

SUPREME COURT OF KOSOVO

Supreme Court of Kosovo
Ap.-Kž. No. 164/2011
Prishtinë/Priština
20 March 2012

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 28 February 2012 in the Supreme Court building in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, EULEX Judge Horst Proetel and Kosovo National Judges Emine Mustafa, Nesrin Lushta and Avdi Dinaj as panel members

And with Stephen Parkinson and Joe Hollerhead as Court Recorders,

In the presence of the

Defense Counsel Av. B. [REDACTED] K. [REDACTED] for the defendant N. M. [REDACTED]

Defense Counsel Av. H. M. [REDACTED] for the defendant R. S. [REDACTED],

Av. X. H. [REDACTED] as Legal Representative of the injured party

In the criminal case number AP-KZ 164/2011 against the defendants:

N. M. [REDACTED], born on [REDACTED] in the village of [REDACTED] Municipality of Skenderaj/Srbica, Kosovo, Kosovo Albanian, father's name [REDACTED] mother's maiden name [REDACTED], resident of [REDACTED] village, Municipality of [REDACTED], married, father of 3 children, highest education secondary school, unemployed, of poor economic status, no known previous convictions, in detention from 02 September 2008 until 17 February 2010 and under house detention since 18 February 2010;

R. S. [REDACTED], born on [REDACTED] 5 January 1971 in the village of [REDACTED] Municipality of [REDACTED], Kosovo Albanian, father's name [REDACTED] mother's maiden name [REDACTED], resident of [REDACTED] Municipality of [REDACTED], married, father of 3 children, highest education technical secondary school, unemployed (invalid), of poor economic status, no known previous convictions, has not been under security measures;

In accordance with the Verdict of the first instance District Court of Mitrovica/Mitrovica in the case no. P. Nr. 17/09 dated 07 October 2010, the defendants were found guilty of the following criminal offenses:

The defendant N M

[i] Because on 02 September 2008 at in the morning there was a conflict between the defendants N M and R S on one side and witness R S on the other. T S, the brother of R S called the defendants N M and R S to meet and to resolve the dispute. They arranged a meeting at around 17:00 hrs at the parking of the Elinda 2 restaurant in Polac village, Municipality of Skenderaj/Srbica. N M and R S drove Golf 2 vehicle. T S and B H drove Opel Vectra vehicle. N M had the weapon TTM-57 with serial number 863307 and R S had the weapon TTM-57 with serial number C57818. At least N M directs his pistol at T S. T S took out a weapon AK of caliber 7.62x39 mm with the serial number 7948-1 and directed the gun to R S. R S moved towards T S and grabbed T S's rifle. During the struggle the rifle is discharged resulting in R S being shot in the leg. N M shot several times at T S. T S received a bullet in the left part of his chest from the gun shots fired by N M. Both T S and R S fell to the ground because of the sustained injuries. N M tried to leave the crime scene. T S condition deteriorated because of the damage to his internal organs caused by the gunshot to the chest and he died on the same day. T S sustained serious injuries from the gunshots to the leg and arm. Therefore, the defendant N M has deprived the life of the late T S. T.S.

By doing so, the accused N M committed and is criminally liable for the criminal act of **Murder**, contrary to Article 146 in conjunction with Article 23 of Provisional Criminal Code of Kosovo (PCCK);

[ii] Because until the date of 02 September 2008 he had illegal possession of the weapon TTM-57 of caliber 7.62 with serial number 863307.

By doing so, the accused N M committed and is criminally liable for the criminal act of **Unauthorized Ownership, Control, Possession and Use of Weapons**, contrary to Article 328 paragraph 2 of the PCCK.

Therefore, he was convicted as follows:

The accused was sentenced for the criminal act of **Murder** to a term of imprisonment of five (5) years and for the criminal act of **Unauthorized Ownership, Control, Possession and Use of Weapons** to a term of imprisonment of four (4) years. The First Instance Court the built an aggregate sentence of seven (7) years according to Article 71 paragraph 1 and 2 of the KCCP;

The defendant R S

Because until the date of 02 September 2008 he had illegal possession of the weapon TTM-57 of caliber 7.62 with serial number C57818.

