court: Mitrovica, P 33/12

Original: English

The Court of Appeals, in a Panel composed of EULEX Court of Appeals judge Hajnalka Veronika Karpati, as presiding and reporting judge, Kosovo Court of Appeals judge Abdullah Ahmeti and EULEX Court of Appeals judge Radostin Petrov and as panel members, assisted by Alan Vasak, EULEX legal officer, acting in the capacity of a recording officer,

in the case concerning the defendant:

SP

[REDACTED]

detention on remand since 20 October 2011

charged under the Mitrovica District Prosecution Office indictment PP 158/2011 filed on 17 April 2011, and amended on 28 February 2014, with:

Attempted Aggravated Murder in violation of Article 147, paragraph 7, of the Professional Criminal Code of Kosovo (PCKK) in conjunction with Article 23 CCK, and Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328, paragraph 2, CCK;



adjudicated in first instance by the Basic Court of Mitrovica with judgment P 33/13, dated 8 December 2014, by which

(SP)
the defendant [REDACTED] was found guilty of Attempted Aggravated Robbery in violation of Article 329, paragraph 5, CCK in conjunction with Articles 28 and 31 CCRK and acquitted of Attempted Aggravated Murder; the defendant [REDACTED] was also found guilty of Unauthorized Ownership, Control or Possession of Weapons in violation of Article 374, paragraph 1, CCRK; the defendant [REDACTED] was sentenced to an aggregate imprisonment term of 10 (ten) years;

(NV)
seised of the appeal filed by defence counsel [REDACTED] on 24 March 2015;

having considered the response of the Basic Prosecution Office Mitrovica, filed on 2 April 2015;

having considered the motion of the appellate state prosecutor, filed on 8 July 2015,

after having held a public session of the Court of Appeals on 26 November 2015;

having deliberated and voted on 30 November 2015;

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

renders the following:

JUDGEMENT

I. The appeal of defence counsel [REDACTED] for the defendant [REDACTED] against the judgment of the Basic Court of Mitrovica P 33/13 dated 8 December 2014 is rejected as unfounded.

II. The judgment of the Basic Court of Mitrovica P 33/13 dated 8 December 2014 is affirmed.



REASONING

I. RELEVANT PROCEDURAL BACKGROUND

The defendant ^(SP) [REDACTED] has been in detention on remand since 20 October 2011.

On 17 April 2012, the District Prosecution Office in Mitrovica filed the indictment against the defendant. The indictment was confirmed by the District Court of Mitrovica on 13 June 2012.

On 27 November 2013 the case was taken over by EULEX Judges.

On 28 February 2014 the initial hearing was held in this case.

The main trial hearings were held on 21, 22 and 23 October 2014 and on 3, 4 and 5 December 2014 with the verdict announced on 8 December 2014.

The written judgment was served on the defendant on 11 March 2015. The defendant, through his defence counsel, appealed the judgment on 24 March 2015.

On 2 April 2015 the Basic Prosecution Office Mitrovica filed a response to the appeal.

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

On 8 July 2015 the appellate state prosecutor filed a motion.

The session of the Court of Appeals Panel was held on 26 November 2015 in the presence of the defendant, his defence counsel and the EULEX appellate state prosecutor Claudio Pala.

The Panel deliberated and voted on 30 November 2015.

II. SUBMISSIONS OF THE PARTIES

A. Appeal of the Defence

Defence counsel ^(NY) [REDACTED] timely filed an appeal on 24 March 2015 on the grounds of:

- Violation of the criminal law
- Erroneously established state of facts
- Determination of the punishment



all concerning the count of Attempted Aggravated Robbery.

He argues that the Court incorrectly qualified the criminal offence as Attempted Aggravated Robbery under Article 329 Paragraph 5 of the CCK, as the required consequence of the death did not occur. The correct qualification would be under Article 329 Paragraph 4, when the offence results in grievous bodily injury, which carries a more lenient punishment. He argues that the presented evidence indicate that the accused had no intention at all to deprive the taxi driver of his life. If he had that intention from the beginning why would he have been concerned about being recognized later and why would he have asked another person to take the taxi.

