COURT OF APPEALS

Case number: **PAKR 1175/12 (Basic Court of Pristina, P 371/10)**

Date: **10 February 2014**

THE COURT OF APPEALS OF KOSOVO in a Panel composed of EULEX Judge Annemarie Meister as Presiding and Reporting Judge, and EULEX Judge Philip Kanning and Judge Driton Muharremi as members of the Panel, with the participation of Andres Parmas, EULEX Legal Officer, acting as Recording Officer, in the criminal proceeding against the accused

> **F.G.,** arrested on 13 July 2010, in house detention from 14 July 2010 to 19 August 2010 and in detention on remand since 19 August 2010;

Indicted and found guilty of the criminal offence of *War Crime against Civilian Population* pursuant to Art-s 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (Official Gazette SFRY no. 44/1976, hereinafter: CC SFRY)

Sentenced to 18 years of imprisonment;

Acting upon **the appeal of the Defence Counsel Tahir Rrecaj filed on behalf of the accused F.G. against the *Judgment of District Court in Pristina/ë no. P 371/2010 dated 23 November 2011* (hereinafter: Impugned Judgment);**

Having considered the Opinion of the Appellate State Prosecutor of Kosovo no. PPA 515/12 submitted to the Court of Appeals on 11 January 2013;

After having held a public session on 10 February 2014 in the presence of the accused **F.G.**, his Defence Counsel Tahir Rrecaj and Appellate State Prosecutor Judit Eva Tatraj;

Having deliberated and voted on 10 February 2014;

Pursuant to Art-s 420 and the following of the Kosovo Code of Criminal Procedure (hereinafter: KCCP)

Renders the following

JUDGMENT

1. The Appeal of the Defence Counsel is partially granted.

2. The Contested Judgment of the District Court of Pristina no. P 371/10 dated 23 November 2011 is modified and F.G. is sentenced to fourteen (14) years of imprisonment.

REASONING

I History of the case

1. On 5 November 2010 an Indictment was filed against **F.G.** and H.R. **F.G.** was charged with the criminal offence of *War Crime against Civilian Population* pursuant to Art-s 22 and 142 CC SFRY (at that time criminalised under Art 23 and 120 of the Provisional Criminal Code of Kosovo – CCK). The Indictment was confirmed by a Ruling of District Court of Prishtina dated 21 December 2010. The main trial was held between 15 March 2011 and 22 November 2011. On 23 November 2011 the verdict was announced

2. **F.G.** was found guilty of criminal offence of *War Crime against Civilian Population* pursuant to Art-s 22 and 142 CC SFRY, because on 15 June at around 21.30 during the internal armed conflict in Kosovo, in his capacity as Kosovo Liberation Army (KLA) member and in co-perpetration with N.B. killed a civilian S.G. in his home.

3. The Court of First Instance established that the killing of S.G. was namely a war crime, because it took place during an armed conflict, it was committed by a person taking an active part in the conflict, the offence was linked to the conflict and it was in violation of both domestic and international norms of humanitarian law at the time. In regard of existence of an armed conflict the Trial Panel held that according to international humanitarian law a non-international armed conflict begins with initiation of a conflict and it lasts until a peaceful settlement is reached, irrespective of the fact whether the actual combat takes place. The District Court established that there was a lasting internal armed conflict in Kosovo on 15 June 1999, because by the time of commission of the criminal offence **F.G.** is charged with, there had not yet been a peace agreement concluded between all involved parties, *i.e.* Serbia, the KLA and NATO. Also the offensives were still on-going, Serbian forces were still present in parts of Kosovo, offensives were still ongoing and the disarmament and disbanding of the KLA had not yet started. The Trial Panel reached such conclusion based on a thorough analysis of a number of governmental and non-

governmental documents and international court practice dealing with the armed conflict in Kosovo.

4. The Court also established that **F.G.** was an active participant in the conflict and that the killing of S.G. was directly linked to the armed conflict. S.G., being a member of the KLA and participating actively in the ongoing conflict, shot and killed a civilian S.G., because of the assertion that he is a Serbian collaborator. The Court also established that beyond any reasonable doubt such conduct violated both domestic law and rules of international law effective at the time of an armed conflict.

5. The Court of First Instance discussed at length the credibility of cooperative witness N.B. and concluded that notwithstanding the fact that N.B. obviously had a grudge against the Defendant and tried to blackmail him for not coming forth with the accusations being the object of ongoing criminal case, his statements are still credible. The Trial Panel stressed that the statements of N.B. are corroborated by other evidence; by giving the statements he exposed also himself as the co-defendant; he gave statements incriminating himself and **F.G.** already before he was turned into a cooperative witness.

6. Based on statements of cooperative witness N.B. and statements of other witnesses the Court of First Instance established that the Defendant **F.G.** in fact shot and killed the victim S.G. at around 21.30 on 15 June 1999.