By doing so, the defendant R S committed and is criminally liable for the criminal act of **Unauthorized Ownership, Control, Possession and Use of Weapons**, contrary to Article 328 paragraph 2 of the PCCK.

Therefore, he was convicted with two (2) years of imprisonment.

Both the aforementioned weapons of the defendants have been confiscated pursuant to Article 60 paragraph 1 and Article 328 paragraph 5 of the PCCK. Moreover, both defendants have been sentenced to reimburse their parts of the costs of criminal proceedings pursuant to Article 102 paragraph 1 of the CPCK with the exception of the cost for translation.

The Defense Counsel of the defendant N M timely filed an appeal dated 08 March 2011 and registered with the Registry of the District Court of Mitrovice/Mitrovica on 15 March 2011 against the Verdict. It was asserted that the Verdict contains essential violations of the criminal procedure, erroneous and incomplete establishment of the factual state, violation of the criminal code and that the punishment imposed upon the accused was to be challenged. It was proposed to change the challenged Verdict as to acquit the defendant from the charge of **Murder** ant to lower the punishment imposed to the defendant for **Unauthorized Ownership, Control, Possession and Use of Weapons**.

The Defense Counsel of the defendant R S timely filed an appeal dated 08 March 2011 and registered with the Registry of the District Court of Mitrovice/Mitrovica on 15 March 2011. It was asserted that the challenged Judgment contains essential violation of the criminal procedure, erroneous and incomplete establishment of the factual situation, violation of the Criminal Law and that the punishment needs to be reconsidered. It was proposed to annul the appealed Judgment and return the case back for retrial or to amend the Judgment and thus impose a more lenient punishment upon the defendant **R S**.

The Representative of the injured party also timely filed an appeal¹, challenging the 1st Instance Judgment regarding the punishment imposed to the defendant **N M** as being too low.

The OSPK, with a response dated 27 February 2012 and registered with the Registry of the Supreme Court of Kosovo on the same day concluded to re-consider the appeal of **N M** under the aspect of possible necessary defense, but to reject all other appeals as ungrounded.

Based on the written Verdict in case P, Nr. 17/09 of the District Court of Mitrovice/Mitrovica dated 07 October 2010, the submitted written appeals of the Defense Counsels on behalf of the defendants **N M** and **R S**, the representative of the injured party, the relevant file records and the oral submissions of the parties during the hearing session on 28 February 2012, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 28 February 2012, hereby issues the following:

¹ Filed with the District Court of Mitrovice/Mitrovica on 9 March 2011

JUDGMENT

The appeals of the Defense Counsels filed on behalf of the defendants N M and R S are PARTIALLY GRANTED. The appeal filed on behalf of the injured party is REJECTED AS UNFOUNDED.

The Judgment P. No. 17/2009 of the District Court Mitrovicë/Mitrovica, dated 7 October 2010, is annulled in regard to the conviction of N M for the criminal offense of Murder contrary to Article 146 of the Criminal Code of Kosovo (CCK) and returned for retrial.

The Judgment is modified in regard to the remaining punishments. N M is sentenced for the criminal offense of Unauthorized Ownership, Control, Possession and Use of Weapons contrary to Article 328 paragraph 2 of the CCK to three (3) years imprisonment. R S is sentenced for the criminal offense of Unauthorized Ownership, Control, Possession and Use of Weapons contrary to Article 328 paragraph 2 of the CCK to one (1) year and six (6) months imprisonment.

The first instance Judgment is affirmed in its remaining parts.

REASONING

Procedural History

On 24 February 2009, the District Public Prosecutor of Mitrovicë/Mitrovica filed an Indictment (PP. no. 98/09) with the Registry of the District Court of Mitrovicë/Mitrovica, dated 20 February 2009, charging the defendant N M with the criminal offence of Murder, contrary to Article 146 in conjunction with Article 23 of the CCK and with Unauthorized Ownership, Control, Possession and Use of Weapons, contrary to Article 328 paragraph 2 of the CCK and the defendant R S with the criminal offense of Unauthorized Ownership, Control, Possession and Use of Weapons, contrary to Article 328 paragraph 2 of the CCK. A third defendant was charged with Attempted Murder.

The Indictment was partially dropped and modified in the course of the Confirmation Hearing on 17 February 2010 but the legal qualification of the criminal acts of the defendants N M and R S remained the same.