The defence counsel claims that the factual situation has been erroneously established by the trial panel because - based on the facts that were proven during the proceedings - the court has drawn erroneous conclusion when stating that the accused acted intentionally with the aim of taking over the vehicle and depriving its driver of his life.

The defence counsel argues that the mitigating and aggravating circumstances were wrongfully determined by the trial panel. The panel found only one mitigating circumstance, the lack of previous conviction, but even to this circumstance the court did not give its full significance. The court also fully neglected the complete confession of the criminal offense although many facts established by the court could be established solely upon the confession of the accused. The court also failed to consider that luckily there was no serious consequence and after treatment the injured party fully recovered. Also the accused' sincere and genuine remorse should have been counted as mitigating circumstance, as well as his personal circumstances, that he is unemployed, he and his family live in poverty, he is married and has a daughter of 8 years and that his parents are aged and seriously ill because they cannot pay for the necessary medical treatment. Furthermore, the injured party did not join the criminal prosecution and he did not submit a request for compensation. His injuries, no matter how dangerous in theory, in reality were not that grave or life threatening which should have been taken in favor of a more lenient sentence as the injured party himself was not interested in criminal prosecution.

Concerning the aggravating circumstances one factor that the panel took into consideration violates the rule of double evaluation. Namely the "disrespect for human life" or "depriving a person of his life" are qualifying element of the criminal offence under Article 329 paragraph 5 therefore it cannot be taken into consideration a second time and to give the defendant a more severe sentence.

The defence counsel claims that the court mistakenly considered the remorse that the defendant showed in front of the court as not genuine and therefore it mistakenly took as aggravating circumstance. The defendant expressed remorse the first opportunity he had and even expressed during the trial that he was expecting the injured party to come as he wanted to ask forgiveness and tell him that he deeply regretted what had happened.



He further claims that if the Court of Appeals found that the original qualification stands, even then the punishment is too strict. He argues with the legal practice, that no one in Kosovo who was punished for the criminal offence of attempted robbery under Article 329 CCK, regardless under which paragraph the act was qualified, was ever punished so severely.

The defence counsel proposes the Court of Appeals to amend the judgment of the basic court in pronouncing the accused [REDACTED] guilty for committing the criminal offence of Robbery under Article 329 Paragraph 4 of the CCK and to give him a minor penalty or to impose a more lenient sentence if it confirms the legal qualification of the first instance court.

B. Response of the SPRK

Prosecutor Tomas Skala filed a reply to the appeal of defence counsel [REDACTED] on 2 April 2015. Concerning the claim of the appeal that the subjective element is missing due to lack of defendant's will to inflict lethal effect the prosecutor states that this claim should be dismissed as groundless. He argues that even a simple person must be aware that by shooting a firearm against somebody's neck from behind extremely highly likely would kill the person. The fatal consequence did not occur irrespectively of the defendant's intent. The same goes concerning the claim of erroneous establishment of factual situation; the deadly intent of the defendant has been proven, the defendant acted at least with eventual intent.

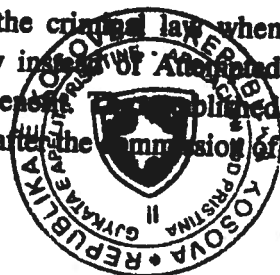
Concerning the third claim of the appeal, the prosecutor argues that the court properly assessed the mitigating and aggravating circumstances. The remorse of the defendant appeared as a pretended one during the main trial. It is completely irrelevant whether the injured party joined prosecution or requested any compensation in this respect. It is also questionable if the defendant's alleged poverty can justify his criminal conduct. Also, the absence of the lethal consequence cannot be taken as mitigating circumstance because it was independent of the defendant's will and his belief.

The prosecutor proposes the Court of Appeals to reject the appeal and affirm the judgment in its entirety.

C. Motion of the Appellate Prosecution Office

The Appellate Prosecutor, Judit Eva Tatrai in her Proposal dated 8 July 2015 concurs with the reply of the prosecutor that the intent of defendant [REDACTED] did enclose the murder of the injured party. This is the only conclusion the objective factors of the case allow.