7. The Court of First Instance specifically rejected the approach proposed by the Defence Counsel that the statements of N.B. given in the capacity of a defendant are inadmissible as evidence. The change of status from a witness to a suspect and from a suspect to cooperative witness does not change the probative value of the statements given as long as the statements have been collected applying respective procedural norms.

8. The District Court paid also specific attention to the fact that the conviction must not rely solely on the statements of a cooperative witness, analysing statements of several other witnesses that fully corroborated the statement given by N.B..

9. In regard of the alibi provided by the defence, the District Court found this to be unconvincing. The Defendant only brought up alibi at a later stage of the proceedings, not in the pre-trial phase, which is illogical and raises doubts of the truthfulness of the alibi already in itself. The persons testifying on **F.G.**s behalf, that he was celebrating the end of conflict with Serbia on the day of killing of S.G., are not credible, because the court does not believe their universal assertion to remember the details of that particular event even after 12 years. The Trial Panel suspects that the statements of these witnesses are tainted and the photograph presented as evidence for this event, is falsified. However the court also held

that even in case if the statements in regard of the celebration of the end of conflict would be truthful, it would not exclude the possibility that **F.G.** could have been on the crime scene at the time when the murder of S.G. took place.

II Submissions of the Parties

The Appeal

10. On 16 May 2012 the Defence Counsel of the Defendant **F.G.** filed an Appeal, proposing that his client be either acquitted or the case returned to the first instance court for a retrial.

Violations of Procedural norms

11. The Appellant argues that the Contested Judgment has been reached with essential violations of criminal procedure. The signed and reasoned judgment was delivered to the Defence Counsel only more than 5 months after its public announcement.

12. The enacting clause of the judgment is incomprehensible and self-contradictory and also in contradiction with the reasoning.

13. The judgment lacks reasoning on decisive facts and the existent reasoning is unclear and self-contradictory. The Defence Counsel stresses that the trial panel wrongfully did not hear many witnesses proposed by the defence and did not administer material evidence, simply ignoring defence applications in this regard. The Appellant points out that the Trial Panel has left unnoticed his closing speech, where every single allegation presented in the indictment was quashed. The court of first instance did not assess correctly contradicting evidence.

14. In violation of Art 371 (1) KCCP the Trial Panel heard the Defendant **F.G.** before hearing of a witness of the defence, Blerim Dajaku. In violation of Art 371 (3) KCCP the Defendant H.R. was not dismissed from the court room during examination of the Defendant **F.G.**.

15. The verdict is based solely on the statement of unreliable cooperative witness N.B., which is in violation of art 157 (4) KCCP. The Appellant also stresses that the statements of N.B. that were given in the capacity of the Defendant, are inadmissible, because unlike a witness the Defendant is under no obligation to speak the truth or respond to posed questions regarding the circumstances of the case at all.

16. Violating the equality of parties and Art 302 KCCP the order declaring N.B. a cooperative witness was not served to the Defendant. Hence the Defendant and his Defence Counsel were effectively denied of the right to challenge this order.

17. The Indictment was confirmed in contradiction to Art 313 (2) KCCP, because in the session on 22 October 2010 when the ruling on confirmation of the indictment was issued, the parties who must have been present in session were actually not presented and in fact they were not even notified about this session.

18. The serious violations of criminal procedure to the detriment of the accused were committed already in the pre-investigative and investigative stage, because the co-defendant H.R. was summoned to police as witness, but during the interview the police by using coercion and threats changed his status from witness to suspect. The same occurred during investigative phase, where the prosecutor again used threats and coercion against H.R. and changed his status from that of a witness to suspect with the purpose avoiding him giving a witness statement in favour of **F.G.**.

19. During main trial the Trial Panel violated criminal procedure by allowing the prosecutor to put suggestive and leading questions to the cooperative witness and to put the same question to him repeatedly until the "right" answer was achieved, ignoring protests from the Defence Counsel. Also the Prosecutor was interfering with the examination of the defence witnesses, disorientating the Defence Counsel and trying to avoid the exercise of defence. As another substantial violation of the criminal procedure the Trial Panel allowed the prosecutor to use as evidence the statements of some of the defence witnesses who were interrogated by the prosecution at the time when main trial was going on. Although the Defence Counsel had proposed to declare such statements inadmissible, the Trial Panel did not even make any decision in this regard. The Appellant is also of the view that after completion of the investigation, the Prosecutor was not authorised to take any new investigative steps, *e.g* to interrogate witnesses.

20. The Court violated Art 343 (1) KCCP by permitting the Prosecutor to order that for a session of the court the witnesses who did not respond to the summonses are compelled to court. This breaches the equality of the parties.

Substantive Law

21. The legal qualification of the acts of **F.G.** is wrong. He cannot be found guilty of war crimes, because there was no armed conflict going on at the time when the crime was committed.