The amended Indictment was confirmed by the Ruling of the EULEX Confirmation Judge on 19 February 2010.

Main Trial sessions commenced on 04, 05, 06 and 7 October 2010, when the latter closing arguments were heard and the Verdict – after deliberation – was orally rendered.

During the main trial, the First Instance Court examined the defendant N M (06 October 2010) while defendant R S chose to remain silent and heard the following witnesses: R S, who is injured party (04 October 2010), B

H [REDACTED], N [REDACTED] L [REDACTED] (05 October 2010), F [REDACTED] S [REDACTED] and S [REDACTED] S [REDACTED] (06 October 2010). Moreover, numerous documents were read and entered into the evidence as follows: Initial Incident Report dated 02 September 2008; Report on Search of House and Persons ([REDACTED]), dated 02 September 2008, Report on Search of House and Persons (S [REDACTED]), dated 02 September; KP S [REDACTED] G [REDACTED] – Officer's Report dated 02 September 2008; KP H [REDACTED] H [REDACTED] – Report on Crime Scene Inspection with photos attached, dated 02 September 2008; KP S [REDACTED] M [REDACTED] and KP V [REDACTED] M [REDACTED] – Officer's Report dated 03 September 2008; KP B [REDACTED] R [REDACTED] Officer's Report dated 03 September 2008; KP I [REDACTED] G [REDACTED] – Investigator's Report dated 03 September 2008; KP H [REDACTED] H [REDACTED] – Report on Crime Scene Inspection with photos attached, dated 05 September 2008; KP [REDACTED] O [REDACTED] – Criminal Report dated 05 September and Forensic Directorate, Crime Scene Sector Request undated; Forensic Identification File #08-094 including the photographs, A [REDACTED] F [REDACTED] – Investigator's Report dated 10 September 2008, R [REDACTED] B [REDACTED] – Autopsy Report dated 03 September 2008; Dr. [REDACTED] – Autopsy Report dated 03 September 2008 including the photos attached; Doctor's note for injured R [REDACTED] S [REDACTED] dated 02 September 2008; Doctor's transcript undated; H [REDACTED] S [REDACTED] – description of case file content; listing of evidence; chain of custody; KP L [REDACTED] R [REDACTED] – Criminal Examination Report; E [REDACTED] K [REDACTED] a – Expert Analysis Report including expert form analysis of Central Crime Laboratory (A), Central Forensic Laboratory Expertise/Analysis Form (B); Central Forensic Laboratory Expertise/Analysis Form (A); template for Forensics Examination at the KP Laboratory (A) and template for Forensics Examination at the KP Laboratory (B), undated; F [REDACTED] S [REDACTED] – Forensic Examination Report, Dactiloscropy sector, including the request for Expertise/Analysis of Evidence in the Forensic Central Laboratory (B) dated 27 November 2008; KP I [REDACTED] S [REDACTED] – Report from the inspection of crime scene dated 04 September 2010 and KP F [REDACTED] F [REDACTED] – Forensics Identification Report including sketch of the crime scene and photo album cover, dated 03 September 2008.

Based on its findings, on 07 October 2010, the District Court announced the verdict and found the defendants guilty of the criminal offences listed above. Consequently, the Court imposed on the accused the punishments as also specified above.

The Defense Counsel of the defendant N [REDACTED] M [REDACTED] timely filed an appeal dated 08 March 2011 against the Verdict and asserted as pointed out before.

The Defense Counsel of the defendant F [REDACTED] S [REDACTED] timely filed an appeal dated 08 March 2011 and asserted as pointed out before.

The Representative of the injured party also timely filed an appeal, challenging the 1st Instance Judgment regarding the punishment imposed to the defendant N [REDACTED] M [REDACTED] as being too low.

The OSPK, with a response dated 27 February 2012 and registered with the Registry of the Supreme Court of Kosovo on the same day concluded as pointed out before.

On 20 March 2012, the Supreme Court of Kosovo held a session pursuant to Article 410 of the KCCP.

The Defense Counsels and the Legal Representative of the injured party confirmed their submissions and requests.