However, the Appellate Prosecutor opines that the court did violate the criminal law when qualifying the act of the defendant as Attempted Aggravated Robbery instead of Attempted Aggravated Murder committed for the purpose of obtaining material benefit. [REDACTED] established facts show that the defendant did not shoot at the injured party during or after the commission of



robbery or in order to break the resistance of the victim. As established also in the judgment Defendant [REDACTED] shot at the injured party in the neck from behind, from less than one meter without giving a chance to resist or prevent [REDACTED] to seize the vehicle. He first tried to murder him with a shotgun, throwing him in the ditch and only then taking away the vehicle. Although the Basic Prosecutor did not file an appeal, but pursuant to Article 394, paragraph 1 subparagraph 1.4 of the CPC, the Court of Appeals shall examine *ex officio* whether the criminal law was violated to the detriment of the accused. She leaves it to the Court of Appeals whether this violation was for the detriment of the accused.

Concerning the calculation of punishment, the appellate prosecutor opines that the basic court assessed the mitigating and aggravating factors properly and explained clearly why it did not find the defendants remorse genuine. She supports the arguments of the basic prosecutor in his response and states that even if the family situation and poverty of the accused are considered, the imposed individual punishments and the aggregate punishment is in accordance with the relevant provisions of the law and a more lenient sentence is not justified.

The Appellate Prosecutor moves the Court of Appeals to reject the appeal as unfounded and *ex officio* establish if there was a violation of the criminal law and if it was to the detriment of the accused. Accordingly it should decide on the modification of the qualification of the criminal offence in Count 1.

III. PRELIMINARY MATTERS

A. Competence

Pursuant to Article 472, paragraph 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 Kosovo judge and two EULEX judges.

B. Admissibility of the Appeal

The defendant was served with the reasoned judgment on 11 March 2015. The appeal on behalf of the defendant was filed within the 15-day deadline pursuant to Article 380, paragraph 1 CPC. The appeal was furthermore filed by the authorized person and contains all other information pursuant to Article 376 *et seq* CPC. The appeal is thus admissible.



C. Applicable Procedural Law in the Case

On 1 January 2013 a new procedural law entered into force in Kosovo – the Criminal Procedure Code, law no. 04/L-123. This Code repealed the previous Criminal Procedure Code of Kosovo, which entered into force on 6 April 2004. Article 545 of the current Criminal Procedure Code stipulates that the determination of whether or not to use the present code of criminal procedure shall be based upon the date of the filing of indictment. Acts which took place prior to the entry of force of the present code shall be subject to the current Code if the criminal proceeding investigating and prosecuting that act was initiated after the entry into force of this code.

The indictment in the case was filed with the District Court of Mitrovica on 17 April 2012, before the entry into force of the current Criminal Procedure Code. The main trial however was initiated after the entry into force of the new code, namely on 28 February 2014. Pursuant to Article 545 of the current Criminal Procedure Code the applicable procedural law would thus be the current Criminal Procedure Code. The Court of Appeals accordingly conducted the proceedings pursuant to the current Criminal Procedure Code.

D. Applicable Criminal Code in the Case

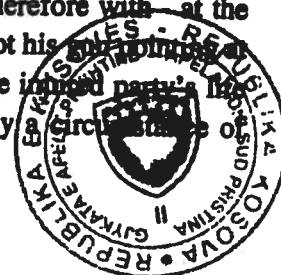
As correctly established by the Basic Court, applying the current criminal code, the Criminal Code of the Republic of Kosovo which entered into force on 1 January 2013, is more favorable for the defendant as opposed to applying the old criminal code, the Criminal Code of Kosovo. Pursuant to Article 3 of the Criminal Code of the Republic of Kosovo the current criminal code shall therefore be applicable.

IV. FINDINGS OF THE PANEL

A. Determination of the Factual Situation and the Legal Qualification

a. *The shooting*

Although the defendant is indicted with the criminal offence of Attempted Aggravated Murder, the Basic Court - pursuant to Article 360, paragraph 2, CPC - requalified the criminal act as Attempted Aggravated Robbery. The Basic Court argues that the elements of Attempted Aggravated Murder could not be established. The Panel however does not share this conclusion of the Basic Court. The defendant was fully aware of the fact that he was firing a gun from close range pointed at the back of the head of the injured party. The defendant therefore with - at the very least eventual - intent shot the injured party. Seeing as the defendant shot his gun at the back of the head at of the injured party at close range, deprivation of the injured party's life was extremely imminent. The fact that the injured party survived is merely a circumstance of