Factual situation

22. The factual situation has not been established completely and correctly. The Appellant opines that the guilt of **F.G.** has not been established beyond reasonable doubt. A number of evidence proposed by the defence was not admitted by the Trial Panel, but such proposals in fact just ignored. Based on only inculpatory evidence assessed, the conclusion of the court as to the factual situation, is wrong and biased in contradiction to Art 7 (1) KCCP.

23. The Trial Panel has not correctly established the time of the crime. If the presented evidence would have been assessed correctly, the conclusion of the Trial Panel in regard of the time of killing of S.G. would have been impossible, because there are contradicting statements about crucial facts in this regard. The crime could not, based on the statements of N.B., have taken place in the time-frame 21.00-21.40 as established by the court, because the Defendants could not have reached the crime-scene by that time.

24. It has not been established beyond reasonable doubt that the criminal offence has been committed by **F.G.** (and N.B.), because the criminals operated in the dark, everything happened very fast, the statements of the events under scrutiny from different witnesses differ in important details and **F.G.** did not resemble by his looks to the perpetrator as described by the witnesses.

25. The statements of N.B. about how the murder of S.G. was committed are self-contradictory and also in contradiction with other evidence. B. has in various stages of the proceedings described differently the crucial details about the crime (the manner how S.G. was requested to show the way to the victim's house; how exactly the killing took place – was there any communication between them and the victim; when and under which circumstances did he meet with **F.G.** in June 1999; there is contradiction between witnesses about what was the source of light at the place of the murder; how come no-one of the victim's family interfered; the statement of the direction of their flight is in contradiction with other witnesses statements; where did N.B. and F.G. go after having allegedly committed the murder etc). The Trial Panel has recognised itself the cooperative witness N.B. as the main source of evidence to be a criminal with pompous character that even tried to blackmail **F.G.** with information now presented as evidence against this Defendant. He is also impeached by the fact that he had big debts and financial problems because of his life-style. The fact that N.B. accuses also himself in the crime at hand does not in any way make him more credible, because he is doing this in the hope to seek publicity. Against this background he is a fully incredible source from the viewpoint of the Appellant.

26. The Appellant also noted that **F.G.** has an alibi – he was celebrating the end of conflict with Serbia with several other persons and he has even a picture to prove this.

27. **F.G.** had no motive to kill S.G., because he did not know the victim. In fact the Trial Panel has not explained the motive of the killing either. It should be pointed out that without having established a motive, no one could be found guilty of a murder.

Sentence

28. When sentencing **F.G.**, the Trial Panel has applied substantive law wrongly, because not the most favourable law was applied.

29. The family situation, the health and the circumstances describing the uncorrupted personality and good character of **F.G.** were not paid due attention to when imposing the punishment on him. The court has wrongly assessed the fact that in 12 years that have passed from the taking place of the crime, **F.G.** has had no legal issues. This should have been assessed as a strong mitigating argument.

The Opinion of the Appellate State Prosecutor

30. The Appellate State Prosecutor proposed that the Court of Appeals rejects the appeal as unfounded and affirms the challenged Judgment of the First Instance Court. The Prosecutor finds that the arguments of the Appellant are unsubstantiated.

31. The many violations of procedural law claimed by the Defence Counsel did not in fact occur. Although there was a delay in delivering the reasoned judgment to the parties, it did not affect the lawfulness of the judgment, neither the rights of the accused. There exists no contradiction in the enacting clause or in the reasoning of the Contested Judgment. None of admitted evidence was inadmissible and all admitted evidence was assessed correctly by the Trial Panel. The Prosecutor does not agree with the Appellant as if the trial panel would have left any of the defence requests in regard of evidence unnoticed or had rejected any request without due reasoning. The main trial has been conducted strictly according to procedural norms in force. The claim as if **F.G.** would have been convicted only based on uncorroborated statements of the cooperative witness N.B., is not correct. The Prosecutor also opposes the claim that the use of statements given by N.B. in the capacity of a defendant is forbidden. The arguments regarding breach of the principle of the equality of arms or right to be present at the session of the court are also unmeritorious. The insinuations as if any illegal pressure would have been used against Co-Defendant H.R., are ungrounded. The allegations that the Trial Panel allowed the Prosecutor to breach the rules of questioning the witnesses during the main trial are wrong. In response to the defence claim that the prosecution conducted unlawfully the investigation even after confirmation of the Indictment the Prosecutor noted that nothing in the procedural code forbids the

prosecutor from interviewing witnesses proposed by the defense. The Prosecutor saw no violation of procedural norms in the fact that the Court permitted the prosecutor to compel witnesses to appear to court. This was done merely because of the consideration of procedural economy.