FINDINGS OF THE COURT

A. Substantial violation of the provisions of the Criminal Procedure

I. INCOMPREHENSIBILITY OF THE ENACTING CLAUSE REGARDING DEFENDANT N M

The Defense of N M has challenged the 1st Instance Judgment because the enacting clause would violate Article 403 paragraph 1 item 12 of the KCCP, since the beginning of the event, the motivation for the alleged criminal offenses and the reasons, why the defendant N M and his co-defendant R S had come into contact with the deceased and his brother, had not been specified by the 1st Instance Court.

The Supreme Court does not share the opinion of the Defense as outlined above. The enacting clause of the challenged Verdict contains all necessary information as required by Article 396 paragraphs 3 and 4 as read with Article 391 of the KCCP.

The Supreme Court in particular finds that the mentioning of the exact time of the event, meaning the discussion between the two defendants and the brother of the victim, R S in the morning of 02 September 2008 is not needed for the enacting clause at hand. In a fully sufficient way, the enacting clause refers to the beginning of the criminal event in the parking lot of "Elinda 2 Restaurant" in Polac at around 17:00 hrs.

The Supreme Court also finds that Article 146 of the CCK, which the defendant N M was found guilty of, in difference to some case as referred to by Article 147 of the CCK does not require a particular motive in addition to the regular subjective requirements of the perpetrator's intent.

Therefore, as to the defendant N M, the enacting clause of the challenged Judgment is deemed in accordance with the law.

II. INSUFFICIENCY AND INCONSISTENCY OF REASONING REGARDING DEFENDANT R S

The Defense Counsel of defendant R S has stressed that the reasoning of the challenged Judgment as to his client would not be clear and moreover does not coincide with the reality. The 1st Instance Court in particular had not taken into consideration the statements of witnesses N I, F X and S G according to which R S did not have a weapon in his hand at all during the questionable time period.

The Supreme Court finds that the enacting clause of the challenged Judgment fulfills all legal requirements as established by Article 396 paragraphs 3 and 4 as read with Article 391 of the KCCP. The enacting clause – although quite short – is also clear beyond all doubts regarding the decisive facts and the criminal act the defendant R S was found guilty for.

In the context given it also needs to be underlined that – opposite to what the Defense allegedly believes – the 1st Instance Court clearly also has taken into consideration the

statements of witnesses, who's observations could have been understood in favor of the accused. The Trial Court in particular has made reference to the witnesses N [REDACTED] I [REDACTED] and S [REDACTED] G [REDACTED] as it can be understood from the challenged Judgment (p.23 of the English version). The question, whether or not the Court has correctly and fully assessed all admissible evidence, is not subject to the discussion on the enacting clause.

B. Erroneous and incomplete determination of the factual situation

I. DETERMINATION OF FACTS REGARDING DEFENDANT N [REDACTED] M [REDACTED]

The Defense Counsel of defendant N [REDACTED] M [REDACTED] has challenged the 1st Instance Judgment, because its reasoning would not contain any evidence regarding the subject of the discussion between Ramiz Shabani and the defendants N [REDACTED] M [REDACTED] and R [REDACTED] S [REDACTED] in the office of the latter as well as to what was discussed in this regard between Ramiz Shabani and his brother, the deceased T [REDACTED] S [REDACTED] and the nephew of R [REDACTED] S [REDACTED], the witness B [REDACTED] H [REDACTED]. Despite that the 1st Instance Court had not considered statements of people, who have been present in the crime scene when the police arrived there, also no accurate adequate expertise as to how many bullets were found in the crime scene and from which weapons they were fired, had been available to the Court.

The Supreme Court finds that the allegations of the Defense as to the subjects of discussion between R [REDACTED] S [REDACTED] and the two defendants N [REDACTED] M [REDACTED] and R [REDACTED] G [REDACTED] in the office of the latter are of no immediate relevance for the criminal case at hand and that therefore no need can be established to determine these facts as being decisive for the criminal offenses, N [REDACTED] M [REDACTED] has been found guilty for.