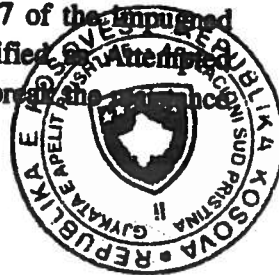
luck, as it is well known that a gunshot wound to the head, especially inflicted from close range, in most cases will be fatal. The defendant must and should have been aware of this. The defendant therefore had – at the very least eventual – intent to deprive the injured party of his life. Only after shooting the injured party and leaving him for dead, the defendant illegally appropriated the vehicle the injured party was driving in, thus obtaining a material benefit. In view of the Panel the above described actions and (at the very least eventual) intent fulfill all the elements of the criminal offence of Attempted Aggravated Murder and the criminal offence should therefore have been qualified as Attempted Aggravated Murder. However, since the Basic Court requalified the proven criminal offence as Attempted Aggravated Robbery and the prosecutor did not appeal the decision of the Basic Court, the Court of Appeals Panel cannot and shall not requalify the criminal offence to the detriment of the defendant, as stipulated in Article 395 CPC.

The Panel shall thus further assess whether or not the qualification of Attempted Aggravated Robbery, pursuant to Article 329, paragraph 5, CCRK is correct.

The defence asserts that the defendant did not fire his gun with the intention to deprive the injured party of his life. The intention was to fire a shot to scare the injured party. Combined with the fact that the injured party did not die, the defence therefore submits the act should be qualified as Article 329, paragraph 4 (Aggravated Robbery resulting in grievous bodily harm), and not Article 329, paragraph 5 (Aggravated Robbery resulting in death) CCRK.

The Panel firstly notes that the defendant was not found guilty of the completed offence of Aggravated Robbery (resulting in death), but he was found guilty of Attempted Aggravated Robbery (resulting in death). The defence nonetheless submits that since the injured party did not die, paragraph 5 of Article 329 CCRK cannot be applicable. The Panel does not subscribe to this point of view and reiterates and affirms the analysis of the Basic Court, namely the established doctrine that if during the perpetration of a robbery the injured party sustained only minor or major bodily injury, but the perpetrator nevertheless took action to deprive the injured party of life, the offence is qualified as an attempted aggravated robbery.¹ As established above, the defendant had – at the very least eventual – intent to deprive the injured party of his life. He furthermore illegally appropriated the vehicle the injured party was driving in. The Panel therefore affirms the qualification of the criminal offence as per Article 329, paragraph 5, CCRK and subscribes to the reasoning of the Basic Court in paragraphs 82 till 97 of the impugned judgment, with the exception that the same facts should have been qualified as Attempted Aggravated Murder as the attack on life was not to keep the stolen item or break the resistance but to obtain the material benefit.

¹ Srzentic Nikola – Ljubisa Lazarevic, Commentary of the Criminal Code of Serbia, 1995, 5th Edition, "Savremena Administracija" Belgrade, Article 169.



b. The weapon

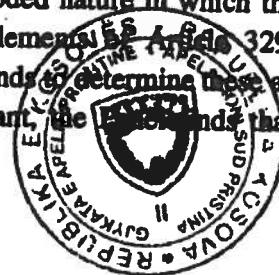
Although not raised by either party, the Panel finds that the Basic Court incorrectly qualified the weapons charge as Unauthorized Ownership, Control, Possession or Use of Weapons, pursuant to Article 374, paragraph 1, CCRK. The current criminal code distinguishes between unauthorized ownership, control or possession of weapons on the one hand and the use of a weapon on the other hand. The criminal offence of Unauthorized ownership, control or possession of weapons is stipulated in Article 374 CCRK and the criminal offence of Use of weapon or dangerous instrument in Article 375 CCRK. It is clear that the defendant used the weapon to shoot the injured party. The correct legal qualification should therefore have been the criminal offence of Use of weapon or dangerous instrument per Article 375 CCRK, instead of the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons, pursuant to Article 374 CCRK. However, the Panel shall not requalify the act as the criminal offence of Use of weapon or dangerous instrument, as this is to the detriment of the defendant and the prosecution did not file an appeal.