32. The Prosecutor does not agree with the claim of the Appellant that the norms of humanitarian law had ceased to apply in Kosovo by the time of the murder of S.G., because the armed conflict was over by that time.

33. The Prosecutor finds that the assessment of circumstances on behalf of the Trial Panel is complete and consistent. The issue of credibility of the cooperative witness has been assessed with utmost thoroughness by the Trial Panel. The alleged discrepancies between different pieces of evidence are not in fact present, but have all been eliminated. The Prosecutor underlined that the defence claim as if the Prosecutor failed to bring forward any motive of the crime is unsubstantiated. The motive of the crime and the nexus between the criminal conduct and the armed conflict is thoroughly elaborated in the Judgment.

34. The Prosecutor does not agree with criticism on behalf of the Appellant regarding sentencing of the Defendant. The Trial Panel has correctly assessed both the aggravating and mitigating circumstances of the case. The circumstances mentioned in the Appeal cannot mitigate the heinousness of the crime the convicted person is charged with.

III. Competence of the Court of Appeals

35. The Court of Appeals is the competent court to decide upon the Appeals pursuant to Art-s 17 and 18 of the Law on Courts.

36. The Panel of the Court of Appeals is constituted in accordance with Art 19(1) of the Law on Courts and Art 3 of the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law no 03/L-053).

IV. Applicable Procedural Law – the KCCP

37. The Court of Appeals finds it appropriate to restate that the procedural law applicable in the respective criminal case is the (old) Kosovo Code of Criminal Procedure that remained in force until 31 December 2012.[1] In criminal proceedings initiated prior to the entry into force of the new Criminal Procedure Code for which the trial already commenced but was not

[1] Kosovo Code of Criminal Procedure, in force since 6 April 2004 until 31 December 2012.

completed with a final decision, provisions of the KCCP apply until the decision becomes final. Reference is made to the transitional provisions of the current Criminal Procedure Code and the Legal Opinion no. 56/2013 of the Supreme Court of Kosovo, adopted in its general session on 23 January 2013.

V. Applicable Substantive Criminal Law

38. The conviction and sentencing of the accused for the War Crime is based on the provisions of the Criminal Code of SFRY as the law applicable at the time when the criminal offence was committed.[2]

39. The Panel notes that since the alleged criminal offence was committed, the criminal law in Kosovo has been amended twice. On 6 April 2004 the Provisional Criminal Code of Kosovo entered into force and remained in force until 31 December 2012. On 1 January 2013 the new Criminal Code of Kosovo, Code no. 04/L-082 (hereinafter: CCRK) entered into force and is the currently applicable criminal law.

40. Pursuant to the general principle of applying the law most favourable to the accused, enshrined in Art 2(2) CCK and Art 3(2) CCRK, in the event of a change in the law applicable to a given case prior to a final decision, the law most favourable to the perpetrator applies.

41. The Court of Appeals *ex officio* analysed the applicable provisions of all three criminal laws to establish whether either of the two subsequently passed laws is more favourable to the accused than the one relied on by the Trial Panel. The Court finds that none of the subsequent laws is more favourable, thus the provisions in force at the time of the commission of the criminal offence apply.

VI. Admissibility of the Appeals

[2] Pursuant to UNMIK Regulation 1999/24, as amended by UNMIK Regulation 2000/59, the substantive criminal law provisions applicable were the provisions of the Criminal Code of the Socialist Federal Republic of Yugoslavia, with the amendments as promulgated by the aforementioned UNMIK Regulations. Capital punishment was abolished pursuant to Article 1.5. Pursuant to Article 1.6 of UNMIK Regulation 2000/59 for each offence punishable by the death penalty under the law in force in Kosovo on 22 March 1989, the death penalty was converted into a term of imprisonment between the minimum as provided for by the law for that offence and a maximum of forty (40) years.

42. The Impugned Judgment served to the Defence Counsel Tahir Rrecaj on the 8 May 2012 and to the Defendant on 15 May 2012.

43. The Appeal was filed with the District Court of Prishtina on 16 May 2012.

44. It shows from the above that the Appeal was timely filed. The Panel also observes that the Appeal has been filed by an authorized person and is hence admissible pursuant to Art-s 399 and 401 KCCP.

VII. Findings on the Merits of the Appeals

Violations of norms of criminal procedure

45. The Court of Appeals does not agree with the Appellant that such serious violations of norms of criminal procedure have occurred in the present case, which would bring to annulling of the District Court Judgment and returning the case for a retrial. When responding to specific criticisms of the Appellant regarding procedural violations the following has to be said.