Whilst the same applies to the contents of discussion between R [REDACTED] S [REDACTED] and his brother, the now late T [REDACTED] S [REDACTED], at least with respect to the criminal responsibility of N [REDACTED] M [REDACTED], the Supreme Court is indeed concerned as to the Trial Court's assessment of evidence regarding the shooting as such and the killing of T [REDACTED]

Although the opinion of the Defense cannot be shared that the number of bullets found in the crime scene is unclear, it must be established that the chain of evidence as to whether the defendant N [REDACTED] M [REDACTED] has killed the deceased T [REDACTED] is not closed. In this regard the fact must be taken into consideration that according to the police protocols and the ballistic report the following weapons and ammunition/shell casings have been found in the crime scene:

- 1 semi-automatic rifle, serial no.: AK 5748
- 2 pistols of the brand Crvena Zastava TTM-57, one with hand engraved number 863307, the other one with industrial serial number C57818
- 18 bullets of caliber 7.62x39mm
- 7 empty shells of caliber 7.62x25mm

Whilst the question of the semi-automatic rifle having been used by the late T [REDACTED] is not contested as well as that the ammunition with caliber 7.62x39mm belongs to that kind of weapon, it was never established by which kind of ammunition (caliber 7.62x25mm or caliber 7.62x39mm) the death of the deceased T [REDACTED] was caused. Moreover, the challenged Judgment makes clear reference to the ballistic report, according

to which only four out of a total of seven empty shells of caliber 7.62x25mm have been fired by the weapon TTM-57 with hand engraved number 863307 of the defendant N M, whilst by the same ballistic report it was positively established that another three shells of caliber 7.62x25mm have not been fired from one of the two hand guns found in the crime scene, neither from the weapon of defendant N M, nor from the other hand gun TTM-57 with serial number C57818. Therefore, the causality of defendant N M shooting and the death of the late Tafil Shabani is not proved by the 1st Instance Court.

The Supreme Court therefore finds that on the background described above also the sole statements of the witness B H, the nephew of the late T as given to the police on 02 September 2008 and in front of the Court of 05 October 2010 need to be (re)-considered, according to which at the time of their arrival in the respective parking lot already two vehicle were there and four up to six people waiting for T S amongst them the two defendants in the case at hand. Whilst the 1st Instance Court has copy-pasted the police statement of the witness B dated 02 September 2008 into the reasoning of the challenged Judgment, thus requiring almost 1 ½ pages of this reasoning, the Judgment does not contain any assessment, why the District Court (allegedly) did not follow the statement of the witness, which the latter is in contradiction to other witness statements as reflected in the reasoning of the Judgment. The statement of the witness B as given in front of the Court on 05 October 2010 is not reflected in the reasoning of the challenged Judgment at all and no reference is made as well to the statement given by the defendant outside the Main Trial.

R. S.

II. DETERMINATION OF FACTS REGARDING DEFENDANT R S

The Defense of R S has pointed out his opinion that the challenged Judgment contains no evidence that proved that the actions of the defendant R S ever have created elements of the criminal offense he was charged with. Moreover, the time, place and manner of commission had not been verified.

The Supreme Court finds that the allegation of the Defense is without merits, although the 1st Instance judgment contains some weaknesses regarding the comparison of contradicting witness statements and the assessment of whether or not the witnesses behind are credible. However, the Trial Court has assessed the relevant evidence and has come to the conclusion that the hand gun TTM-57, serial number C57818 was held by the defendant R S before he fell down to the ground. In order to avoid unneeded repetitions, reference is made to the reasoning of the challenged Judgment (p.23 of the English version), which deems fully sufficient. The 1st Instance Court has based its respective opinion, which the latter to build is under the discretion of the Trial Judge, upon the admissible evidence available.

Last but not least, it needs to be mentioned that the witness and injured party R S has testified that both defendants, N M as well as I S, regularly have had unauthorized weapons with them.

C. Substantial violation of the Criminal Law

Both Defense Counsels, each of his respective client, have stressed that the judicial qualification for the criminal offenses the defendants have been found guilty for (with the exception of the criminal offence of **Unauthorized Ownership, Control, Possession and Use of Weapons**, which was admitted by N M) had not been based upon the material evidence.