The current conviction for Article 374, paragraph 1, CCRK therefore still stands, albeit with the correction that the description of the criminal offence is to be read as 'Unauthorized ownership, control or possession of weapons', without the words 'or Use of Weapons'.

B. Decision on the criminal sanction

The defence challenges the determination of the punishment by the Basic Court, considering it incomplete and too severe.

The Panel has carefully reviewed the aggravating circumstances established by the Basic Court and the challenges raised by the defence in this regard. The Panel finds that, contrary to the submission of the defence, the Basic Court did not additionally consider the same elements of the criminal offence for which the defendant is found guilty for the determination of punishment at the sentencing stage. Although Article 329, paragraph 5, CCRK, includes the element of death, there are no other elements pertaining to the cause and manner of death. The Basic Court therefore was within its bounds to determine that the complete disregard for the value of human life constitutes an aggravating circumstance, as this circumstance does not constitute an element of Article 329, paragraph 5, CCRK. With regard to the consideration of the Basic Court pertaining to sacrificing a high value for the trivial purpose of obtaining a profit, the Panel notes that the Basic Court merely referred to this in light of the cold blooded nature in which the defendant acted. With regard to the consideration of the Basic Court pertaining to depriving a person of his life, the Panel notes that the Basic Court merely referred to this in light of acting in such a way without even the smallest previous warning. The cold blooded nature in which the defendant acted, as well as giving no warning do not constitute elements of Article 329, paragraph 5, CCRK. The Basic Court therefore again was within its bounds to determine these as aggravating circumstances. With regard to the remorse of the defendant, the Panel finds that



given the interaction during main trial, the Basic Court is best suited to determine the sincerity of the displayed remorse by the defendant. The Panel finds no reasons or grounds to doubt or alter the assessment of the Basic Court that the displayed remorse seemed false.

The Panel has also carefully reviewed the mitigating circumstances of the defendant and the challenges raised by the defence in this regard. The Basic Court referred to one mitigating circumstance, namely the fact that the defendant has no previous convictions. The Basic Court did not address other circumstances. The Panel however takes notice of the fact that the defendant made a confession regarding the acts he committed. The Panel also takes notice of the financial and family situation of the defendant. As noted above the Panel however finds no mitigating circumstances in the displayed remorse of the defendant. Furthermore, the fact that the injured party survived is merely a circumstance of luck. The injured party survived despite the actions of the defendant, and most certainly not because of the actions of the defendant. The fact that the injured party sustained relatively minor injuries therefore absolutely cannot be a mitigating circumstance. Also, the mere fact that the injured party did not join the criminal proceedings or requested compensation does not imply anything and cannot be considered a mitigating circumstance.

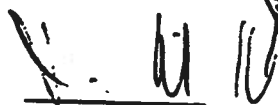
After consideration of the above circumstances, the Panel finds that although the Basic Court did not address all mitigating circumstances in its judgment, there are no particularly mitigating circumstances which indicate that the purpose of punishment can be achieved by imposing a lesser punishment than the punishment imposed by the Basic Court. In light of the above the Panel therefore finds that the aggregate sentence of 10 (ten) years of imprisonment imposed by the Basic Court is not disproportionate and reflects an appropriate punishment in view of the circumstances of the case.

C. Closing remarks

The Court of Appeals - for reasons elaborated above - rejects the appeal and affirms the impugned judgment.

Reasoned written judgment completed on 4 January 2015.

Presiding Judge



Hajnalka Veronika Karpati
EULEX Judge

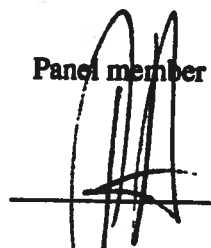


Panel member



Abdullah Ahmeti
Kosovo Judge

Panel member

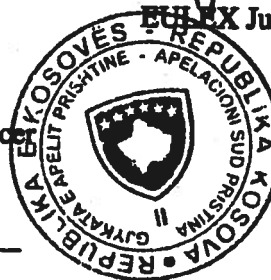


Radosin Petrov
EULEX Judge

Recording Officer



Alan Vasak
EULEX Legal Officer



Court of Appeals
Pristina

PAKR 229/15

30 November 2015