46. The delay in delivery of the reasoned judgment to the parties goes undoubtedly against the letter and the spirit of the KCCP, because any delay in rendering the judgment affects the basic rights of the Defendant. However, such a delay can only be a ground for quashing the judgment, if it has contributed to unlawfulness of the judgment. Nothing in this vein has been argued by the Appellant. Furthermore, it has to be observed that with a letter dated 23 November 2011 the Presiding Trial Judge informed the President of the District Court of Prishtina that the judgment would not be drawn up within the time frame foreseen in Art 395 KCCP, because of the sensitivity of the case and the quantity of evidence that had to be assessed. The Court of Appeals also agrees with what has been referred to in the Appellate State Prosecutor's response. Namely, the detention on remand of the convicted person was extended until the judgment becomes final by an independent ruling dated 23 November 2011. The Defence Counsel had an opportunity to submit an appeal against this ruling or a request for the protection of legality. Such an appeal or request was not filed by the Defence Counsel. The Appeals Panel does not assess the delay in delivering the reasoned judgment to be such in nature in the present case that it would have brought to any disproportionate interference with basic rights of the Defendant.

47. The claims of the Appellant in regard of contradictions in the enacting clause or the reasoning of the Contested Judgment are unsubstantiated. The Panel reminds the Defence Counsel that one can only refer to such contradictions if there are intrinsic inconsistencies in the respective parts of the judgment or between the reasoning and the enacting clause, *i.e.* if

the conclusions of the court cannot be logically based on the underlying facts. Nothing like this can be found in the case at hand. The mere fact that a party does not agree with the stances of the court does not give ground to criticisms of incomprehensibility and self-contradiction of the judgment. The enacting clause of the Challenged Judgment contains all the requirements foreseen in the law and it is fully consistent with the reasoning of the court.

48. The Defence Counsel claims that the challenged judgment lacks reasoning on decisive facts and the existent reasoning is unclear and self-contradictory. He stresses that the trial panel wrongfully did not hear many witnesses proposed by the defence and did not administer material evidence, simply ignoring defence applications in this regard. The Appellant points out that the Trial Panel has left unnoticed his closing speech, where every single allegation presented in the indictment was quashed. The court of first instance did not assess correctly contradicting evidence.

49. The Court of Appeals does not agree with the claim that the Trial Panel has wrongfully not assessed or even admitted many pieces of evidence proposed by the Defence Counsel. The parties were allowed to present evidence and propose the Court to collect additional evidence. Any time such a proposal was put forward, the Court allowed the parties to explain the reasons for the request and the relevance of the proposed evidence with respect to the charges. On 5 August 2011 and 7 September 2011 the Court issued rulings deciding on the proposal of the Defence Counsel to hear some witnesses. In the hearing on 7 June 2011 some items were returned to Defence Counsel as inadmissible evidence. In the hearing on 21 October 2011, upon request of Defence Counsel, the Presiding Trial Judge stated that "all what has been admitted has been discussed and all which has not expressly been discussed is not admitted and we have retuned the material". The Court of Appeals holds that both parties have been treated equally by the Trial Panel and the norms regulating evidence have been observed.

50. Neither can it be agreed as if the Court of First Instance would have left unassessed contradictions between various pieces of evidence. The District Court has appraised each of the witnesses' accounts and has given a comprehensive reasoning on why it attached or did not attach any weight to such testimonies and other evidence presented by the parties. If one of the parties chooses not to agree with the outcome of such assessment of the Court, it does not turn the assessment void.

51. In response to the claim that the Trial Panel, in breach of Art 371 (1) KCCP, heard the Defendant before a defence Witness B.D., it has to be pointed out that the examination of the said Witness was requested by Appellant in the hearing on 17 October 2011. In the same hearing Defence Counsel agreed with the Presiding Trial Judge's proposal to examine the Defendant before the Witness. Hence this argument of the Appeal is groundless.

52. The violation of Art 371 (3) KCCP referred to by the Appellant is not of serious enough that it could bring to annulment of the District Court's Judgment. There is no ground for believing that this violation influenced or might have influenced the rendering of a lawful and proper judgment, having in mind that H.R. stood by his previous statements and refused to be examined at trial.

53. The argument of the Appellant as if the statements of cooperative witness N.B. have not been corroborated by any other evidence and have therefore in violation of Art 157 (4) KCCP served as the sole basis of conviction of **F.G.**, are groundless. The statements of cooperative witness have been corroborated by statements of other witnesses (the family members of the victim). These witnesses have testified as to the modalities of the intrusion of the perpetrators in the victim's house, the physical complexion of the perpetrators, the darkness of the room due to the lack electricity, the behaviour of the perpetrators, their weaponry, and the course of the criminal action as well as their hasty leaving of the house. Considered as a whole the evidential material made available to the Court suffices the establishment of the guilt of **F.G.** beyond reasonable doubt.