Reference is made to what was established above under point B. of the Judgment at hand. Whilst the Supreme Court does not find any failure of the 1st Instance Court with regards to the defendant R S A being found guilty for **Unauthorized Ownership, Control, Possession and Use of Weapons**, the assessment of evidence regarding the criminal responsibility of defendant N M for the killing of T S is not sufficient to close the chain of proofs and establish any causality between the defendant shooting and the death of the late T S. Thus, for the time being and with the evidence established, the situation cannot be qualified as Murder pursuant to Article 146 of the CCK.

D. Decision on the punishment

I. PUNISHMENT IMPOSED UPON DEFENDANT N M

Whilst the Defense Counsel of defendant N M is of the opinion that the punishment imposed upon his client is too severe given that the alleged Murder had not been proven and that the defendant had the weapon only as a souvenir from the war, the Representative of the injured party has challenged the 1st Instance Judgment as being too lenient regarding the punishment for the Murder, considering that five years are the minimum punishment foreseen by the law and that the deceased was a husband and father of eight (8) children and that the defendant had not admitted his respective guilt.

Reference is made to what was established under point B. of the Judgment at hand. The punishment to be imposed on defendant N M needs to be re-considered based upon the findings of the Re-Trial-Court, after the responsibility or non-responsibility regarding the killing of T S is clarified. Therefore, the aggregate punishment imposed upon N M cannot be upheld. T.S.

However, since the defendant N M has confessed the criminal offense of **Unauthorized Ownership, Control, Possession and Use of Weapons** contrary to Article 328 paragraph 2 of the CCK, the separate punishment as imposed by the District Court needs to be re-considered. Having in mind that the focus on the criminal activities in the case at hand is on the killing of the deceased T S, the Supreme Court is of the opinion that the separate punishments as imposed by the District Court upon the defendant N M for the alleged Murder and the **Unauthorized Ownership, Control, Possession and Use of Weapons** are not well balanced in relation to each other, which is why the punishment for the latter criminal offense needed to be reduced. Considering as aggravating circumstance the fact that N M was acting as an official person and commanding officer of the Kosovo Forces, thus using an illegal weapon to solve a private dispute, the separate punishment was lowered to three (3) years of imprisonment. T.S.

II. PUNISHMENT IMPOSED UPON DEFENDANT R [REDACTED] S [REDACTED]

The Defense of R [REDACTED] S [REDACTED] finally is of the opinion that the imposed punishment would be too serious and not in proportion with the incriminated actions.

Reference is made to what was already stated in the context of the punishment for [REDACTED] [REDACTED] As an aggravating circumstance it needed to be considered that also [REDACTED] [REDACTED] was acting as an official person and commanding officer of the Kosovo Forces, thus using an illegal weapon to solve a private dispute. In his favor it had to be taken into consideration the fact that the weapon found at his side close to his right hand was empty and that from this weapon was not fired in the course of the incident at hand.

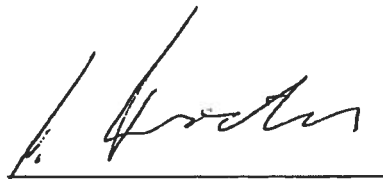
N.M.
R.S.

Therefore, in relation to the punishment as imposed to N [REDACTED] M [REDACTED] the punishment for R [REDACTED] S [REDACTED] was lowered to 1 ½ years of imprisonment.

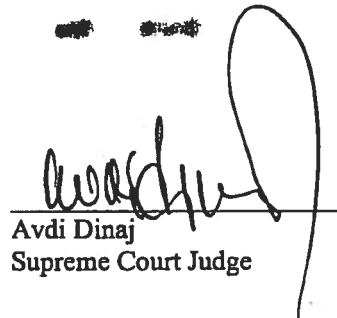
In both cases it was also taken into consideration the level of social risk of the commission of criminal offenses like the ones at hand as well as the level of responsibility of the defendants.

For the foregoing reasons the Supreme Court decided as in the enacting clause.

Members of the panel:



Dr. Horst Proetel
EULEX Judge



Avdi Dinaj
Supreme Court Judge



Nesrin Lushta
Supreme Court Judge



Emine Mustafa
Supreme Court Judge

Presiding Judge:



Gerrit-Marc Sprenger
EULEX Judge

Recording Clerk



Volker Engelmann
EULEX Legal Officer

Supreme Court of Kosovo
Ap.-Kž. No. 164/2011
Prishtinë/Priština
20 March 2012