54. Defence Counsel claims that the Court of First Instance allowed the Prosecutor, in violation of Art 153 (2) and Art 154 (4) KCCP, to refer to the statements given by N.B. during the investigations as a defendant. Such evidence is inadmissible, because in the capacity of a defendant N.B. was not obliged to tell the truth, whereas at trial he was interviewed in the capacity of a cooperative witness and therefore obliged to tell the truth. Thus, the Prosecutor should have re-interviewed N.B. on all the circumstances of the criminal offence, after he was declared a cooperative witness. The argumentation of the Appellant referred above is unmeritorious, because nothing like this is prescribed in the KCCP. A statement collected according to the procedural status of the person does not become inadmissible evidence just because that status has later on changed. N.B. was always interviewed in accordance with the status he had when the interview took place: first suspect, then as a defendant, lastly as a cooperative witness. The rules and procedures which were followed respected the KCCP (and now CPC) provisions. Also, by implicitly recognizing that the previous status of the cooperative witness was that of suspect/defendant and not that of mere witness, the code fills the gap represented by the lack of obligation of truthfulness upon a defendant by imposing that obligation on the cooperative witness any time before giving testimony under the protection of the order.

55. The Court of Appeals does not agree with the defence claim that the Defence Counsel nor the Defendant were served with the copy of the order declaring N.B. a cooperative witness. This order was served to them that in the hearing on the confirmation of the indictment held on 25 November 2010. The Defendant and his Defence Counsel could not have been

effectively denied of the right to challenge this order, because according to KCCP such and order is final and not subject to appeal.

56. The Appellant asserts violation of Art 313 (2) KCCP, because in the hearing of the confirmation of indictment held on 21 December 2010 where the ruling confirming the indictment was announced, the parties "who must be present in the confirmation session were not present and they were not notified about this session." The Court of Appeals notes that a hearing on the confirmation of the indictment was held on 25 November 2010. Based on the Record of the hearing it appears that Defence Counsels of **F.G.** claimed that the Prosecutor had not fulfilled his disclosure duties, because some documents had not been served to the Defendant or the Defence Counsel, and requested adjournment. The record of the hearing reflects the delivery of the missing documents to Defence Counsels of **F.G.** and also that the confirmation hearing was concluded on the same day. On 1 December 2010 Defence Counsel of **F.G.** submitted a written statement and on 21 December 2010 the Confirmation Judge issued the Ruling K.A. No. 339/2010 confirming the Indictment against **F.G.** and H.R. In the absence of a written record, it has to be concluded that there was no hearing held on 21 December 2010. Parties were informed by the written Ruling of the Confirmation Judge, which instructed the parties on their right to appeal. Defence Counsel did not exploit this right at the given time; therefore this claim became obsolete at this instance, turning also this claim of the appeal unmeritorious.

57. The claims regarding unlawful coercion towards co-defendant H.R. are unsubstantiated slander and do not deserve any closer comment on behalf of the Court of Appeals.

58. The Defence Counsel asserts that the Trial Panel breached criminal procedure rules by allowing the Prosecutor to put suggestive and leading questions to the cooperative witness N.B. and other prosecution witnesses; to ask the same questions several times until the prosecutor received the wanted answer; and to bring the cooperative witness N.B. twice back to the Court in order to correct his previous statements. Also, the Prosecutor allegedly continuously interrupted the defence counsels in order to disorientate them and prevent exercising a proper defence.

59. The Appellant also points out that during the main trial the cooperative witness N.B. was called back by the Prosecutor to testify and on that occasion he rectified the content of his previous statements affirming that what he had written in the letter he left under the wall of A.G's house was not completely true. He rectified his version of the facts in order to adjust it to the content of the statements given by the other witnesses.

60. In response to the above cited criticism the Court of Appeals holds that the assertion as if the Trial Panel would have allowed the Prosecutor to ask leading or suggestive questions or to

repeat questions until the "right answer" was given, is not supported by the minutes of the Main Trial and thus unmeritorious. The Appellate Panel observes in agreement with Appellate Prosecutor's assertion that the continuing interruption and disorientation of the Defence Counsel on behalf of the Prosecutor has in fact not occurred. When the request of the Prosecutor to call N.B. back to testify was granted by the Trial Panel, the defence did not oppose it. The calling back of the cooperative witness was necessary in order to clarify some issues that occurred during the many hearings of the trial, in light of the special status and relating duties of N.B. as cooperative witness as well as the limitation imposed by Art 157 (4) KCCP. Upon the motion of the Prosecutor, the Trial Panel decided in the hearing on 8 September 2011 to call back N.B. to confront him with the statements given by other witnesses and to clarify some points. In the hearing on 29 September 2011 the Witness was simply requested to state whether his deposition on 13 April 2011 relating to the place where the murderers slept after the killing was an accurate one. The issue pertained to the accuracy of the minutes of the trial on the point whether N.B. said that the house was or was not A's house. The issue, which was already clarified in the hearing on 13 April 2011 through the questions of the Defence Counsel, was also the main topic in the examination of witness S.A. which took place soon after that of N.B., on 29 September 2011.

61. The Appellant sees another substantial violation of the criminal procedure in the fact that the Trial Panel allowed the Prosecutor to use as evidence the statements of some of the defence witnesses who were interrogated by the prosecution at the time when main trial was going on. Although the Defence Counsel had proposed to declare such statements inadmissible, the Trial Panel did not even make any decision in this regard. The Defence Counsel expresses the opinion that the right of the Prosecutor to conduct post-indictment investigation by interrogating witnesses is limited. The results of such an investigation can only be used in order to assess whether to propose a certain person to be summoned as witness by the court.

62. The Court of Appeals finds no violation of the criminal procedure in the above and agrees in this regard with the assessment given already by the Trial Panel in the hearing on 22 June 2011: that after the confirmation of the Indictment the Prosecutor interviewed some of the witnesses proposed by Defence Counsel as well as other witnesses; that the Defence Counsel was provided a copy of the minutes of the interviews; and that no provision of the KCCP forbids post-indictment investigation or prevents the Prosecutor from interviewing witnesses proposed by the defence.

63. Finally the Appellate Panel disagrees with the defence claim that Art 343 (1) KCCP was violated, because in the hearing on 26 June 2011 the Court permitted the Prosecutor to compel witnesses to appear to court. This issue has also been adequately explained already by the Trial Panel, when dealing with the problem of non-appearance of summoned witnesses. The request of the Trial Panel for the Prosecutor to intervene in this matter was

necessitated by the fact that although the escorting of summoned witnesses was arranged, the procedure stopped due to a misunderstanding with the police. In order to secure a secure and speedy trial the Prosecutor as the instance who works with the police was asked to help out. This was not against the law.

Substantive law

64. The Defence Counsel disagrees with the Trial Panel on the assessment whether an internal armed conflict between forces of the Republic of Serbia and of the Federal Republic of Yugoslavia and the Kosovo Liberation Army was still ongoing in Kosovo on 15 June 1999, *i.e* at the time of the offence. He asserts that by that date the armed conflict had ended and the humanitarian law had seized to apply. Therefore, according to the Defence Counsel, the conduct of the Defendant has been wrongly qualified as a war crime. The Court of Appeals holds that such disagreement of the Appellant is unsubstantiated. The Trial Panel has given a meticulous account on every relevant aspect of the issue of continuance of armed conflict in Kosovo and the nexus between the act of the Accused and the conflict. The respective analysis of the Trial Panel is overwhelmingly convincing and leaves no shadow of doubt as to the continuing applicability of humanitarian law in Kosovo on 15 June 1999.

Establishment of facts

65. Regarding the time and date of the commission of the murder, the Appellant is on the viewpoint that the evidence heard by the Trial Panel does not support the version of the murder of S.G. having been committed at the time proposed in the Indictment.

66. The Appeals Panel notes that N.B. has admitted throughout the whole proceedings that he could not remember precisely the time of the crime; even in the letter that he wrote to A.G. in 2007 he stated that he could not recall precisely the date of the murder. However, notwithstanding these uncertainties the cooperative witness provided an accurate and reliable account on the murder of S.G., from the preparation to the actual killing, including details on the trip to the house of the victim and the description of the house. These statements have been corroborated by other evidence and based on the assessment of the evidence as a whole the Trial Panel reached a credible conclusion that the murder was committed on 15 June 1999 between 21:00 and 21:40 hours.

67. The Appellant challenges the credibility of the statements of N.B., pointing out that his statements have been contradictory in different stages of the proceedings; that his personality and relations with the Defendant rob his statements of any credibility. The

Defence Counsel also suggests that there are contradictions in the statements of other witnesses upon crucial facts.

68. The Court of Appeals disagrees with the above criticism and holds that the District Court has paid due attention to the credibility issues as well as to various contradictions that have emerged in the various witness statements throughout the case. The explanation offered by the District Court, why the statements of N.B. are credible notwithstanding his obvious grudge against the Defendant, his verified attempts to blackmail him and information regarding his untrustworthy personality, is thorough, adequate and compelling. The Court of Appeals sees no ground to overthrow the respective assessment of the Trial Panel.

69. What concerns the suggested contradictions in the statements of the cooperative witness and other witnesses, the Court of Appeals assesses that none of these contradictions is of such serious quality that they would undermine the credibility of the statements of respective witnesses' altogether. These contradictions mostly concern minor details only, whereas in general description of the events and the setting of the offence all challenged witness statements concord. The Challenged Judgment gives full account of those discrepancies and considers them logically explainable by the long time passed since the events took place. It is also observed that the statements of the cooperative witness N.B. and the family members of the victim concur in most details regarding the event under deliberation.

70. It has to be underlined that even the Appellant himself does not provide any concrete argument showing that the findings of the Court are incorrect and limits himself only to assert in a speculative manner that they are erroneous. The Court of Appeals deems it appropriate to remind the Defence Counsel that it is primarily within the competence of the Trial Panel to assess the circumstances of the case. The Court of Appeals should only interfere with this discretionary power in case the Appeals Panel finds that the court of first instance has violated the rules governing this assessment. Nothing alike is established in the present case however.

71. Therefore the Court of Appeals is satisfied that the District Court has established the guilt of **F.G.** beyond reasonable doubt.

72. Regarding the defence criticism that **F.G.**'s conviction was illegal, because the Trial Panel has not showed, what was the motive of such an act, the Court of Appeals stresses that motive is not a constitutive element of the criminal offence of murder. Therefore the absence of assessment of a motive from the judgment's reasoning does not represent any violation of the establishment of the factual situation or application of substantive criminal law. However, it has also to be noted that in the case at hand the District has in fact established a motive, why the murder of the victim was committed. Attention has to be drawn in this

respect to para 116 of the Challenged Judgment, where the District Court concludes – based on the statement of cooperative witness N.B. – that S.G. was murdered because of his alleged collaboration with Serbia.

Sentence

73. The Appellant argues that the District Court did not give proper weight to the aggravating and mitigating circumstances, underestimating the latter and exaggerating the weight of aggravating circumstances. The Court failed to correctly asses that long time had passed since the commission of the crime, the fact that the defendant has two wives and six children, his behaviour and humanitarian spirit, and that the defendant has a poor health.

74. None of these arguments is valid in the opinion of the Court of Appeals. It has to be reminded that also the assessment of circumstances determining the exact severity of the sentence lies primarily within the discretion of the District Court and the Court of Appeals is only competent to overthrow such assessment if concrete circumstances indicate a breach of its discretionary boundaries by the District Court. Nothing in that vein has been pointed out in the Appeals. The claims that the District Court has not put correct weight in various circumstances affecting the sentence are fully unsubstantiated.

75. However the Court of Appeals observes that the sentence of **F.G.** has to be mitigated because of wrong application of the substantive law. The Defendant **F.G.** has been found guilty of the criminal offence of war crime against the civilian population under Art-s 142 and 22 CC SFRY (Art-s 120 and 23 CCK). Since the substantive criminal law in terms of available sentences had changed significantly from the time of commission of the criminal act until conviction of the Defendant, the sentence had to be decided according to the most favourable law to the Accused. According to the District Court's assessment Art-s 38 and 142 CC SFRY foreseeing a sentence of imprisonment for not less than five years or the death penalty for the criminal act committed by **F.G.** was the most favourable law to the Accused. The District Court correctly noted that the capital punishment was abolished by UNMIK regulation No. 1999/24, whereas pursuant to Art 38 CC SFRY, the term of imprisonment may not be less than 15 days and not longer than 15 years. In second sentence of this article, however, it is stipulated that exceptionally, in case of criminal offences punishable by death penalty, the maximum term of imprisonment is 20 years. The Court of Appeals disagrees with this view, finding that it is a result of erroneous broadening interpretation of the substantive criminal law to the detriment of the Accused. In the absence of any clear legislation in this regard, the Court of Appeals holds that in the situation where the sentence of death penalty had been abolished by UNMIK, no more reference can be made to second sentence of Art 38 CC SFRY and the available maximum term of imprisonment can only be determined based on first sentence of Art 38 CC SFRY and the

respective article of the special part, foreseeing the criminal offence which the Defendant has been convicted of. This view also concurs with practice adopted by courts in Kosovo.[3]

76. From the above it is clear that the sentence for **F.G.** has to fall within the frames of 5-15 years of imprisonment. Based on the correct assessment of mitigating and aggravating circumstances as presented in the Challenged Judgment, the Court of Appeals deems it appropriate to sentence **F.G.** to 14 years of imprisonment.

Conclusion

77. It is therefore decided as in the enacting clause.

Prepared in English, an authorized language. Reasoned Judgment completed on 1 April 2014.

Presiding Judge

_____
Annemarie Meister
EULEX Judge

Panel member

_____
Philip Kanning
EULEX Judge

Panel member

_____
Driton Muharremi
Kosovo CoA Judge

Recording Officer

_____
Andres Parmas
Eulex Legal Officer

COURT OF APPEALS OF KOSOVO
Pakr 1175/12
10 February 2014

[3] See Supreme Court of Kosovo in *re* Latif Gashi *et al* – judgment in case No. AP-KZ 139/2004 dated 21 July 2005, but also District Court of Prishtina in *re* S. Abazi *et al* judgment in case No. P 592/11 dated 17 December 2012 (affirmed by the Court of Appeals in part of the assessment of most favourable law for sentencing purposes – judgment No. PaKr 102/13 dated 12 December 2013).